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Promulgated April 4, 1912.

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THE SOUTHERN REPORTER

VOLUME 57

OAKS v. STATE. (No. 15,851.)
(Supreme Court of Mississippi. Jan. 15, 1912.)

CRIMINAL LAW (§ 1208*)—PUNISHMENT—SUBSEQUENT OFFENSES.

The law having provided a greater punishment for a second offense of vagrancy than for the first, it was error to inflict the punishment provided for the second offense on defendant's first conviction thereof.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1208.*]

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.

Ruth Oaks was convicted of vagrancy and she appeals. Reversed and remanded.

Currie & Currie, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

SMITH, J. The punishment provided by law for the crime of vagrancy is greater for the second offense than for the first. Appellant was convicted, not of a second, but of a first, offense of this character; but the punishment inflicted upon her was that provided for a second offense.

The judgment of the court below is therefore reversed, and the cause remanded for proper sentence.

STATE v. TRAYLOR. (No. 15,253.)
(Supreme Court of Mississippi. Jan. 15, 1912.)

On suggestion of error. Suggestion overruled.

For former opinion see 56 South. 521.

MAYES, C. J. When this case was before the court on its original hearing, it had the most thorough consideration from every viewpoint permissible under the statute. The original opinion dealt with the case exhaustively and completely. The suggestion of error only calls to our attention again matters that the court fully considered before the original opinion was rendered.

This court has no more right to amend a statute than it had to enact it originally, and if we should adopt the view urged by counsel filing the suggestion of error we would amend the statute as written by the Legislature, so as to make it conform to what this court thinks the Legislature should have done when the statute was enacted. Our duty to follow, and not lead, in legislation, is plain and imperative. This is no doubtful statute. Its meaning is clear, and the crime defined by it is complete. The writer of this opinion feels that no strength can be given to the original opinion by any further discussion.

The opinion supports itself, is admirably clear and convincing in the light of the statute, and the suggestion of error is overruled.

SMITH, J., dissents.

CROWDER et al. v. NEAL et al.
(No. 15,370.)

(Supreme Court of Mississippi. Dec. 18, 1911.)

1. ADVERSE POSSESSION (§ 65*)—ACTS CONSTITUTING.

Where a purchaser in actual possession claimed a tract as his own under an honest, but mistaken, belief that it was within the calls of his deed, his possession was adverse, and that he would have surrendered possession, had he known that the land was not within the calls, is immaterial.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 365-370; Dec. Dig. § 65.*]

2. ADVERSE POSSESSION (§ 43*)—TACKING POSSESSION—WHEN AUTHORIZED.

Before one adverse possession may be tacked to another, there must be privity of possession between the holders thereof, and generally such privity may be created by a conveyance or understanding that has for its object the transfer of possession, accompanied by a transfer in fact.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 213-225; Dec. Dig. § 43.*]

3. ADVERSE POSSESSION (§ 43*)—TACKING POSSESSION—WHEN AUTHORIZED.

A purchaser in actual possession claimed land as his own not included in the calls of his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 57 SO.—1

deed, and conveyed the land by similar description, together with the improvements and appurtenances, and the possession was turned over to his grantee. The parties intended that all the land claimed should pass by the deed. Held, that the possessions of the purchaser and his grantee could be tacked to create title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 213-225; Dec. Dig. § 43.*]

4. ADVERSE POSSESSION (§ 60*)—ACTS CONSTITUTING.

Where one in possession under a deed claimed title to a tract as within the calls of his deed, which was not in fact within such calls, the character of his possession as adverse was not changed because he obtained permission from the owner of the adjacent lot, of which the portion claimed adversely was a part, to use the whole lot for a pasture.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282-314; Dec. Dig. § 60.*]

Appeal from Chancery Court, Hinds County; G. G. Lyell, Chancellor.

Suit by Mrs. Nancy B. Neal and another against A. C. Crowder and another, who filed a cross-bill. From a decree for complainants, defendants appeal. Reversed and rendered according to the prayer of the cross-bill.

Prior to February 18, 1895, John W. Robinson was the owner of a certain lot situated in the city of Jackson, described as follows: The south half of the north half of two-acre lot No. 3, according to Daniel's official map. This property fronted east 83 feet on State street, and ran back between parallel lines to President street; the southern boundary being George street. The length of the block, as shown by the official map, is 320 feet. At that time, however, there were no sidewalks on President street or George street adjoining this property, and this lot had a fence around it, which extended out eight feet on President street, over what was afterwards laid out by the city as a sidewalk. On the date above named Robinson sold to Mrs. Gunning the east half of said lot; the deed in question describing the property as the east half of the south half of the north half of two-acre lot No. 3, and giving the dimensions as being 83 feet front on State street by 160 feet deep. The transaction was made with Mrs. Gunning's husband, and he afterwards built a fence around what he considered half of the lot and proceeded to improve it. In running his lines, he took half of the inclosed lot, which was in fact 328 feet in length, thus giving him a lot 83 feet by 164 feet. He built a fence around this lot, and in July of the same year erected a handsome residence. He built outhouses, a stable, a servant's house, and added other improvements, including fruit trees. These improvements extended to the back fence, which was 164 feet from the eastern boundary of the lot on State street. Mr. Robinson and Mr. Gunning are both dead; but it seems clear

from the record that Mr. Gunning, in running his lines, took half of the lot, and that until the institution of this suit thought he was only taking 160 feet. However, the improvements and occupancy extended to the 164-foot line.

On September 21, 1903, Mrs. Gunning sold this lot to appellants, describing it just as it was described in the deed from Robinson to her, and adding, "together with all the improvements and appurtenances therein situated." Appellants immediately entered into possession of the property, and have occupied it continuously since. Their occupancy began at the moment Mrs. Gunning moved out. Appellants did not know the dimensions of the lot they were actually occupying, but in making the purchase the lot was pointed out to them as being within the inclosure and including all improvements, such as the servant's house, stable, fruit trees, etc., which extended to the back fence. The premises were delivered to appellants just as held and occupied by Mrs. Gunning, and appellants made certain additional improvements, such as rebuilding the back fence, and filling in low places in the lot, and adding to and improving the outhouses. On February 8, 1909 (Robinson being dead), the special commissioner of the chancery court sold to appellee Mrs. Neal the west half of the south half of the north half of two-acre lot No. 3, giving the dimensions as being "83 feet front on President street, and running back 160 feet." Thereafter, when pavements were laid on President street and George street, it was discovered that appellants' lot was 164 feet in length, and appellee's lot 156 feet; the sidewalks on President street having extended over the 8 feet formerly inclosed by the old fence. Thereupon the appellee laid claim to 4 feet at the back end of appellants' lot, and on the 19th day of June, 1909, filed suit for the recovery of same.

The appellants contended that they and those under whom they claim title had been in actual, open, notorious, adverse possession of the 4 feet in question for a period of more than 10 years prior to the bringing of this suit—that is to say, since 1895—and that they were entitled to tack their occupation on to the occupation of their grantors, so that there was continuous occupation for more than 10 years, and that therefore they had acquired title by prescription, and that appellee had no right to maintain her suit. The court below held that there was no privity between the occupancy of the Gunnings and the Crowders, and that the entry of the appellants upon the premises constituted a new trespass, and that, as neither occupation had been continued for as much as 10 years, the appellants had not acquired title by adverse possession. It was shown in the evidence that Mrs. Gunning never intended to claim more than 160 feet, but that it was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the mistake of her husband that 164 feet was fenced in and improved. It is further shown, however, that all the property within the close was pointed out by Mr. Gunning to Mr. Crowder as being the property conveyed, and that delivery was made of the premises as thus indicated. It was also shown that, after the appellants had entered into possession of the premises conveyed to them by Mrs. Gunning, they were permitted by Robinson to use the west half of the lot as a cow pasture. They used this vacant lot, however, with the express permission of Robinson, and recognized his title to the same; but appellants' claim to the four feet in question is not based upon any privilege granted by Robinson to use same as a pasture, but as being part of the lot conveyed to appellants by Gunning, and as being within the close and pointed out to them as part of the premises conveyed, and which, at the time of the institution of this suit, had been continuously occupied as a homestead by the appellants and the Gunnings, and that their successive possessions created such a privity of estate as permitted the possession of appellants and their grantor to be held as one continuous possession, since there had been no break in possession and occupancy for more than 10 years.

Watkins & Watkins, for appellants, cited the following authorities: *Metcalf v. McCutchen*, 60 Miss. 145; *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680; *Bradley v. Burkhart*, 139 Iowa, 323, 115 N. W. 597, 130 Am. St. Rep. 328; *Krause v. Nolte*, 217 Ill. 298, 75 N. E. 362, 3 Ann. Cas. 1061; 1 Cyc. p. 1038; *Neale v. Lee*, 19 D. C. 5; *Am. & Eng. Enc. Law* (2d Ed.) vol. 1, p. 844; *Davis v. Adams* (Tex. Civ. App.) 129 S. W. 150; *Bardin v. Insurance Co. (S. C.)* 64 S. E. 165; *Steel Co. v. Paczocha*, 139 Wis. 23, 119 N. W. 550; *Oldig v. Flak*, 1 Neb. (Unof.) 124, 95 N. W. 492; *Wishart v. McKnight*, 178 Mass. 356, 59 N. E. 1023, 86 Am. St. Rep. 486; *Murray v. Romine*, 60 Neb. 94, 82 N. W. 318; *Faloon v. Simshauser*, 130 Ill. 649, 22 N. E. 835; *Wilson v. Rogers* (Ark.) 134 S. W. 318; *McNeely v. Langan*, 22 Ohio St. 32; *Kendrick v. Latham*, 25 Fla. 819, 6 South. 871; *Clithero v. Fenner*, 122 Wis. 356, 99 N. W. 1027, 106 Am. St. Rep. 978; *Steel Co. v. Budzisz*, 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534, 48 L. R. A. 830, 80 Am. St. Rep. 54; *Rembert v. Edmondson*, 99 Tenn. 15, 41 S. W. 935, 63 Am. St. Rep. 819; *Holt v. Adams*, 121 Ala. 664, 25 South. 716; *Davock v. Nealon*, 58 N. J. Law, 21, 32 Atl. 675; *Bateman v. Jackson* (Tex. Civ. App.) 45 S. W. 224; *Naher v. Farmer*, 60 Wash. 600, 111 Pac. 768; *Railroad Co. v. Mulkey* (Ark.) 139 S. W. 643; 1 Cyc. 1002, 1003.

Potter & Hindman, for appellant.

Williamson & Wells, for appellee, cited the following cases: *Dixon v. Cook*, 47 Miss. 226; *Metcalf v. McCutchen*, 60 Miss. 145; *Jasperson v. Scharnikow*, 150 Fed. 571, 80 C.

C. A. 373, 15 L. R. A. (N. S.) 1205; 1 Cyc. p. 1007, subsec. "E"; *Erck v. Church*, 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641; *Marr v. Gilliam*, 1 Cold. (Tenn.) 491; *Graeven v. Dieves*, 68 Wis. 317, 31 N. W. 914; *Fanning v. Willcox*, 3 Day (Conn.) 258; *Weber v. Anderson*, 73 Ill. 439; *Jennings et al. v. White*, 139 N. C. 23, 51 S. E. 799; *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Hollingsworth v. Sherman*, 81 Va. 668; *Lucy v. Tenn.*, etc., 92 Ala. 246, 8 South. 806; *Sluyter v. Schwab*, 73 Neb. 870, 102 N. W. 757; *Maher v. Brown*, 183 Ill. 575, 56 N. E. 181; 1 Cyc. 1030, 1032; *Adams v. Guice*, 30 Miss. 397.

SMITH, J. [1] In order that appellants' title to the land in controversy may have become perfect by adverse possession, it is necessary for it to have been held adversely by their grantor, Mrs. Gunning, and that their (appellants') possession should be tacked to that of Mrs. Gunning. It is manifest from the evidence that Mrs. Gunning, while in possession of this land, intended to, and did, claim it as her own under an honest, but mistaken, belief that it was within the calls of her deed. Her possession was, therefore, adverse. *Metcalf v. McCutchen*, 60 Miss. 145. That she would have surrendered possession, had she known that the land was not within the calls of her deed, is immaterial; for the character of her possession is determined, not by what she would have done, had this fact been known to her, but by what she actually did while in possession.

[2] In order that one adverse possession may be tacked to another, there must exist privity of possession between the holders thereof. "As a general rule, it may be stated that the requisite privity may be created by any conveyance, agreement, or understanding, that has for its object the transfer of possession and is accompanied by a transfer in fact." 2 Cyc. 451.

[3] This land is not included within the calls of the deed by which the lot owned by Mrs. Gunning was conveyed to appellants; but it is manifest from the evidence that all parties to this deed intended that it should be, and thought that it was, so included, and that possession thereof was by Mrs. Gunning turned over to appellants as a part of the land conveyed. It follows, therefore, that appellants' possession can be tacked to that of Mrs. Gunning. This is in accord with the great weight of authority, as will be seen by an examination of the cases cited in the briefs of counsel.

[4] Under the evidence, the character of appellants' possession of the land in controversy was not for the time being changed by reason of the fact that they obtained permission from the then owners of the lot now owned by appellee to, and did for a short time, use it for a cow pasture.

The decree of the court below is reversed, and a decree here according to the prayer of appellants' cross-bill.

ADAMS, State Revenue Agent, v. LUMBERMEN'S INDEMNITY EXCH. et al.

(Supreme Court of Mississippi. Dec. 4, 1911.)

On suggestion of error. Overruled.

For former opinion, see 55 South. 882.

HARPER, Special Judge. We do not think that the pleadings sufficiently present the liability of appellees for taxes under chapter 103, Acts of 1910. The suggestion of error is therefore overruled. But it follows necessarily that this decision will in no way prevent the revenue agent from asserting the rights of the state to its taxes under said act in another suit, and nothing in the opinion in this case is intended to apply to said taxes.

HAWKINS v. SHIELDS. (No. 15,224.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

1. BILLS AND NOTES (§ 267*)—"INDORSEMENT"—RIGHTS UNDER INDORSEMENT.

The "indorsement" of a bill or note is not merely a transfer, but it is a new contract, by which the indorser engages that the bill or note is a genuine and valid instrument, and will be accepted or paid as the case may be; this engagement being conditioned upon presentment of demand and notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 620, 629; Dec. Dig. § 267.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3561-3566; vol. 8, p. 7686.]

2. BILLS AND NOTES (§ 285*)—INDORSEMENT—INDORSEMENT AFTER MATURITY.

As between the indorser and indorsee, it is immaterial whether the indorsement is made before or after maturity, save that, when the indorsement is made before maturity, the time of payment is fixed by the terms of the instrument, and, when made after maturity, payment must be demanded within a reasonable time, and notice of a refusal be given to the indorser in order to charge him.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 628; Dec. Dig. § 285.*]

3. BILLS AND NOTES (§ 299*)—ACTIONS—QUESTION FOR COURT.

Where an indorsement is made after maturity, the question of what is a reasonable time for a demand for payment may, when the facts are ascertained, be determined by the court as a matter of law; and where they are few and simple, it may likewise be determined by the court.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 680; Dec. Dig. § 299.*]

4. EVIDENCE (§ 403*)—DOCUMENTARY EVIDENCE—PAROL EVIDENCE TO VARY.

Parol evidence being inadmissible to vary or contradict a written instrument, a contract of indorsement, whether special or in blank, cannot be explained or denied by parol evidence, except to show failure of consideration or an irregular indorsement, or to impeach the indorsement for fraud, or to show that it is the subject-matter of a trust.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1807-1812; Dec. Dig. § 403.*]

5. BILLS AND NOTES (§ 285*)—TRANSFER—INDORSEMENT.

Where the payee of notes, who, for the purpose of using them as collateral, indorsed them in blank, and later, after paying the debt for which they were pledged and receiving them back, sold them with the indorsements upon them, this act was equivalent to a new indorsement, rendering him liable in case of the maker's failure to pay the notes at maturity.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 285.*]

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action by E. B. Hawkins against J. T. Shields. From a judgment for defendant, plaintiff appeals. Reversed.

Wyatt Easterling, for appellant. McBeath & Miller, for appellee.

MCLEAN, J. W. B. Johnson and wife were indebted to one Bluett Lee, and in order to secure payment of this indebtedness, on December 24, 1904, executed a certain deed in trust upon certain real estate. Subsequently to this Johnson and wife become indebted to J. T. Shields, and in order to secure the payment of this indebtedness also executed a certain deed in trust upon the same property, and at a still later date, being indebted to E. B. Hawkins, executed a third deed in trust conveying the same property. The indebtedness to Shields was evidenced by eight promissory notes, all of which were dated January 8, 1906. These notes were made payable to the order of J. T. Shields and were due at different dates; the first one being due on April 15, 1906, and the last one on December 15th of the same year. In January, 1907, Shields borrowed some money from the Citizens' Bank, and in order to secure the payment of this loan he indorsed, by writing his name across the back, the Johnson notes, and delivered them to the bank. Some time after that, Shields paid his note to the bank, and the Johnson notes were surrendered to him. In August, 1909, Shields proposed to dispose of these notes to Hawkins. The matter was consummated, and Hawkins became the owner of the notes. Shields delivered the notes, with a written indorsement thereon. At the time of the purchase of these notes it was suggested by Hawkins that it would be necessary for the transfer of the notes to be marked on the record, and that this transfer would have to be acknowledged, and that it would cost something to have this done; but after advising with an attorney it was ascertained that it was not necessary for an acknowledgment to the transfer to be made on the record. The real estate covered by the several mortgages was sold under the first trust deed, and Hawkins became the purchaser. The property did not bring enough money to pay the debts covered by the first and second trust deeds, and the result was that Hawkins

demanded of Shields the balance that was due on the Johnson notes, transferred by Shields to Hawkins.

The defense set up by Shields was that at the date of the transfer Shields was not to be responsible as an indorser of the notes. There is no evidence in the record to show that at the time of this transfer there was any understanding at all between Hawkins and Shields as to the latter's liability on the notes as indorser. Hawkins never said anything to Shields about being liable as indorser until after the property was sold under the trust deed, but shortly thereafter he made demand upon Shields for the difference. Shields' testimony on this point is as follows: "There was no agreement between me and you that I was to become responsible. He says: 'I know it, but the place did not bring enough to pay the two notes; but, as your indorsement is on the notes, I will look to you for it.' I says: 'If I was legally or morally responsible to you, I would pay you; but I am neither legally or morally responsible for it. You did not ask me to indorse them to you, and for that reason I will not pay it, unless the law says so.'" Objection was made to the testimony of Shields, objection overruled, and exception taken.

The court gave the following instruction for the defendant: "The court instructs the jury for the defendant, Shields, that if they believe from the evidence that Shields did not indorse said notes for the purpose of transferring same to E. B. Hawkins, and that the only requirement of Hawkins from Shields was that Shields was to make the transfer on the record of the deed of trust, then plaintiff cannot hold Shields on said indorsement, and the jury will find for the defendant." And a verdict was returned for the defendant, and from the judgment entered thereon this appeal is prosecuted.

In the first place, it may be said there was no evidence at all, even if it were admissible, that the indorser, Shields, was not to be responsible in the event the makers failed to pay the notes. There was in truth and in fact no agreement one way or the other about this matter. Evidently the conversation relating to having the record show a transfer of the notes was for the purpose of complying with section 2794 of the Code of 1906, to the effect that "the assignor shall be required by the assignee to enter the fact of the assignment on the margin of the record of the lien, and in default of making such entry in satisfaction of the lien or instrument evidencing it, entered by the original creditor, shall release the same as to subsequent creditors and purchasers for value without notice," etc.; and under section 2795 of the Code it is provided that "all assignments of any indebtedness secured by a mortgage (etc.) shall be entered on the margin of the record of the lien within thirty days from the date of such assignment, and

for a failure so to do the assignee shall forfeit to the debtor ten per cent. of the amount of said indebtedness." We must conclude from the evidence in this case that the conversation had between Hawkins and Shields, as to letting the record show the assignment, was simply for the purpose of complying with the provisions of these two statutes.

[1] The indorsement of a bill or note is not merely a transfer thereof; but it is a fresh and substantive contract, embodying all of the terms of the instrument in itself. The indorsement of a bill is equivalent to the drawing of a new bill by the indorser upon the drawee in favor of the indorsee; and the indorsement of a note is equivalent to the drawing of a bill upon the maker, who stands in the relation of acceptor, as it were, in favor of the indorsee. So entirely distinct and independent is the contract of an indorser of a note thereof and the maker that at common law a separate action against each was indispensable. The indorser engages that the bill or note will be accepted or paid, as the case may be, according to its purport; but this engagement is conditioned upon due presentment of demand and notice. It also engages that it is in every respect genuine, that it is the valid instrument it purports to be, that the ostensible parties are competent, and that he has the lawful title to it and the right to indorse it. Such is the nature and effect of the contract of indorsement as shown by all of the authorities.

[2] As between the indorser and indorsee there is no difference in the contract of indorsement, so far as the rights and liabilities of the indorser are concerned, when the indorsement is made before and when made after maturity; the only difference being that, when the indorsement is made before the maturity of the bill or note, the time of payment is fixed by the terms of the instrument itself, but when the indorsement is made after maturity, payment must be demanded of the payor within a reasonable time and notice, in the event of a refusal given to the indorser in order to charge him. In such an instance the instrument is regarded as being equivalent to one payable on demand. Daniel on Negotiable Instruments (5th Ed.) § 611, and authorities cited in notes; 7 Cyc. 822, et seq; Baskerville & Whitfield v. Harris, 41 Miss. 535.

[3] The great weight of authority is that, when the facts are few and simple, it is within the province of the court to determine what is reasonable time; but, when they are complicated and doubtful, they should be left for the ascertainment and judgment of the jury under proper instructions from the court. Further, that when the facts are ascertained it is for the court to determine what is reasonable time as a matter of law. Daniel on Negotiable Instruments, § 612; Baskerville & Whitfield v. Harris, 41 Miss. 535.

[4] It is elementary that parol evidence is never admissible to contradict or vary the terms of a valid written instrument. While this general principle is admitted to be applicable to all contracts written out in full, some authorities are not willing to apply this principle to those contracts which are raised from implication by the operation of law, such, for instance, as indorsements in blank. Such seems to be the rule in Pennsylvania, North Carolina, Florida, Colorado, and Connecticut; but this doctrine is certainly opposed to the great weight of authority, and also to the better reason. When it appears from an inspection of the paper that the party is an indorser, there seems to be no just ground for the distinction taken between the implied contract from his mere name thereon written and contracts written out in extenso. The signature of the indorser upon the bill or note is as marked a manifestation of the intention of the party as if the contract were set forth in express words. All of the authorities hold that, though there be nothing but the indorser's signature, the indorser's contract is as fully expressed as that of the drawer of the bill or maker of a note payable to bearer; and it is a general rule, supported by the great weight of authority, that the indorser in a suit brought by the indorsee, whether mediate or remote, cannot show by parol that it was agreed that the indorser should not be liable, and that his indorsement was without recourse on him. *Brown v. Spofford*, 95 U. S. 474, 24 L. Ed. 508; *Martin v. Cole*, 104 U. S. 30, 26 L. Ed. 647; *Daniel on Negotiable Instruments*, § 709; *Tiedman on Commercial Paper*, § 274. Indeed, this is no new question in this state, as has been so declared by this court. *Baskerville & Whitfield v. Harris*, 41 Miss. 530.

In denying the admissibility of parol evidence to vary or to contradict the terms of a contract of indorsement, we, of course, do not extend this rule, so as to exclude evidence offered to show want or failure of consideration, or in cases of irregular indorsement (*Thomas v. Jennings*, 5 Smedes & M. 627; *Polkinghorne v. Hendricks*, 61 Miss. 366; *Holmes v. Preston*, 70 Miss. 152, 12 South. 202; *Richardson v. Foster*, 73 Miss. 12, 18 South. 573, 55 Am. St. Rep. 481; *Pearl v. Cortright*, 81 Miss. 300, 33 South. 72), or to impeach the original or present indorsement on the ground of fraud, nor to exclude the parol evidence to the effect that the indorsement was upon trust for some special purpose, as from a principal to an agent, or for collection merely, or as an escrow upon an express condition that has been complied with, and in cases of fraud, and perhaps in other instances.

[5] The evidence in this case shows that the indorser wrote his name in blank across the back of the notes and delivered the same to a bank, when he hypothecated these notes

as collateral security for an accommodation extended by the bank; that when he paid the bank its debts these notes were surrendered to the indorser, Shields; that the indorser did not erase his indorsement, but the same remained on the notes, and when subsequently, he made the contract with the appellant, Hawkins, he, the indorser, did not rewrite his name or reindorse the notes, but delivered the notes with the old indorsement thereon—it being a blank indorsement. It was not at all necessary to reindorse the notes. The delivery of the notes with the old indorsement thereon was an adoption of the former indorsement, and was equivalent to a new indorsement. No authority is needed for so obvious a proposition.

The instruction given for appellee was in direct conflict with this opinion, and the cause is reversed.

FULLER v. STATE. (No. 15,521.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

1. CRIMINAL LAW (§ 982*)—SUSPENSION OF SENTENCE—POWER OF COURT.

Independent of statute, a court of record may, upon conviction, suspend a sentence during the good behavior of the accused, and upon his violation of the condition may then sentence him; and, as this power is for the benefit of the accused, it is binding upon him, regardless of his consent.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

2. CRIMINAL LAW (§ 982*)—SENTENCE—SUSPENSION OF SENTENCE—CONSTITUTIONALITY OF POWER.

The common-law power of courts of record to suspend sentences upon conviction of crime does not interfere with the exclusive power of the Governor to grant respites and pardons, for a pardon releases the punishment and blots out the existence of guilt, while the suspension of the sentence only postpones the execution of the penalty.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

"To be officially reported."

Charles Fuller was convicted of unlawfully selling intoxicating liquors. From an order imposing a sentence, which had been suspended, defendant appeals. Affirmed.

Potter & Hindman and Burch & Stricker, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

McLAIN, C. In the circuit court of Hinds county, at the December term, 1910, the appellant, Charles Fuller, was arraigned upon an indictment charging him with the unlawful sale of intoxicating liquors. To this indictment he pleaded guilty. The court

thereupon entered this judgment: "It is therefore considered by the court, and so ordered and adjudged, that the defendant, Charles Fuller, for such his offense, for which he has pleaded guilty, be fined the sum of five hundred dollars (\$500.00), and be confined in the Hinds county jail for ninety (90) days, and to pay the costs of this prosecution. It is further ordered that the jail sentence be suspended during the good behavior of the defendant." Appellant paid the fine and costs, and was released from custody. In April, 1911, on motion of the district attorney, he was brought before the court, and, after hearing proof, the court decided that the defendant's behavior had not been good, as the proof showed he was still selling liquor without authority of law, and the court adjudged that he had violated the condition upon which execution of the sentence had been suspended, and he ordered him committed to serve the suspended sentence of 90 days in jail. From this action of the court, the appellant appeals to this court.

[1] It is contended by appellant that the conditional sentence of 90 days imposed upon him, and suspended, was a nullity, and that the suspension of execution thereof upon condition was beyond the power of the judge. It becomes necessary for us to inquire whether the circuit court, at the time the sentence was pronounced upon the defendant, had lost jurisdiction of the case, or the prisoner, so that it could not legally pronounce sentence and order judgment in the manner and form as it did. In other words, the precise question involved is the power of a court of record possessing jurisdiction in criminal cases to suspend judgment after conviction. We think there can be no doubt that the power to suspend sentence after conviction is inherent in courts. "This power belonged of common right to every tribunal invested with the authority to award execution in a criminal case." 1 Chitty, Crim. Law (1st Ed.) 617 and 758.

We cannot conceive how the rights of appellant are invaded or infringed upon, or his interest in the least prejudiced, by permitting him to escape for the present upon a partial judgment, instead of subjecting him immediately to such fine and imprisonment as his own criminal conduct has made him liable to suffer. After a most careful search of the authorities, it is clear to our minds that the right and the power remained in the circuit court to pass the judgment above set out. Such power was properly exercised by the learned circuit judge in this case, and the judgment rendered thereon is, in our opinion, regular and binding upon the appellant. Surely the appellant will not be permitted to say that he deserved and should have received sentence much earlier than he did. He did not de-

mand it, and it is not shown that any injury resulted to him by this delay. In a criminal case, the power to stay the execution in whole or in part is inherent in every court having final jurisdiction in such cases, unless otherwise provided by statute.

It occurs to us the suspension, being in favor of the prisoner, is for his benefit, and beyond question is binding, and that, too, whether consented to by him or not. "The power to suspend after conviction is, at common law, inherent in a court of record possessing jurisdiction in criminal cases. Suspending sentence in a criminal case, after conviction, does not encroach upon the constitutional powers of the executive to grant reprieves and pardons." *People v. Monroe County*, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856. In a well-considered opinion in the case of *Com. v. Dowdican's Bail*, 115 Mass. 133-136, the court said: "It has long been a common practice in this commonwealth, after a verdict of guilty in a criminal case, when the court is satisfied that, by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the commonwealth, and upon such terms as the court, in its discretion, may impose, that the indictment be laid on file. Such an order is not equivalent to a final judgment, or to a nolle prosequi or discontinuance, by which the case is put out of court, but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the dockets, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein."

Our own court has said, speaking through Judge Campbell, in the case of *Gibson v. State*, 68 Miss. 242, 8 South. 329: "As the defendant pleaded guilty, and was liable to be immediately sentenced to pay a fine and costs, and to be imprisoned, and the court, presumably with the consent of the defendant, for whose benefit it was, and who did not object, suspended judgment and postponed sentence, except for costs, no wrong was done to him by pronouncing at a future term the sentence which might have been immediately given, but was thus delayed. *It is not the case of a second punishment of an offense.* It does not appear that the costs were paid; but, if they were, that was the condition upon which the postponement of the sentence was made." *Mr. Bishop*, in his *New Criminal Procedure* (volume 1, § 1299, p. 799), uses this language: "Every court which has the power to award an execution may grant a suspension of its own sentences."

We invite special attention to the case of *People v. Court of Sessions of Monroe County*, reported in 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 857, 858. The question here involved is ably and elaborately considered in this opinion, and we take great pleasure in quoting liberally from the same: "Without attempting to collate all the authorities on the subject, it is sufficient to say that the power to suspend sentence at common law is asserted by writers of acknowledged authority on criminal jurisprudence, by the uniform practice of the courts, and numerous adjudged cases." We cite the following cases: *Gibson v. State*, 68 Miss. 241, 8 South. 329; *State v. Crook*, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260; *State v. Whitt*, 117 N. C. 804, 23 S. E. 452; *Bird v. Cinn.*, 12 Wkly. Law Bul. (Ohio) 101, 102; *Hawk. P. C.*, c. 51, § 8; 1 *Bishop Crim. Proc.* § 1124; 4 *Blackstone's Comm.*, ch. 31; *People v. Graves*, 31 Hun (N. Y.) 382; *People v. Harrington*, 15 Abb. N. C. (N. Y.) 161; *People v. Whipple*, 9 Cow. (N. Y.) 715; *Carnal v. People*, 1 Parker, Cr. R. (N. Y.) 262; *Com. v. Dowdican's Bail*, 115 Mass. 136; *State v. Addy*, 43 N. J. Law, 114, 39 Am. Rep. 547; *Weaver v. People*, 33 Mich. 297; *People v. Reilly*, 53 Mich. 260, 18 N. W. 849; *Com. v. Maloney*, 145 Mass. 205, 13 N. E. 482; *Sylvester v. State*, 65 N. H. 193, 20 Atl. 954. We have no statute authorizing the court to suspend sentence in any criminal case. This is not necessary. The power is inherent in all courts.

[2] It is said, with some degree of force, that this exercise of power by the court encroaches upon the power of the Governor to grant respites and pardons, which is exclusively vested in him under our Constitution. This question has been ably discussed by the New York Court of Appeals, and from that opinion we make this liberal quotation: "The power to suspend sentence and the power to grant reprieves and pardons, as understood when the Constitution was adopted, are totally distinct and different in their origin and nature. The former was always a part of the judicial power; the latter was always a part of the executive power. The suspension of the sentence simply postpones the judgment of the court temporarily or indefinitely; but the conviction and liability following it, and all civil disabilities, remain and become operative when judgment is rendered. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment, and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. It removes the penalties and disabilities, and restores him to all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity. Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366; *United States v. Klein*, 13 Wall.

128, 20 L. Ed. 519; *Knote v. United States*, 95 U. S. 149, 24 L. Ed. 442. The framers of the federal and state Constitutions were perfectly familiar with the principles governing the power to grant pardons, and it was conferred by these instruments upon the executive, with full knowledge of the law upon the subject, and the words of the Constitution were used to express the authority formerly exercised by the English crown, or by its representatives in the colonies. Ex parte Wells, 18 How. 307, 15 L. Ed. 421. As this power was understood, it did not comprehend any part of the judicial functions to suspend sentence, and it was never intended that the authority to grant reprieves and pardons should abrogate, or in any degree restrict, the exercise of that power in regard to its own judgments, that criminal courts had so long maintained. The two powers, so distinct and different in their nature and character, were still left separate and distinct—the one to be exercised by the executive, and the other by the judicial, department. We therefore conclude that a statute which in terms authorizes courts of criminal jurisdiction to suspend sentence in certain cases after conviction—a power inherent in such courts at common law, which was understood when the Constitution was adopted to be an ordinary judicial function, and which, ever since its adoption, has been exercised by the courts—is a valid exercise of legislative power under the Constitution. It does not encroach, in any just sense, upon the powers of the executive, as they have been understood and practiced from the earliest times. The power to suspend the judgment during good behavior, if understood as expressing a condition, upon the compliance with which the offender would be absolutely relieved from all punishment, and freed from the power of the court to pass sentence, is open to more doubt. The Legislature cannot authorize the courts to abdicate their own powers and duties, or to tie their own hands in such a way that, after sentence has been suspended, they cannot, when deemed proper and in the interest of justice, inflict the proper punishment in the exercise of a sound discretion. Nor can the free and untrammelled exercise of this power, or the right to pass sentence according to the discretion of the court, be made dependent upon compliance with some condition that would require the court to try a question of fact before it could render the judgment which the law prescribes. The statute must not be understood as conferring any new power. The court may suspend sentence as before, but it can do nothing to preclude itself or its successor from passing the proper sentence whenever such a course appears to be proper. This, we think, is all that the statute intends, and that was the only effect of the judgment. It is the power which the court should possess in furtherance of justice, to

be used wisely and discreetly; and it is perhaps creditable to the administration of justice in such cases that, while the power has always existed, no complaint has been heard of its abuse." *People v. Monroe County*, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 857, 858.

After a thorough search of the authorities bearing upon this case, we think that the same should be affirmed.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated by the Commissioner the judgment is affirmed.

HOWARD v. STATE. (No. 15,629.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

"To be officially reported."

Henry Howard was convicted of the unlawful sale of intoxicating liquors. From an order imposing a sentence, which had been suspended, he appeals. Affirmed.

R. P. Thompson, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

McLAIN, C. Appellant was indicted and tried in the circuit court of Hinds county for the unlawful sale of liquor. Upon being arraigned, he pleaded guilty to the indictment, and was sentenced to pay a fine of \$500 and to be imprisoned in the county jail for 90 days, and to pay all costs of the prosecution. The court further ordered that this sentence be suspended, provided defendant leave and remain away from Hinds county, Miss.

The question involved here is the same as that presented in the case of *Charles Fuller v. State*, 57 South. 6, this day decided by the court.

We think the case should be affirmed.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated by the Commissioner the judgment is affirmed.

ALLEN v. STATE. (No. 15,628.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

"To be officially reported."

Lula Allen was convicted of the unlawful sale of intoxicating liquors. From an order imposing the sentence, which had been suspended, she appeals. Affirmed.

See, also, 58 South. 498.

Jas. R. McDowell, Asst. Atty. Gen., for the State.

McLAIN, C. Appellant was indicted and tried in the circuit court of Hinds county for the unlawful sale of liquor. Upon being arraigned, she pleaded guilty to the indictment, and was sentenced to pay a fine of \$100 and to be imprisoned in the county jail for 90 days, and to pay all costs of the prosecution. The court further ordered that this sentence

be suspended, provided defendant leave and remain away from Hinds county, Miss.

The question involved in this case is the same as that presented in the case of *Charles Fuller v. State*, this day decided by the court, 57 South. 6.

We think the case should be affirmed.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated by the Commissioner the judgment is affirmed.

HOGGETT v. STATE. (No. 15,546.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.

"To be officially reported."

Bessie Hoggett was convicted of vagrancy, and from an order imposing a suspended sentence she appeals. Affirmed.

J. E. Davis, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

McLAIN, C. This is an appeal from the circuit court of Forrest county, where appellant was indicted for vagrancy, pleaded guilty, and sentence was suspended upon payment of costs. The conditions of the suspension of sentence being violated by defendant, she was at a subsequent term of court sentenced to jail for 90 days. From this judgment she appeals to this court.

The question involved in this case is the same as that in the case of *Charles Fuller v. State*, this day decided by the court, 57 South. 6.

We think the case should be affirmed.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated by the Commissioner the judgment is affirmed.

HOGGETT v. STATE. (No. 15,545.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.

"To be officially reported."

Emma Hoggett was convicted of crime, and appeals. Affirmed.

See, also, 58 South. 172.

J. E. Davis, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the state.

McLAIN, C. The questions involved in this case are fully discussed and decided in the case of *Charles Fuller v. State*, 57 South. 6, this day decided by the court.

We think the case should be affirmed.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated by the Commissioner the judgment is affirmed.

HOGGETT v. STATE. (No. 15,544.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.

"To be officially reported."

Emma Hoggett was convicted of crime, and appeals. Affirmed.

See, also, 56 South. 172.

J. E. Davis, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the state.

McLAIN, C. The questions of law involved in this case are the same as those presented in the case of Charles Fuller v. State, 57 South. 6, this day decided by the court.

We think the case should be affirmed.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated by the Commissioner the judgment is affirmed.

SOUTHERN GRAVEL & MATERIAL CO. v. MERCHANTS' GROCERY CO.

(No. 15,502.)

(Supreme Court of Mississippi. Jan. 20, 1912.)

Appeal from Circuit Court, Lincoln County; D. M. Miller, Judge.

Action between the Southern Gravel & Material Company and the Merchants' Grocery Company. From the judgment the Material Company appeals. On motion to dismiss. Sustained.

A. A. Cohn, for the motion.

PER CURIAM. Motion to dismiss sustained.

DAVIS v. STATE. (No. 15,236.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Union County; W. A. Roane, Judge.

Will Davis was convicted of assault and battery with intent to kill, and appeals. Affirmed.

Stephens & Kennedy, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

OAKS v. STATE. (No. 15,394.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.

Ruth Oaks was convicted of conniving at a sale of liquor, and appeals. Affirmed.

Currie & Currie, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

LOWE v. STATE. (No. 15,624.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Marion County; A. E. Weathersby, Judge.

Charley Lowe was convicted of manslaughter, and appeals. Affirmed.

Dale & Hall and Davis & Goss, for appellant. Mounger & Mounger and Jas. R. McDowell, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

VOLLM v. STATE. (No. 15,397.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Franklin County; M. H. Wilkinson, Judge.

C. Vollm was convicted of forgery, and appeals. Affirmed.

Clem V. Ratcliff, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

PARKER v. STATE. (No. 15,607.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Calhoun County; H. K. Mahon, Judge.

Charles Parker was convicted of manslaughter, and appeals. Affirmed.

Haman & Bates, for appellant. Carl Fox, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

POWELL v. STATE. (No. 15,170.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Lincoln County; D. M. Miller, Judge.

Carrie Powell was convicted of selling liquor, and appeals. Affirmed.

Clem V. Ratcliff, for appellant. Carl Fox, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

MARTIN v. STATE. (No. 15,576.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Junius Martin was convicted of manslaughter, and appeals. Affirmed.

John W. Crisler, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

FURR et al. v. STATE. (No. 15,158.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Lincoln County; D. M. Miller, Judge.

Henry Furr and Sophia Wommack were convicted of crime, and appeal. Affirmed.

Clem V. Ratcliff, for appellants. Carl Fox, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

ILLINOIS CENT. R. CO. v. D. G. PATTON & CO. (No. 15,406.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Action by D. G. Patton & Co. against the

Illinois Central Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

F. M. West, for appellant. Powell & Thompson, for appellees.

PER CURIAM. Affirmed.

SHACK v. STATE (No. 15,422.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Coahoma County; Sam. C. Cook, Judge.

Tom (alias Bull) Shack was convicted of murder, and appeals. Affirmed.

Maynard & FitzGerald and R. H. Kirby, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

DIXIE COTTON CO. v. BROWN, Tax Collector. (No. 15,144.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Tallahatchie County; N. A. Taylor, Judge.

Action between the Dixie Cotton Company and P. H. Brown, as Tax Collector. From the judgment, the Cotton Company appeals. Affirmed.

Harris & Potter, for appellant. Jas. R. McDowell, Asst. Atty. Gen., and J. M. Kuykendall, Co. Atty., for appellee.

PER CURIAM. Affirmed.

ELLIS v. ELLIS. (No. 15,498.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

Appeal from Circuit Court, Washington County; Van B. Boddie, Special Judge.

Action by L. W. Ellis against S. M. Ellis. From the judgment, L. W. Ellis appeals. Affirmed.

A. J. Rose, for appellant. Percy Bell, for appellee.

PER CURIAM. Affirmed.

SOUTHERN STEEL CO. v. HOPKINS et al.

(Supreme Court of Alabama. Jan. 29, 1911.)

Rehearing Denied Dec. 21, 1911.)

INJUNCTION (§ 26*)—MULTIPLICITY OF SUITS—RIGHT TO MAINTAIN BILL.

A bill does not lie to enjoin 110 separate suits against a coal company, for negligent death of employés killed in a mine explosion, until determination by the court, in the injunction suit, of the liability of the company; there being merely a community of interest in the questions of law and of fact involved.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 81; Dec. Dig. § 26.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by the Southern Steel Company against Willey Hopkins, administrator, and

others. Decree for defendants, and complainant appeals. Affirmed.

See, also, 157 Ala. 175, 47 South. 274, 20 L. R. A. (N. S.) 848, 131 Am. St. Rep. 20.

J. T. Stokely, for appellant. Stallings & Drennen, for appellees.

MAYFIELD, J. This is a suit in equity to enjoin the prosecution of 110 separate actions at law. The sole ground of equity jurisdiction upon which the suit is based is to prevent a multiplicity of suits. The separate actions at law were brought by the administrators of 110 unfortunate workmen, who lost their lives by an explosion in a coal mine. Each of these 110 actions was brought, under the employer's liability act, to recover damages for the wrongful death of the respective intestate; was brought against the same defendant, the complainant in this suit; and sought to recover on account of negligence in causing or allowing the explosion which killed the unfortunate workmen.

The prayer for relief is as follows: "Your orator further prays that your honor will grant unto your orator a preliminary writ of injunction, enjoining and restraining each and all of said parties defendant and their attorneys and successors from all further proceedings in said actions at law, or prosecuting the same in any manner, until the further orders of this court, and that your honor will proceed to hear and determine the question of the liability vel non of said Alabama Steel & Wire Company, in the premises, and, if there should prove to be any such liability, that your honor will further determine the extent thereof, and the manner and mode in which the same shall be prorated or paid."

This appeal, for the second time, brings up for our decision the equity of this bill, a full statement of the facts of which, and a discussion of the law involved, may be found in the reports of the case in 157 Ala. 175, 47 South. 274, 20 L. R. A. (N. S.) 848, 131 Am. St. Rep. 20.

The question of law involved in this suit is this: Has a court of equity jurisdiction to enjoin numerous tort actions, brought by different plaintiffs against the same defendant, when there is merely a community of interest in the questions of law and of fact involved, and no common title, no community of interest or of right, in the subject-matter? This question was decided in the affirmative by this court on the former appeal. After the cause was remanded, the complainant amended the bill, and other defendants demurred, and again raised the equity of the bill as last amended. The chancellor again sustained the demurrer, and from that decree the complainant again appeals to this court.

We regret the necessity of overruling our

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

former decision, and recognize and appreciate the wisdom in the maxim, that "it is as important that the law be certain as that it be right;" yet it is not only our prerogative, but our duty, to overrule a former decision, when we are convinced that it is fundamentally wrong, both in theory and in practice.

There is a sharp and distinct conflict in the decisions of the various courts upon this question; but, after a careful examination and review of many of them, and of the text-books upon the subject, we are constrained to recede from the holding on the former appeal, and to follow that line of decisions and those text-books which deny equity jurisdiction to prevent a multiplicity of suits at law, in the absence of a common title, or of some community of right or interest, in the subject-matter among the several parties. To state the proposition differently, we now hold that a community of interest among the several parties in the questions of law and of fact involved is not sufficient to confer jurisdiction upon a court of equity to enjoin the several tort actions at law, though brought against the same defendant, and though each may depend upon the same state of facts.

Our statute (section 5965 of the Code) provides as follows: "The Supreme Court, in deciding each case, when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what, in its opinion at the time, is law, without any regard to such former ruling on the law by it; but the right of third persons, acquired on the faith of the same former ruling, shall not be defeated or interfered with by or on account of any subsequent ruling."

The importance of this question of law and practice involved is such that we deem it proper to state, as briefly as we may, the reasons which have impelled us to overrule the former decision.

We have reached the conclusion that the law has been correctly settled, both in England and America, differently from that declared by this court in the former decision of this case. We think there is little doubt that the courts have been led astray upon this subject by following what Mr. Pomeroy stated in his valuable work on Equity Jurisprudence (2d Ed.) § 269. We recognize both the ability and the authority of Mr. Pomeroy as a writer upon equity jurisprudence; in fact, we concede, as we have often stated in our opinions, that he is probably the leading and the best authority upon this subject; but he is human, and must therefore sometimes err. Prior to this text of Mr. Pomeroy, there were, we are certain, few, if any, adjudicated cases which supported the text, or which would sustain the equity of a bill which rested solely upon the jurisdiction of equity to prevent a multiplicity of suits, when there was no common title, no community of interest or of right, in the sub-

ject-matter among the several individuals whose actions at law were sought to be enjoined.

It must be conceded, however, that there are a number of decisions, since the text, which support it; some of them extending the doctrine further, probably, than it was ever intended or supposed by Mr. Pomeroy. Chief among these is the decision of our own court in this case on the former appeal. Another is that of *Whitlock v. Yazoo*, 91 Miss. 779, 45 South. 861. These two cases have certainly extended the Pomeroy doctrine further than have any others, before or since their rendition.

Chief Justice McClellan, in the *Turner Case*, 135 Ala. 73, 33 South. 132, after devoting several pages of the opinion to the fallacy of the Pomeroy doctrine, which was followed and given effect to by this court on the former appeal, concluded as follows, which is quoted with approval from the *Tribette Case*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642: "But we affirm, after careful examination and full consideration, that Pomeroy is not sustained in his 'conclusions,' stated in section 269 of his most valuable treatise, and the cases he cited do not maintain the proposition that mere community of interest 'in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body,' is ground for the interposition of chancery to settle, in one suit, the several controversies. There is no such doctrine in the books, and the zeal of the learned and usually accurate writer mentioned, to maintain a theory, has betrayed him into error on this subject. It has so blinded him as to cause the confounding of distinct things in his view of this subject, to wit, joinder of parties, and avoidance of multiplicity of suits."

On the other hand, the opinion of Chief Justice Tyson, on the former appeal, referring to the same doctrine, quotes approvingly from another Mississippi case, as follows: "We think the doctrine announced by Pomeroy is sound, and clearly established by the best-considered modern cases." Chief Justice Tyson also states in his opinion that *Tribette's Case* was directly opposed to his views of the law, and to the other Mississippi cases quoted from by him, but that the *Turner Case* was not so opposed, except as to certain dicta therein.

In this last statement as to the *Turner Case*, we think the opinion in the former case is in error. It is certain that the *Turner Case* followed the *Tribette Case*, and gave sanction to every doctrine announced therein. Chief Justice McClellan, in *Turner's Case*, referring to the doctrine that, in order for a court of equity to enjoin a multiplicity of actions at law, there must be a common title to, or common interest in, the subject-matter involved, and that a mere common interest

in a question of law is not sufficient, states that, "this position is nowhere better nor more fully stated than by Campbell, C. J., in *Tribette's Case*, * * * and as the opinion treats fully of Mr. Pomeroy's position, and demonstrates its fallacy, we quote it in part," etc., and then proceeds to quote several pages from the opinion in *Tribette's Case*.

The opinion in the *Turner Case* thus shows on its face that Chief Justice McClellan therein quoted more than half of Chief Justice Campbell's opinion in the *Tribette Case*. This, we think, makes it certain that if the decision in the *Tribette Case* was in conflict with Chief Justice Tyson's opinion it was unquestionably in conflict with the decision in *Turner's Case* which not only followed the decision in *Tribette's Case*, but literally quoted pages of it, and thus expressly adopted it.

Chief Justice McClellan, in the *Turner Case*, says: "This court has never undertaken to define the jurisdiction of equity to prevent a multiplicity of suits, nor to lay down general principles from which the several categories of cases in which that jurisdiction may be invoked is possible of statement. All that has been decided or said by this court bearing upon the subject evidences an inclination toward the confinement of this jurisdiction to a narrow field, and a purpose to conserve in its full integrity the right of trial at law and by juries"—citing many authorities. Further on in that opinion he says that: "Nothing has ever been said or decided in this court giving any countenance to the proposition that 'a common interest in the question at issue only' will give to numerous parties so interested a standing in equity for the prevention of a multitude of suits. The intolerable consequences to which the recognition of such a doctrine would logically lead are sufficiently indicated in the cases to which we have referred. * * *

It is an elementary and fundamental proposition that a party who seeks to come into equity must himself have an equity, or he cannot maintain a bill. The wholly fortuitous, accidental, and collateral fact that numerous other persons have like, but entirely independent and disconnected, legal rights, estates, or defenses cannot, upon any conceivable principle, invest him with any right, legal or equitable, and his rights, whatever they may be, are precisely the same as if no other person had similar rights. * * * Jurisdiction in equity is not entertained on any motion that the court has an equity; that it will take jurisdiction to prevent a multiplicity of suits, in order to lessen its own labors or those of other courts. The equity upon which the invocation is made must reside in the party making it. When numerous parties have each the same equity, they may in a proper case unite in one bill for its declaration and effectuation; each having the separate right to come into equity upon an identical ground, they will be

allowed to come in together, on the theory of preventing a multiplicity of suits. So, where one party is subjected to or threatened with numerous and vexatious actions at law, or is the victim of numerous and continuing wrongs, so that a multitude of suits would be necessary for his redress at law, he may come into chancery, because the necessity for numerous suits or defenses is in itself such a wrong and vexation as vests him with an equity. But the mere fact that a defendant has committed a tort, by which he injured one or a hundred parties, cannot give him an equity to prevent each and every one of the parties so injured from maintaining an action against him to recover damages. If there had been a combination or conspiracy between such numerous parties to vex and harass the complainant by numerous suits, then he would have an equity to enjoin their prosecution. But the mere fact that his tort has injured a hundred persons, and that it will save him and the court time and lessen the expenses of the litigation, does not give him any equity to go into a court of chancery to enjoin or prevent a multiplicity of suits."

It was pointed out by Chief Justice Campbell, in the *Tribette Case*, and by Chief Justice McClellan, in the *Turner Case*, that the authorities cited by Mr. Pomeroy do not support the text upon which the former decision of this case was based. We will now proceed to show that the authorities cited by Chief Justice Tyson, in his opinion in the former decision of this case, do not support the text of Mr. Pomeroy, nor the former decision in this case.

We think we have shown that the *Turner Case*, cited in favor of it, not only fails to support the opinion to which it is cited, but is diametrically opposed to it, and is based solely upon the *Tribette Case*, which Chief Justice Tyson concedes is opposed to this opinion and decision. The case of *Crawford v. Railroad Co.*, 83 Miss. 708, 36 South. 82, 102 Am. St. Rep. 476, cited, does not support the conclusion, because it rested upon an independent equity, which sought to compel the surrender and cancellation of forty odd written instruments, upon the ground that they were obtained by the same fraud. The case of *Sheffield Water Works Company*, which is so strongly relied on by Chief Justice Tyson, was also based upon an independent equity, to wit, the delivery and cancellation of more than 7,000 instruments, upon the ground that they were fraudulently issued, and that they were used as the foundation for the prosecution of the suits based thereon. That case did not seek to enjoin actions of tort, brought by the persons injured by the bursting of a water pipe, as might be inferred from the reference made to it in the opinion. While more than 7,000 persons were injured by the bursting of the pipe, certificates were issued in compromise and settlement of their claims

against the company, and the bill in that case was filed by the company to compel the surrender and cancellation of such certificates and claims, on the ground that they were secured by fraud. It was only a question of multifariousness involved in each of the two cases referred to, and not the question of the jurisdiction to prevent a multiplicity of suits. The case of *York v. Pinkerton*, 1 *Atkins*, 282, was a bill of peace, by one in possession of land, to settle a disputed right of fishery against several persons who were claiming it, which, of course, is not an authority in point. The other cases cited are reviewed in the note to that case, as reported in 20 *L. R. A. (N. S.)* 849. Each of the cases cited has been examined, and none of them supports the conclusion reached in that case. The *Whitlock Case*, however, does support the *Hopkins Case*, but it is in direct conflict with the *Tribette Case*, which it does not cite or mention, though it does cite the case of *Railroad Co. v. Garrison*, 81 *Miss.* 264, 32 *South.* 996, which quotes approvingly from the *Tribette Case*. We concede, however, that later *Mississippi* cases have in effect departed from the *Tribette Case*, but they have not done so expressly, nor have they ever criticised it, so far as we have been able to find.

We base our conclusion chiefly upon the *Tribette Case*, which we concede to be the leading authority in the world upon the question of the jurisdiction of equity to prevent a multiplicity of suits. It has been reprinted, time and again, and copied into the latest editions of most of the text-books upon the subject, as stating the true doctrine. This case has been followed by *Mr. Bliss (Code Pleading, § 76)*, by *Mr. Beach (Injunctions, § 543)*, and *Mr. High (Injunctions, § 65a)*.

Mr. Pomeroy, in his last edition on *Equity Jurisprudence*, devotes a great deal of space and attention to the *Tribette Case*, because it had taken him to task on this question, and adds two new sections to that edition, to wit, 25½ and 25¾, to set himself right in this matter. It is quite evident from an examination of this last edition that the author does not go to the extent of upholding the equity jurisdiction of a case like the one under consideration. While he does criticise the tone of the opinion, and some things that are said by Chief Justice Campbell in the *Tribette Case*, yet, in the notes to his text, he admits that the decision in that case was correct.

The entire subject under review has been fully considered, and the authorities thereon discussed, in the recent case of *Vandalia Coal Company v. Lawson*, 43 *Ind. App.* 226, 87 *N. E.* 47. That opinion fully sustains the decision of Chief Justice Campbell in the *Tribette Case*, and that of Chief Justice McClellan in the *Turner Case*, and criticises rather severely our former decision in this case.

There is also a recent case (that of *Ducktown v. Fain*, 109 *Tenn.* 56, 70 *S. W.* 813) which cites approvingly the *Tribette Case*, and sustains the proposition that a community of interest in the subject-matter is necessary, in order for equity to take jurisdiction to prevent a multiplicity of suits. The last two cases cited and reviewed many authorities upon the question, and, we think, show beyond question that our former decision in the *Hopkins Case* was wrong, and should be overruled. In fact, we are of the opinion that the two new sections (the only ones) added in the last edition of *Pomeroy's Equity Jurisprudence* support us in the conclusion that there is no equity in the bill under consideration.

In section 25½, speaking to this question, it is said: "The equity suit must result in a simplification or consolidation of the issues; if after the numerous parties are joined there still remain several issues to be tried between the several parties, nothing has been gained by the court of equity in assuming jurisdiction. In such a case, while the bill has only one number upon the docket and calls itself a single proceeding, it is in reality a bundle of separate suits, each of which is no doubt similar in character to each of the others, but rests nevertheless upon the distinct liability of one defendant." (The author must have had this case in mind.)

All the text-writers on the subject, who have revised their texts since the decision in the *Tribette Case*, seem to have followed it; some of them literally quoting it at length. *Beach*, in his work on *Injunctions* (section 543), says: "While courts of equity will freely exercise their jurisdiction in order to prevent an unnecessary and vexatious multiplicity of suits, they will not enjoin the prosecution of several pending actions at law, instituted by different plaintiffs, and compel their consolidation into a single suit in equity, at the instance of the common defendant at law, merely because the cause of action in each of the several actions at law arose from the same act of negligence or other single tort of the common defendant at law." He then sets out the opinion in the *Tribette Case* at length in a note to the text.

Mr. High, in his last work on *Injunctions*, adds a new section (65a), which states the rule as follows: "It is to be observed that, in order to justify relief by injunction for the prevention of a multiplicity of suits, there must be some common subject-matter in controversy, or some common right of interest therein, and that without this a mere community of interest in the questions of law and fact to be determined constitutes no basis for equitable relief. Thus, where numerous actions at law have been brought by separate plaintiffs against the same defendant to recover damages resulting from a fire started by sparks from complainant's locomotive, the mere fact that the questions of law

and fact are the same in all the actions, and that the various parties have a common interest in those questions, will not authorize an injunction against the prosecution of the actions and the determination of the issues in equity." The only authorities cited in support of this text are the Tribette and Turner Cases.

The distinction between a community of interest in the subject-matter which will support the jurisdiction of chancery to prevent a multiplicity of suits, and a common interest in the questions of law and of fact which will not support it, is well illustrated in the Tribette Case and the authorities cited. It must be a right enjoyed in common with all the parties, and in such manner that the invasion of the right of one is an invasion of the right of all, such as a right of common fishery. Storey, Eq. Jur. 854, 855; Adams, Eq. 199.

"Two or more owners of mills propelled by water are interested in preventing an obstruction above that shall interfere with the downflow of the water, and may unite to restrain it or abate it as a nuisance; but they cannot unite in an action for damages, for, as to the injury suffered, there is no community of interest." Bliss, Code Pl. § 76.

"Where several persons, acting independently, combine to produce a nuisance, such persons may be joined as defendants in a suit for injunctive relief. But there can be no joinder, either of complainants or defendants, for the purpose of recovering damages for the injuries caused by such nuisance." Demarest v. Hardham, 34 N. J. Eq. 469; Vandalla Coal Co. v. Lawson, 43 Ind. App. 242, 87 N. E. 53.

It is thus made to appear that all of the text-writers who have written since the Tribette Case have followed it and revised their texts accordingly. Even Mr. Pomeroy, though he speaks of the case as sensational in many of its statements, says "it has been so frequently reprinted that it appears to call for special notice," and he proceeds to quote from it and to comment adversely upon it as to those statements which he calls sensational; yet the effect of his text and notes, as revised, is to say that the case was correctly decided. See section 25½ and note, 1 Pomeroy's Eq. Jur. p. 425. This being true, it follows that our decision in this case on the former appeal was wrong. Roanoke Guano Co. v. Saunders, 56 South. 198. We deem it just to Mr. Pomeroy, however, to say that we do not think his original text supported the decision of this court on the for-

mer appeal, and it is certain that the revised text does not.

The evil consequences of maintaining the equity of a bill like this is illustrated clearly by the record in this case. The explosion which killed the 110 workmen in question, and which is the subject of this controversy, occurred February 20, 1905, and because of this proceeding a trial of those 110 damage suits has been delayed for more than six years. Suppose the equity of the bill should be sustained and the parties proceed to trial, and the complainant fail, then the parties plaintiff, after a delay of many years, will have to be remitted to courts of law to try each of these cases separately. Or, if the complainant succeeded, still there must be 110 trials in the court of chancery, not only as to the liability vel non, as to each of the persons killed, but as to the amount of damages recoverable in each case. If the complainant is liable under the employer's liability act, the amount for which it is liable would be different in each of the 110 cases, depending upon the earning capacity of each decedent, which, in its turn, depends upon age, character, habits, etc.

It would be difficult to select a case that would more clearly demonstrate the impracticability of the rule than the one under consideration. Contemplate 110 separate answers, and as many pleas and demurrers in one suit, and the innumerable issues of law and of fact that would be raised thereby, and the defense being conducted by 110 different attorneys, or the parties deprived of the right to have the counsel of their choice—a worse confusion could scarcely be imagined. It could be likened unto the confusion of tongues at the building of the Tower of Babel.

To reach a final decree in this case that would approach justice for all, by a trial of all these issues, and a trial in accordance with our statutes and the rules of law and chancery provided for such cases, would be wholly impracticable, if not impossible. No stronger or more conclusive argument could be produced to show that the rule announced on the former appeal is wrong than would be an attempted trial of this case upon its merits, in a chancery court, under the prayer of the bill quoted above.

No error appearing in the record, the decree of the chancellor is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON, ANDERSON, McCLELLAN, SAYRE, and SOMERVILLE, JJ., concur.

Ex parte BRADSHAW.

(Supreme Court of Alabama. June 16, 1911.
On Rehearing, Dec. 21, 1911.)

1. COSTS (§ 137*)—ORDER OF SECURITY—EFFECT.

Where an order directed a nonresident plaintiff to give security for costs within a certain time or the cause should stand dismissed, the order itself did not, upon default of the plaintiff, effect a dismissal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 537; Dec. Dig. § 137.*]

2. COSTS (§ 137*)—SECURITY FOR COSTS—STATUTES—CONSTRUCTION.

Act 1807 (Toulmin's Dig. p. 350), which was the first statute requiring nonresident plaintiffs to give security for costs, provided that such suits would be dismissed for failure to give security within 60 days after notice, and was held not mandatory. It was supplanted by Code 1852, § 2396, providing that such suits must be dismissed on motion, unless security for costs was indorsed on the complaint or lodged with the clerk previous to the issue of the summons, which was held to make the giving of security for costs a condition precedent to the commencement of an action. The provision in Code 1852 was in turn supplanted by Act February 17, 1885 (Sess. Acts 1884-85, p. 137), providing for dismissal unless security be furnished, if required on motion therefor, and this act, as codified in Code 1896, was brought down as Code 1907, § 3687, providing for dismissal if security be not given by such nonresident when the suit is commenced, or within such time thereafter as the court may direct. Held that, in view of the preceding statutes, Code 1907, § 3687, while giving the trial court a discretionary power to extend the time for giving security, makes the giving of security in accordance with the order of the court a condition precedent to the maintenance of the action, and a failure to comply with the order of the court requires a dismissal of the action.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 537; Dec. Dig. § 137.*]

3. MANDAMUS (§ 43*)—DISMISSAL OF ACTION—SECURITY FOR COSTS—FAILURE TO GIVE.

Under Code 1907, § 3687, providing that a suit by a nonresident must be dismissed on motion, if security for costs be not given when the suit is commenced, or within such time as the court may direct, the trial court may be compelled by mandamus to dismiss a suit in which security for costs has not been given.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 88, 89; Dec. Dig. § 43.*]

4. COSTS (§ 119*)—SECURITY FOR COSTS—TIME FOR GIVING.

Under Code 1907, § 3687, providing that an action by a nonresident shall be dismissed if security for costs be not given when the suit is commenced, or within such time as the court may direct, the trial court has a discretionary power to prescribe the time within which the security shall be given, and, having prescribed the time, may, in its discretion, extend it.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 542; Dec. Dig. § 119.*]

5. COSTS (§ 119*)—SECURITY FOR COSTS—TIME FOR GIVING—EXTENSION.

Where the trial court, under Code 1907, § 3687, requiring a nonresident plaintiff to give security for costs within the time set by the court, ordered security to be given within 30 days, and, before the end of that period, plaintiff's attorney moved for another extension, and the court, without any order of record, continu-

ed the hearing of the motion to a period after the 30 days, an order then entered, extending the time, was void, for, the period prescribed having expired, the court could not order another extension, and, furthermore, the order of extension, like the original order, is the act of the court, and as such must be in writing, signed by the judge and filed or entered of record unless made in open court, and the mere application for an extension without any written order does not prevent a lapse.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 542; Dec. Dig. § 119.*]

On Rehearing.

6. COSTS (§ 106*)—SECURITY FOR COSTS—STATUTES—CONSTRUCTION.

While penal statutes should be strictly construed, unless they exhibit an intent to the contrary, Code 1907, § 3687, requiring the dismissal of an action by a nonresident plaintiff unless security for costs be given, being an outgrowth of previous legislation which had been from time to time altered, is not subject to that rule.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 402; Dec. Dig. § 106.*]

7. COSTS (§ 137*)—SECURITY FOR PAYMENT—STATUTES—CONSTRUCTION.

Code 1907, § 3687, providing that actions by nonresident plaintiffs must be dismissed on motion unless security for costs be given at the commencement of the action, or within such time as the trial court may direct, which supplanted Code 1852, § 2396, providing that such suits must be dismissed on motion, unless security for costs was indorsed on the complaint or lodged with the clerk previous to the issue of summons, while preserving the authority of the trial court to dismiss peremptorily, gave it a discretionary power to fix the period within which plaintiff must act, and the action must be dismissed if security be not given within the time fixed by the court, even though, after the expiration of the time fixed, the court attempted to extend the time; this holding not requiring the reading in of the word "first" as qualifying the word "direct" in the statute.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 537; Dec. Dig. § 137.*]

Sayre, J., dissenting.

Petition by Caldwell Bradshaw for a writ of mandamus to be directed against C. C. Ne Smith, as Judge of the City Court of Birmingham. Peremptory writ issued.

A. Latady, for petitioner. Bowman, Harsh & Beddow, W. K. Terry, and W. T. Stewart, for respondent.

SOMERVILLE, J. In the case of L. W. Phillips v. Caldwell Bradshaw, pending in the city court of Birmingham, the defendant filed his motion to require the plaintiff, a nonresident, to give security for the costs of suit; and on December 24, 1910, the trial judge granted an order, duly entered on the motion docket, as follows: "December 24, 1910. Ordered that plaintiff give security for costs in above-styled cause within thirty days from this date or cause shall stand dismissed. C. C. Ne Smith, Judge." On January 23, 1911—the thirtieth day of the period prescribed—plaintiff's attorney appeared before the court and by verbal motion asked

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for an extension of the time for giving such security. This motion was held under consideration by the court until January 25, 1911, at which time plaintiff's attorney again appeared, and the court granted further time by an order entered on the docket as follows: "January 25, 1911. It is ordered that time within which security for costs may be given by plaintiff be and hereby is extended to February 8, 1911. C. C. Ne Smith, Judge." On February 7, 1911, the time was again extended by a similar order to February 16, 1911, and on February 13, 1911, plaintiff filed his bond securing the costs, which was duly approved by the clerk of the court. In the meantime, on February 6, 1911, the defendant filed a motion to dismiss the suit and strike the cause from the docket. This motion was heard by the court and by it overruled on February 25, 1911. On this state of facts, the defendant seeks by mandamus to compel the trial judge to strike the said cause from the docket of the city court of Birmingham. The theory of the petitioner is that, the trial court having fixed the time within which plaintiff should give the security, and that time having fully elapsed without the making or entry of any order by the court extending the time for such action, the discretion of the court was exhausted, and thereafter it could grant no further extension to plaintiff.

[1] As we understand from the brief and argument of petitioner's counsel, it is not contended that the provision inserted in the order of December 24th, that in case of default by plaintiff "the cause shall stand dismissed," operated *ipso facto* to effect the dismissal. And we think, on both principle and authority, it could not so operate. *Whitaker v. Sanford*, 13 Ala. 522; *Springfield Co. v. Construction Co.*, 49 Ohio St. 681, 32 N. E. 961; *Ex parte McLendon*, 33 Ala. 276.

[2-4] Our statutes requiring nonresident plaintiffs to give security for costs, beginning with the territorial act of 1807, have differed greatly in language, purpose, and effect, and it becomes necessary to briefly review them as indicative in some degree of the purpose and meaning of the present statute (section 3687, Code 1907), which we are now called upon to interpret and apply to the case before us.

The act of 1807, as found in *Toulmin's Digest*, p. 350, and in *Clay's Digest*, p. 316, provided that suits should be dismissed for failure to give the security within 60 days after notice of requirement to do so. As interpreted by this court, the time thus prescribed was held to be not mandatory, and the plaintiff had a right to offer and give the security at any time before actual dismissal, and even when the case was called for trial; and dismissal in the case of such an offer was erroneous. *Whitaker v. Sanford*, 13 Ala. 522.

This law no doubt proved inefficient, and

there was placed in the Code of 1852 (as section 2396) a provision that such suits must be dismissed on motion unless security for costs was indorsed on the complaint, or lodged with the clerk, previous to the issue of the summons. This statute was held to be mandatory, and its requirements a condition precedent; and the plaintiff's failure to conform to its requirements demanded the dismissal of his suit by the trial court on motion therefor. And if the court failed on motion to execute the sentence of dismissal denounced and perfected by the statute, it could be compelled thereto by writ of mandamus at the petition of an interested party. *Ex parte Cole*, 28 Ala. 50; *Ex parte Robbins*, 29 Ala. 71; *First National Bank of Anniston v. Cheney*, 120 Ala. 122, 23 South. 733.

This law remained in force until repealed by the act of February 17, 1885 (Sess. Acts 1884-85, p. 137), which provided for dismissal as formerly, "or unless security be furnished as required by the court on motion therefor." This act as codified in section 2858 of the Code of 1886, and brought down as section 3687 of the Code of 1907, requires dismissal on motion if the security "be not given by such nonresident when the suit is commenced, or within such time thereafter as the court may direct."

Under this present statute it has been held by this court that the plaintiff's failure to give the security as prescribed requires the dismissal of the suit, and that the trial court may be compelled thereto by writ of mandamus at the petition of the defendant. *First National Bank v. Cheney*, 120 Ala. 117, 23 South. 733; *Ex parte L. & N. R. Co.*, 124 Ala. 547, 27 South. 239; *Ex parte Smith*, 168 Ala. 179, 52 South. 895. It has also been held that it gives to the court a discretionary power to prescribe the time within which the security should be given, that once fixing the time does not exhaust this discretion, and that the court has the same right to extend the time thus prescribed as it had to fix it in the first instance. *Ex parte Jones*, 83 Ala. 587, 8 South. 811.

Looking to the history and purpose of the statute, and especially to the office and operation of its immediate progenitor (section 2396 of the Code of 1852), we can discover in the additional provision ingrafted on the old law no other legislative purpose than to merely allow the trial court, in its sound discretion, to substitute for the former condition precedent to filing the suit a new condition to its further maintenance—but none the less a condition precedent. And we are clear in the conviction that the plaintiff's failure to give the security within the terms of the order of the court, thus substituted by it for the statutory condition, has exactly the same effect as had under the prior statute his failure to give the security previous to the issue of the summons. We are una-

ble to assent to the suggestion of counsel for respondent that the statement in *Bank v. Cheney*, 120 Ala. 122, 23 South. 733, that "the present statute was intended to restore the practice prevailing under the statute prior to the Code of 1852" had any application other than to the practice which permitted the motion to be made after continuance or the filing of defensive pleas—a practice not allowed under the Code of 1852. This was the point under consideration, and to it the statement must be referred and limited.

[8] We now come to consider the precise questions presented by this petition, viz., whether the extension of plaintiff's time for giving the security, as originally prescribed by the order of December 24, 1911, could be granted only by an order made before the 30 days had expired; any subsequent order being *functus officio*. And, if it must have been so made, whether such order must be evidenced by the usual written memorial, i. e., by an entry upon the records of the court, or by a writing duly filed; or whether, upon the verbal application of the plaintiff, made before the expiration of the 30 days, the court may carry the matter in the breast of the judge beyond the allotted period, without the entry of any order expressly or impliedly extending the plaintiff's time, and then at a later day enter an appropriate order of extension which shall be of the same effect as if duly entered before the expiration of the 30-day period.

We find no difficulty in reaching the conclusions: (1) That any attempt of the trial court to extend the period once prescribed, by action taken after its expiration, is unauthorized, null, and void. *Ex parte Jones*, 83 Ala. 587, 3 South. 811; *Kimball v. Penney*, 117 Ala. 245, 22 South. 899; *Morris v. Brannen*, 103 Ala. 602, 15 South. 865; *Rosson v. State*, 92 Ala. 76, 9 South. 357; *Bass Furnace Company v. Glasscock*, 86 Ala. 244, 6 South. 430. (2) That the order of extension, like the original order, must be the act of the court as distinguished from the personal act of the judge, and as such must be in writing, signed by the judge, and filed or entered of record, unless made in open court; and even then it can be evidenced only by the notes or minutes of the court as are other interlocutory orders thus made. This results from the very nature of courts, which speak only through their records. As said by Mr. Freeman: "All courts and all tribunals possessing judicial functions are required by the written or unwritten law, and often by both, to reduce their decisions to writing in some book or record kept for that purpose. The requirement is believed to be of universal application." 1 *Freeman on Judgments* (4th Ed.) § 37; *Speed v. Cocke*, Adm'r, 57 Ala. 209, 216, 217.

We note in passing that it has been once held by this court that an order continuing

the cause, entered within the period first prescribed for the giving of the security, keeps alive the discretion and power of the court to grant a further extension of time; such order being in itself, by necessary implication, a general extension. *Ex parte Jones*, 83 Ala. 587, 3 South. 811. We recognize this case as authority for the proposition that the order of extension need not expressly and specifically extend the period already prescribed, but may have that effect if of such a character as to necessarily imply an extension.

Applying the principles and conclusions above enunciated to the facts of the present case as shown by the answer of the learned trial judge, we are unable to escape the final conclusion that the mere application of the plaintiff for an extension of the 30-day period previously granted him for giving the required security for costs, though made within that period, there being no order made or entered by the trial judge until after that period had expired, could not by any subsequent granting order keep alive or resuscitate the expired discretion of the court; that the mere mental purpose of the judge to entertain the application and pass upon it at a future day is not sufficient to avoid the forfeit; and that after this uninterrupted lapse is complete there remains in the trial judge no further discretion, but it becomes his duty, on motion of the defendant, to execute the sentence of the statute according to its mandatory terms.

This, we conceive, after thorough consideration, to be the true meaning and intent of the statute, which it is our duty to declare.

We need not now determine whether, if the security were in fact filed before the defendant interposed his motion to dismiss the cause, the motion would be thereby rendered unavailing; nor what delay or other conduct on the part of the defendant would operate as a waiver of his right to a dismissal—questions not presented by the record.

Let the peremptory writ issue as prayed for in the petition.

SIMPSON, ANDERSON, McCLELLAN, and MAYFIELD, JJ., concur. SAYRE, J., dissents.

On Rehearing.

SOMERVILLE, J. A spirited criticism is made of the reasoning and the conclusion of the court as stated in the foregoing opinion. It is insisted: (1) That we have unwarrantably read into the statute the word "first" in order to qualify the word "direct"; (2) that we have strictly construed a penal statute which ought to be construed liberally; (3) that we have violated the plain meaning and effect of two previous decisions of this court, viz., *Ex parte Jones*, 83 Ala. 587, 3 South. 811, and *First National Bank v. Cheney*, 120 Ala. 117, 23 South. 733.

In view of the practical importance of the question adjudicated, we deem it worth while to notice these arguments.

1. When the act of 1807 was changed by the Code of 1852, and the construction of the latter was first before this court, the same argument was vigorously urged against giving it a mandatory meaning, to which the court replied by Goldthwaite, J.: "The act speaks as clearly as language can speak, and declares that the suit must be dismissed if that is not done (i. e., the lodgment of the costs with the clerk); and when the Legislature have said that this shall be done before suit, upon what principle is it that courts would be authorized to say that it might be done after the commencement of the action? Such a course would savor more of legislation than of judicial interpretation. It is better, in all such cases, to stand upon the plain words of the statute." *A. & T. River R. Co. v. Harris*, 25 Ala. 232, 235.

[6] It is, indeed, an elementary rule that penal statutes should be strictly construed unless they exhibit a specific or general intent to the contrary. But, in the long process of legislative evolution and change, our statutes on this subject have long since passed the stage when that rule, or the reasoning upon which it rests, can be accorded any controlling force. The only question here is: How far did the Legislature intend to abrogate the mandatory meaning of the statute of 1852? Did it intend a complete or only a partial reversion to the discarded and inefficient rule in force prior to 1852?

[7] 2. We think it was plainly intended by the present statute only to *qualify* the previous requirement of contemporaneously filing the security, and, while still preserving the authority of the trial court to dismiss the action peremptorily for failure to do so, to permit the court in its discretion to fix a period of grace within which the plaintiff must act; the length of the period being also left to the sound discretion of the court. The language is that the suit "*must* be dismissed on motion if security for the costs be not given * * * *within such time thereafter as the court may direct.*"

It is obvious that the ruling complained of does not require that the statute be read "within such time thereafter as the court may *first* direct," nor have we given it any such meaning. On the other hand, we are not authorized, as insisted upon by counsel, to make the statute read "within such time or *times* as the court may direct"; for "time," as here used, means no more nor less than *period*. Indeed, if it were an open question, it might well be doubted whether it was ever intended to vest in the trial court the power of continued and indefinite extension of such period of time as its original order prescribed. As to this, however, we are bound to adhere to the ruling in *Ex parte*

Jones, *supra*, which, it must be presumed, has been sanctioned by later re-enactments of the statute.

3. The case of *Bank v. Cheney*, 120 Ala. 117, 23 South. 733, is relied upon as authority for the contention that *all* questions relating to the enforcement of the statute are left to the discretion of the trial court. We have critically re-examined the opinion in that case, and are fully convinced of the correctness of our views with respect to it as already expressed. Indeed, Chief Justice Brickell there pointedly affirms that mandamus lies against the trial judge to compel the dismissal of the suit, for he says: "While the *error* in refusing a dismissal for want of security for costs may be available on error for the reversal of a judgment, obviously an appeal is not an adequate remedy. The citizen is compelled into litigation with a nonresident, pending the further continuance of the suit, and the appeal, without indemnity against the cost, the evil the statute intends to avoid. Hence it has been the uniform course of decision that mandamus is an appropriate remedy to compel the dismissal of the suit."

The writ was denied in that case only because the defendant had not filed any preliminary motion to require security, and hence was not yet entitled to a peremptory dismissal.

Even the most biased mind must concede that the declared right of a defendant by mandamus to compel the trial court to dismiss the suit is wholly incompatible with the theory of a judicial discretion residing in that court. If, then, the defendant may resort to mandamus to vindicate his right, it is pertinent to inquire what *right* he has. If the trial court may prescribe the time within which the security must be given, and also *after* that time has completely elapsed prescribe a new period, and so on indefinitely at his uncontrolled discretion, it is quite certain that the defendant remains with no right at all, for there is no stage at which he may successfully coerce the action of the trial court. If the time fixed by the original order has expired without response from the plaintiff, how long must the defendant delay the assertion of his right to the writ of mandamus? Clearly, if he has any *right* at all, it is complete when the plaintiff has failed to act within the time allowed him by the order. If not, each application for mandatory relief, whenever he may have the temerity to seek it, will be effectually met by the answer of the trial judge that he has on *that very day* made an order fixing a new period of time; and it would of necessity result that the petition would be dismissed.

"Must" is a strong word, and when used in statutes it must always be regarded as mandatory, unless from context or subject-

matter a merely permissive meaning seems clearly and certainly to have been intended.

The ruling in *Ex parte Jones*, supra, left but little life in the mandatory feature of the statute, and we are unwilling to now sanction its complete devisceration. In that case it was said: "The time within which the security is to be given is here made to rest within the sound discretion of the presiding judge. His once fixing the time did not exhaust the exercise of this discretion. He had the same right to *extend* it, as he did to *fix* it in the first instance." And the right to extend the time was plainly based upon the fact that the extension was made *within* the period first prescribed, and while the power was still alive.

It is now insisted that this language supports the respondent's contention and refutes our conclusion to the contrary. This argument is founded on a misapprehension of the meaning of the language quoted. To *extend* is to draw out, to prolong, to continue; and, *ex vi termini*, it can only refer to something already in existence. It is therefore idle to speak of *extending* a given period of time which has already completely expired. If a new period is then designated, it is not an extension of the old period, but the creation of an entirely new one. *State v. Scott*, 113 Mo. 559, 20 S. W. 1077; *W. C. R. Co. v. Comstock*, 71 Wis. 88, 36 N. W. 843, 844; *Clement's Ex'rs v. Dickey*, 5 Fed. Cas. 1025, 1027. And this court is fully committed to this view.

A statute of this state formerly gave to circuit judges the power in term time to "fix the time in which the bill of exceptions shall be signed," and further provided that "the judge, in vacation, may for good cause shown *extend the time* fixed in term time." *Sess. Acts 1886-87*, p. 126; section 2762, Code of 1886. Here was an express power to *extend* the time originally fixed. This *express* power to extend can surely not be deemed less comprehensive and efficient than the implied power to extend ingrafted on the statute under consideration by judicial decision; and under the former it has been uniformly held that an attempted extension of the time prescribed, after the *expiration of the last day thereof*, was without authority—the power to extend having then become *functus officio*. *Bass Furnace Co. v. Glasscock*, 86 Ala. 244, 6 South. 430, and numerous other cases.

No reason has been given, and we think none can be given, why the same rule of construction should not be applied to both statutes; and certainly distinctions without differences are not creditable to the law.

Application overruled.

SIMPSON, ANDERSON, McCLELLAN, and MAYFIELD, JJ., concur. SAYRE, J., dissents.

BROWN v. FEAGIN.

(Supreme Court of Alabama. June 29, 1911.
Rehearing Denied Dec. 21, 1911.)

1. QUIETING TITLE (§ 41*) — COMPLAINT — SUFFICIENCY—DEMURRER.

A bill to quiet title, which failed to allege that no suit to try title was pending and that complainant was in possession, is demurrable on either ground.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 82; Dec. Dig. § 41.*]

2. PARTITION (§ 55*)—BILL—CONSTRUCTION.

A bill alleging that complainant and one defendant were the joint owners of land, and praying that all the other defendants should be required to propound their interests in the land mentioned, and that the interests of all the parties should be ascertained and the land divided, must be treated primarily as a bill for partition between joint owners.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 148-159; Dec. Dig. § 55.*]

3. PARTITION (§ 19*)—POSSESSION TO OBTAIN PARTITION.

To entitle one of several cotenants to partition, it is immaterial whether complainants or defendants are in possession, or neither.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 60-63; Dec. Dig. § 19.*]

4. EQUITABLE (§ 150*) — BILL — MULTIFARIOUSNESS—PARTITION AND QUIETING TITLE.

Code 1907, §§ 5231, 5232, respectively provide that any joint owner of land may file a bill for partition against his cotenants, and may join with them any persons claiming the property adversely, in order to determine the validity of such adverse claim, and that the chancery court shall have jurisdiction to partition real property held by joint owners or tenants in common, whether defendant denies the title of complainant or sets up adverse possession, and may adjust claims and equities between cotenants, and the equities and claims of incumbents. *Held* that, as courts of chancery have long employed their general powers to adjust equities between cotenants, growing out of their ownership of property sought to be partitioned, the statutes are no more than a codification of the previous chancery powers, so that the power to adjust claims and equities is merely that incidental to the partition and to make it more effective, and does not extend to the claims of third parties in possession claiming adversely; and hence a bill seeking partition, and also to quiet claims of third persons, is multifarious.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 342, 371-379; Dec. Dig. § 150.*]

Appeal from Chancery Court, Jefferson County; A. H. Benner, Chancellor.

Bill by Arthur I. Brown against John Vary and others to sell land for partition and to vest the title to said lands in the true owner, revived after death of Vary in the name of N. B. Feagin as administrator. Decree for said respondent on demurrer, and complainant appeals. Affirmed.

The bill is filed against John Vary, Charles D. Smith, Walter L. Smith; Cella Smith, Charles D. and Walter L. Smith, as administrators of the estate of R. D. Smith, deceased, and the Alabama National Bank, a corporation. The facts as made by the bill

are that R. D. Smith, father of the respondents Smith, and the intestate of the administrators, was indebted to the Birmingham National Bank in the sum of about \$40,000, and in order to secure the same executed and delivered to said bank, its successors and assigns, an assignment of all claims, right of rescission, and all other rights and remedies, which the assignor had against the Birmingham Furnace Manufacturing Company and certain named individuals growing out of a breach of the contract in reference to certain land, and also conveying all right, title, and interest that the assignor had in and to the mineral land described in a deed from Ewing, treasurer, to the Birmingham Furnace & Manufacturing Company, which deed is recorded in Book 83, p. 495, of the probate judge's office in Jefferson county, dated November 14, 1893. It is then alleged that the Alabama National Bank for value received acquired this indebtedness of Smith, and also the securities above set out, securing said indebtedness. Exhibit B describes the land above referred to in said securities. It is then alleged that in 1899 Smith filed a petition in bankruptcy, and that at the time of filing the same he owned certain real estate in Jefferson county, Ala., as described in Exhibit B, but that said real estate was not embraced in the schedules filed by said Smith as an asset of the said bankrupt estate. It is then alleged that, if the representations of said Smith that he did not own said land at said time were true, he, by the instrument set out as Exhibit A, estopped himself and his heirs from claiming any title therein, even though it may have been acquired after said mortgage or instrument in writing, called Exhibit A, and the said bankruptcy proceeding. It is then alleged that at the time he filed said bankrupt proceedings he had a perfect equity in said land, and had agreed to accept the same in settlement of his right of action referred to in Exhibit A, and that any title subsequently acquired by him inured to the purchaser from the trustee in bankruptcy and the grantors of said purchaser. The bill then alleges a petition by the trustee in bankruptcy for the sale of said land, and order and decree entered thereon, a sale in pursuance of said order, and a purchase by and conveyance to the Alabama National Bank of the lands described in Exhibit B. It is alleged that the Alabama National Bank went into possession of the property acquired by the deed, and on the 27th day of May, 1905, conveyed all of said lands to John Vary, and that later Vary executed and delivered to complainant a deed conveying to him a one-tenth undivided interest in said land, which deed was duly filed and recorded. It is then averred that Vary owned a nine-tenths, and complainant a one-tenth, interest, and that the lands cannot be equitably divided without a sale thereof. Paragraph 10 and the prayer sufficiently appear in the opinion.

Smith & Smith, for appellant. Charles A. Calhoun and Tillman, Bradley & Morrow, for appellee.

SOMERVILLE, J. The bill of complaint is filed by Arthur L. Brown, as complainant, against John Vary, Chas. D. Smith, Walter L. Smith, Celia Smith, Chas. D. and Walter L. Smith, as administrators of the estate of R. D. Smith, deceased, and the Alabama National Bank, a corporation. It shows that complainant owns an undivided one-tenth interest in the land described in the bill, and that the respondent John Vary owns the remaining undivided nine-tenths.

The relation of the other respondents to the cause is shown by paragraph 10 of the bill, as follows: "Complainant avers that respondents Charles D. Smith, Walter L. Smith, Celia Smith, and Charles D. Smith and Walter L. Smith, administrators of the estate of C. D. Smith, deceased, and the Alabama National Bank, claim to have or own some kind or character of interest in said lands, which said claims cast and create a cloud upon the title of complainant and that of respondent John Vary to said lands."

The prayer for relief is: "That all said respondents be required to propound their interests in the lands mentioned in this bill of complaint; that upon final hearing of this cause the interests of all parties concerned be ascertained, and that said lands mentioned may be sold under decree of this court for division, or divided by metes and bounds in the event the court should ascertain that said lands can be divided by metes and bounds; that it appoint commissioners and empower them to so divide said property between the parties in interest; and that the title of said lands may be decreed to be vested in the true owners thereof. And complainant prays for such other, further, additional, or different relief as the facts may warrant or equity demand."

The respondents Smith interposed a demurrer to the bill, assigning 16 grounds, and the chancellor sustained the demurrer generally, from which decree complainant appeals. The only grounds we need now notice are the following:

"(8) For that said bill fails to allege that there is no suit pending to try the title to the property which is the subject-matter of the bill.

"(4) For that the bill fails to aver or show that the complainant was in the possession of the property described in said bill at the time the said bill was filed."

"(6) For that said bill is multifarious, in that it seeks two remedies and reliefs, to wit: It seeks to have said property sold or partitioned, and it seeks to have the title to said property quieted and cleared."

"(8) For that it does not appear from the allegations of said bill that said lands are held by the parties to this suit as joint owners or tenants in common."

[1, 2] Considered as a bill to quiet title, the bill here exhibited is plainly defective, and subject to the third and fourth grounds of demurrer. *Brown v. Hunter*, 121 Ala. 210, 25 South. 924; *Moore v. Alabama National Bank*, 139 Ala. 273, 35 South. 648. But judged by its averments and prayer for relief, which are apt and ample for the purpose, it must be treated as being primarily a bill for partition between joint owners.

[3, 4] As we understand the contention of the complainant, it is that under sections 5231 and 5232, Code 1907, any joint owner of land is authorized to file a bill for partition, or sale for distribution, against his cotenants, and to join with them as parties defendant any person or persons who may claim the property adversely to and exclusively of the right and title of the asserted tenants in common, for the purpose of testing and determining the validity vel non of such adverse claim, and quieting the title of the tenants in common by a decree favorable to them. Such is the case made by the bill of complaint, and its tenability is challenged by the sixth and eighth grounds of the demurrer.

Section 3187, Code 1896, now section 5231, Code 1907, is: "The chancery court shall have jurisdiction to divide or partition, or sell for partition, any property, real or personal, held by joint owners or tenants in common, whether the defendant denies the title of the complainant or sets up adverse possession or not." As explanatory and definitive of this jurisdiction and its incidents, section 5232 was inserted in the Code of 1907, which is as follows: "If the title of the complainants seeking partition or sale of lands for a division shall be controverted, it shall not be necessary for the court to dismiss the bill or delay the suit for an action at law to try the title, but the question of title shall be tried and determined in the suit by the chancery court, which shall have power to determine all questions of title, and to remove all clouds upon the title, if any, of the lands whereof partition is sought and to apportion incumbrances, if partition be made of land incumbered and it be deemed proper to do so; and the court may adjust the equities between and determine all claims of the several cotenants, as well as the equities and claims of the incumbrancers."

The right of partition, or sale for distribution, is a right which from its very nature exists only in favor of and against tenants in common, and the equity of the bill filed for either purpose is founded on the community of title or interest in the several parties complainant and defendant. *Tindal v. Drake*, 51 Ala. 574, 578; *Marshall v. Marshall*, 86 Ala. 383, 388, 5 South. 475. And, this being true, it is immaterial for the purposes of such a bill whether complainants or defendants have the possession, or that none of them have it. *Gore v. Dickinson*, 98 Ala.

363, 11 South. 743, 39 Am. St. Rep. 67; *Berry v. Webb*, 77 Ala. 507.

Independently of section 5232, above quoted, courts of chancery, having acquired jurisdiction for partition between joint owners, could and did employ their general powers "to adjust the equities between the parties, growing out of their ownership of and relation to the property, and the connection of their interests with those of their cotenants, and with the general equity or right of the complainant." *Marshall v. Marshall*, 86 Ala. 383, 5 South. 475; *Gore v. Dickinson*, 98 Ala. 363, 11 South. 743, 39 Am. St. Rep. 67. It is therefore, perhaps, safe to say that section 5232 is no more than a statutory specification of the incidental powers of chancery courts in relation to partition proceedings between tenants in common, as already recognized by the decisions of this court.

And it seems perfectly clear, both under this statute and the various decisions which it codifies, that these powers and modes of relief are merely incidental to the partition which is the primary purpose and essential equity of the bill. As said, per *Thorington, J.*, in *Gore v. Dickinson*, 98 Ala. 369, 11 South. 745, 39 Am. St. Rep. 67: "The prime object of the bill is to obtain partition of the property, and the cancellation of the deeds mentioned in the bill as clouds upon the title is only incidental, and designed to make the partition more effective. All the conveyances sought to be canceled are made by and to some of the cotenants, simply having the effect to change their relation to the common property, or specific portions thereof, and which the court can adjust in connection with the general right or equity of the complainants."

In view of these well-settled principles, it cannot be plausibly urged that either section 5231 or 5232 was intended to radically change, enlarge, and combine the distinct grounds of equity jurisdiction for quieting unassociated adverse claims and making partition between tenants in common, and thereby to overthrow the settled maxims and policies of chancery procedure, and practically abolish the action of ejectment whenever there are joint claimants of property in the hostile possession of another.

The precise question we are considering, the right of a joint owner to seek in one and the same proceeding a partition as against his recognized cotenants, and also a quieting of his title against outside parties claiming adversely to him and his cotenants without any title or interest in common with them, has been determined adversely to appellant in the case of *Bullock v. Knox*, 96 Ala. 195, 11 South. 339, where such a joinder of unrelated matters and parties is held to render the bill multifarious, and subject to demurrer on that ground. This case is cited with approval to an analogous proposition in *Merritt v. Alabama Pyrites Co.*, 145 Ala. 262, 40 South. 1028.

We hold that section 5232 of the Code does not change nor affect the principles declared in *Bullock v. Knox*; and on the authority of that case, as well as by force of the principles above set forth, we hold that the bill here exhibited is multifarious, and that the demurrer was properly sustained as to this ground.

There are a number of decisions in which it is stated in general terms that a bill for partition and to remove a cloud, or to quiet title, is not multifarious. These will be found cited in the annotations to section 5231, Code 1907, and an examination of them will in every case disclose the fact that the removal of the cloud, or the quieting of an adverse claim, or the adjustment of their legal or equitable rights, left a relationship and community of interest of some sort between all the parties, entitling all of them to share in the partition or in the distribution of the proceeds of sale. This is especially well stated in *Tindal v. Drake*, 51 Ala. 574, 578, and *Gore v. Dickinson*, 98 Ala. 363, 369, 11 South. 743, 39 Am. St. Rep. 67.

It is unnecessary to notice other grounds of demurrer, and the decree of the chancellor must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

ROBINSON v. CROTWELL.

(Supreme Court of Alabama. Dec. 21, 1911.)

1. TRIAL (§ 248*)—INSTRUCTIONS—ABSTRACT INSTRUCTIONS.

Error cannot be predicated on the giving of abstract instructions, unless they mislead the jury to the prejudice of the party complaining.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 582, 583; Dec. Dig. § 248.*]

2. PHYSICIANS AND SURGEONS (§ 18*)—MALPRACTICE—INSTRUCTIONS.

An instruction, in an action against a physician for malpractice, that, no matter how skillful a physician may be, he is responsible for his negligence, if any, merely states the law that no degree of skill on the part of a physician will relieve him of responsibility for the consequences of a tortious failure to exercise that skill, and is not objectionable as holding a physician responsible for his negligence, without limiting the responsibility to the proximate results of such negligence.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 45; Dec. Dig. § 18.*]

3. PHYSICIANS AND SURGEONS (§ 14*)—CIVIL LIABILITY—CARE AND SKILL REQUIRED.

A physician, failing to exercise such reasonable care and skill as physicians in the same general neighborhood and in the same general line of practice ordinarily exercise in like cases, is civilly liable for injuries to a patient caused thereby.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 21-30; Dec. Dig. § 14.*]

4. PHYSICIANS AND SURGEONS (§ 14*)—ACTIONS FOR MALPRACTICE—SKILL.

An instruction, in an action for malpractice, that a physician is bound to give his patient the benefit of his best judgment, but is not liable for an error of judgment, is properly refused for failing to require any skill of the physician.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 21-30; Dec. Dig. § 14.*]

5. PHYSICIANS AND SURGEONS (§ 18*)—ACTION FOR MALPRACTICE—INSTRUCTIONS.

Where, in an action for malpractice, there was no pretense that the physician had by malpractice induced plaintiff's disease, but, except for the disease, plaintiff would not have suffered the injurious consequences of an operation performed without his consent, or without the exercise of due care, an instruction that there could be no recovery for the injuries sustained by plaintiff, by reason of the disease with which he was afflicted, was properly refused as misleading.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 45; Dec. Dig. § 18.*]

6. TRIAL (§ 250*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

An instruction, in an action for malpractice, which places on plaintiff the burden of proving one certain aspect of his case as a condition to recovery, while in his pleading and evidence he proceeded on another and entirely different alternative theory, proof of which entitled him to a verdict without reference to the aspect of the case with which the instruction attempted to deal, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.*]

7. PHYSICIANS AND SURGEONS (§ 16*)—MALPRACTICE—LIABILITY.

Where a patient had a temperamental or physical weakness which could not be foreseen, and which contributed to the failure of an operation performed by a physician sued for malpractice, the physician was liable, if he contributed to the patient's injury by a failure to exercise due care and skill, or by performing on the patient a serious operation without his knowledge and consent.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 31; Dec. Dig. § 16.*]

8. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUES.

A requested instruction, directing a verdict for defendant in one aspect of the case, ignoring plaintiff's contention, which was supported by the evidence, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

9. EVIDENCE (§ 570*)—EXPERT EVIDENCE—WEIGHT—QUESTION FOR JURY.

The jury need not, as a matter of law, accept the conclusions of expert witnesses, but they must determine for themselves the weight to be accorded to the expert testimony, and base their verdict on their own judgment of the facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2395; Dec. Dig. § 570.*]

10. TRIAL (§ 191*)—INSTRUCTIONS—INVADING PROVINCE OF THE JURY.

An instruction which assumes a fact contrary to evidence is properly refused for that reason.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.*]

11. TRIAL (§ 237*)—INSTRUCTIONS—BURDEN OF PROOF—"SETTLE."

Refusal of a requested charge that, if, after considering all the evidence, the minds of the jury remain in an unsettled state on the issue, the verdict must be for defendant is not erroneous; the word "settle" implying that the mental state to which it is applied has become fixed, permanent, and not subject to change.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 237.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6446-6450.]

12. TRIAL (§ 139*)—INSTRUCTIONS—INVADING PROVINCE OF THE JURY.

An affirmative charge on the whole case is properly refused, though on the whole evidence plaintiff's case is so thoroughly unproved that a verdict for him cannot stand.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 332; Dec. Dig. § 139.*]

13. PHYSICIANS AND SURGEONS (§ 18*)—MALPRACTICE—EVIDENCE.

In an action against a physician for malpractice, based on the ground that defendant caused a dangerous operation to be performed on plaintiff, after assuring him that the operation would be a mere trifle, and would involve no serious consequences, evidence held not to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 43; Dec. Dig. § 18.*]

14. HOSPITALS (§ 7*) — MALPRACTICE — LIABILITY.

A physician, who kept a hospital, had treated a patient for some years, and advised an operation, and procured a skilled surgeon to perform the operation for compensation agreed on, to be paid by the patient. The physician took part in the operation to the extent only of administering the anæsthetic, and advising that the effort to complete the operation be abandoned on account of the patient's ebbing vitality. There was no suggestion that the physician showed any lack of skill or committed any error, or that he negligently advised the employment of an incompetent surgeon. Held, that the physician was not liable for any default on the part of the surgeon, who practiced his profession as an independent agent.

[Ed. Note.—For other cases, see Hospitals, Dec. Dig. § 7.*]

15. HOSPITALS (§ 7*) — MALPRACTICE — LIABILITY.

A physician owning a hospital is not responsible for failure to furnish an adequately equipped place in which a surgeon may operate on a patient with safety; the responsibility for the sufficiency of the equipment resting on the surgeon performing the operation.

[Ed. Note.—For other cases, see Hospitals, Dec. Dig. § 7.*]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Action by William T. Crotwell against Thomas F. Robinson for malpractice. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The counts referred to in the complaint as having gone to the jury are as follows:

"(3) The plaintiff claims of the defendant \$50,000 damages, for that heretofore, to wit, in March, 1909, defendant held himself out as a surgeon, and as such undertook for

hire and reward to perform a particular operation upon the plaintiff, and by means of the confidence engendered by said operation, and defendant's undertaking to perform said operation, plaintiff subjected himself to defendant's control, and defendant, on the 8th day of March, 1909, wrongfully performed another and different operation upon the plaintiff, without the plaintiff's consent, and as a proximate consequence thereof plaintiff has suffered the injuries and damages as set out in the first count.

"(4) Plaintiff claims of the defendant \$50,000 damages, for that heretofore, to wit, on the 8th day of March, 1909, defendant wrongfully and without the consent of the plaintiff removed a large part of plaintiff's skull, and as a proximate consequence thereof plaintiff suffered the injuries and damages set out in the first count of the complaint.

"(5) Plaintiff claims of defendant \$50,000 damages, for that heretofore, to wit, on the 8th day of March, 1909, defendant held himself out as a practicing surgeon, and together with another or other physicians or surgeons undertook to diagnose and treat plaintiff surgically for hire and reward; that it then and there became and was the duty of the defendant to exercise due care, skill, and diligence in the diagnosis and treatment of plaintiff, but, notwithstanding said duty, defendant so negligently conducted himself in that regard that as a proximate consequence thereof plaintiff was unskillfully diagnosed or treated, and as a proximate consequence thereof suffered the injuries complained of in the first count."

The following charges were given at the instance of the plaintiff:

"(1) If a physician or surgeon has taken charge of a patient, and undertaken for reward to furnish hospital and apparatus for the operation, it is his duty to exercise proper care and diligence to furnish reasonably prudent and proper facilities, and he may be liable for any failure so to do, even though he is otherwise careful and competent.

"(2) No matter how skillful or careful a physician or surgeon may be, he has no right to perform a dangerous operation upon an adult person of sound mind without his consent, even if the patient has consented to another and different operation."

"(4) Consent to the performance of one kind of operation would not be consent to the performance of another and different operation."

"(6) No matter how skillful a physician or surgeon may be, he is responsible for his negligence, if any."

The following charges were refused to the defendant:

"(4) The court charges the jury that there can be no recovery in this case for any negligence on the part of the defendant that falls short of gross negligence.

"(5) The court charges the jury that, unless they are reasonably satisfied from the evidence in this case that the defendant was guilty of gross negligence in his treatment of or his efforts to cure the disease of plaintiff, or in his diagnosis of the disease of the plaintiff, there can be no recovery."

"(9) The court charges the jury that a physician or surgeon is bound to give his patient the benefit of his best judgment, but is not liable for a mere error of judgment."

"(21) The court charges the jury that there can be no recovery in this case for the injuries sustained by the plaintiff by reason of the disease with which he was afflicted."

"(29) While the responsibility of the medical practitioner and surgeon is great, and care appropriate should be observed, in the exercise of his professional employment, when his errors are of judgment only, if he keeps within recognized and approved methods, he is not liable for their consequences."

"(31) The court charges the jury that the burden of proof is upon the plaintiff in this case to show that there was a want of care, skill, and diligence, and also the burden is on the plaintiff to show that the injury complained of was a proximate result of such want of care, skill, and diligence."

"(42) The court charges the jury that a physician or surgeon incurs no liability where the natural temperament or physical weakness of the patient, of which he is ignorant, contributes to bring about an injury which could not be foreseen as a result of the course of treatment."

"(43) The court charges the jury that, if they find from the evidence in this case that the injuries complained of were a proximate result of the plaintiff's physical inability to stand the operation, then I charge you that the verdict should be for the defendant."

"(45) The court charges the jury that if they find from the evidence in this case that the defendant did undertake to perform the operation in question, or to cause the same to be performed, and further find that in carrying out the undertaking he procured the services of Dr. E. M. Robinson, and you further find that Dr. E. M. Robinson was at the time doing an independent business as a physician, not connected with the defendant, and that he was a regularly licensed and practicing physician and surgeon under the laws of this state, and you should further find that the injuries complained of were the result of some act of omission of the said Dr. E. M. Robinson, then you should find for the defendant."

"(51) The court charges the jury that a surgeon has the legal right to advise such an operation as in his judgment the exigencies of the case demand, and if the patient consents to such an operation the surgeon has the legal right to proceed with such operation, and cannot be held liable for the proper performance of such operation."

"(56) The court charges the jury that the burden is on the plaintiff to reasonably satisfy you from the evidence in this case that he did not give his consent for the very operation in question, and also to reasonably satisfy you from the evidence that he was incapacitated to consent to the operation."

"(59) The court charges the jury that, if a physician is called to treat a patient, it matters not with what disease he is suffering, or the nature of the treatment needed, the physician may treat such patient with such treatment to the best of his ability, and he cannot be held liable for undertaking such treatment and doing it as best he can."

"(44) The court instructs the jury that they are necessarily bound, independent of every other consideration, to adopt the testimony of the physicians and surgeons who have testified in this case, and the text-books introduced in evidence, when they come to determine whether, on the facts in this case, this defendant has treated the case in question in the proper form and by the use of proper appliances."

"(57) I charge you, gentlemen of the jury, that if you find from the evidence in this case that the plaintiff was carried to the hospital for a slight operation and that after he was there the operation performed on him was agreed on between plaintiff and the doctors, then I charge you that there can be no recovery in this case for the proper performance of said operation."

"(38) The court charges the jury that if, after considering all the evidence in this case, they find that their minds are in an unsettled state as to whether the defendant is liable or not, then your verdict should be for the defendant."

James Trotter and Estes, Jones & Welch, for appellant. Bowman, Harsh & Beddow, for appellee.

SAYRE, J. For some years plaintiff had been treated by the defendant and other medical men for tic douloureux, an exceedingly painful disease of the nerve which supplies the face with sensation. In keeping with the general, if not universal experience, medicaments had been of no avail. Defendant, who kept a hospital, advised an operation, and, after consulting with plaintiff, procured his brother, who made a specialty of surgical cases, to perform the operation for a compensation agreed upon, and to be paid by the plaintiff. Doctor E. M. Robinson, defendant's brother, was not interested in the hospital, nor had any business connection with the defendant. The operation was not successful in relieving the suffering caused by plaintiff's specific disease, and, besides, left him with some disfigurement, and without the protection afforded the brain by the hard plate of his skull over an area of 2½ by 1½ inches. Afterwards plaintiff brought this suit for malpractice, and recovered a

verdict and judgment for a good round sum. Defendant appeals.

Counts 1 and 2 were eliminated by judgment on demurrer. The remaining counts, upon which the case went to the jury, proceeded upon two theories: (1) That defendant performed, or caused to be performed, upon plaintiff a serious operation, without his consent; (2) that defendant unskillfully or negligently diagnosed or treated plaintiff's ailment. Defendant's alleged default in each case is averred to have caused grave injury to plaintiff in particulars which are set out. We do not find that the demurrers pointed out any defect in the complaint on which the case was tried.

Many assignments of error are based upon the giving and refusal of instructions and some upon rulings on questions of evidence. These assignments have been examined seriatim, and we are not ready to affirm error of any of them. So far as the exceptions relating to questions of evidence are concerned, the rulings in the trial court are to be justified on grounds which are familiar, and we do not feel that any good is to be accomplished by noticing them at length.

[1] As for the charges, those given at the instance of the plaintiff assert principles of law which seem entirely plain. The appellant criticises those numbered 1, 2, and 4 as stating propositions of law pertinent to hypotheses of fact which had no support in the evidence. We think it will appear from a discussion of the evidence, to which we will come later on, that there was at least a scintilla of evidence to support the plaintiff's case in at least one of its general aspects, as well as those particular features presented by these charges. Even though the fact were otherwise, the charges would be abstract merely, in which case error could not be predicated of their giving, unless it appeared from the whole record they did in fact mislead the jury to the appellant's prejudice.

[2] Of charge 6 appellant complains, because it holds a physician or surgeon responsible for his negligence; whereas he is responsible only for the proximate result of such negligence. But appellant's argument mistakes the purpose and effect of the charge. It does not deal with the question of the necessary intimacy of the connection between recoverable damages and the cause out of which they arise. It does no more than state the sound general proposition that no degree of skill on the part of a physician or surgeon, no knowledge of his profession or power to perform its duties, will relieve him of responsibility for the consequences of a negligent and tortious failure to exercise that skill in behalf of his patient.

[3] Charges 4 and 5, refused to the defendant, maintain the proposition that a physician and surgeon is responsible civilly for gross negligence only. Such is the measure of his responsibility in criminal prosecutions,

but a civil action may be sustained on proof of a failure to exercise such reasonable care and skill in respect to the duty assumed as physicians and surgeons in the same general neighborhood, in the same general line of practice, ordinarily have and exercise in like cases. *McDonald v. Harris*, 131 Ala. 359, 31 South. 548; *Shelton v. Hacellip*, 167 Ala. 217, 51 South. 937; *Hamrick v. Shipp*, 169 Ala. 171, 52 South. 932; *Carpenter v. Walker*, 54 South. 61.

[4] Charge 9 exempts medical men from liability for mere errors of judgment, provided they give the patient the benefit of their best judgment. The charge is defective, in that it requires of medical men no skill whatever. There is in it no requirement that the judgment brought by the professional man to the discharge of his duties shall be informed and educated according to the standard of the time and general locality, as the law requires. 2 *Jaggard on Torts*, 912; cases, *supra*. The charge in the shape proposed by the defendant was incomplete, misleading, and in consequence properly refused.

[5] Charge 21 was misleading and refused without error. There was no pretense that defendant had by malpractice induced plaintiff's disease. But without the disease plaintiff would not, it may be assumed, have suffered the injurious consequences of an operation performed, as he alleges, without his consent, or without the exercise of due care and skill, so that, in a sense, plaintiff suffered these consequences by reason of his disease. The disease was the occasional cause of the injury complained of, while, on plaintiff's theory of his case, defendant's malpractice was its efficient cause. If the alleged efficient cause existed, as alleged, plaintiff was entitled to recover. Defendant could not require the court to give in charge to the jury a statement of the law involving such discriminations, unless with a clear statement of them. The only effect of the charge would have been to obscure the issue and confuse the jury.

The considerations upon which we have ruled that the court properly refused to give charge 9 will suffice to justify the court in refusing charges 29, 51, and 59. It may be further said of charge 29 that, while appellant no doubt had in mind the methods of skilled and careful medical men, as furnishing a proper standard by which to judge defendant's treatment of plaintiff's disease, the charge is not so written.

[6] The refusal of charges 31 and 56 may be justified on the ground that they were capable of a construction which would fix upon the plaintiff the burden of proving one certain aspect of his case as a condition to recovery; whereas, in both pleading and evidence, plaintiff was proceeding at the same time upon another and entirely different alternative theory, proof of which would have entitled him to verdict and judgment with-

out reference to that aspect of the case with which the charge attempted to deal.

[7] Charges 42 and 43, when read in connection with the pleading and testimony, have a common fault. If plaintiff had a temperamental or physical weakness which could not be foreseen, and which contributed to the failure of the operation, defendant would be nevertheless liable, if he contributed to plaintiff's injury by a failure to exercise due care and skill, or by performing upon plaintiff a serious operation without his consent, express or implied. We do not, of course, intend to say that there may not arise grave emergencies in which a surgeon may operate upon his patient without his knowledge and consent. Clearly this was not a case of that character.

[8] Forty-five was properly refused, because it directed a verdict for the defendant on one aspect of the case, ignoring plaintiff's contention, which had support on the face of the evidence, that the defendant caused a serious and unsuccessful operation to be performed upon plaintiff, after assuring the latter that the operation would be superficial in extent and unattended by serious risk.

[9] A number of the questions which arose during the progress of the trial were of such character, were so far apart from the field of general knowledge, and so peculiarly within the scope of professional learning and experience, that the testimony of the expert witnesses was entitled to great consideration by the jury. Still the jury could not be required, as matter of law, to accept the conclusions of such witnesses. They were to determine for themselves, theoretically at least, the weight to be accorded to the expert testimony, and to base their verdict upon their own judgment of the facts. *McAllister v. State*, 17 Ala. 434, 52 Am. Dec. 180; *Andrews v. Frierson*, 144 Ala. 470, 39 South. 512. Charge 44 was properly refused to the defendant.

[10] Charge 57 assumes that the operation was properly performed, and was well refused for that reason.

[11] By charge 38, the defendant sought to have the jury instructed that if, after consideration of all the evidence, their minds remained in an unsettled state in respect to the question whether the plaintiff was entitled to recover, their verdict should be for the defendant. It has been frequently decided that the plaintiff carries the burden of proving his case to the reasonable satisfaction of the jury, and that a charge which omits the word "reasonable" in connection with "satisfaction" is erroneous. *L. & N. R. R. Co. v. Sullivan Timber Co.*, 128 Ala. 95, 27 South. 760. In stating this burden of proof to the jury, there was no occasion for the use of an untried term, which may have produced upon the minds of the jury an unwarranted impression in respect to the weight of the burden placed by law upon the plaintiff. "Settle" is a strong word. It implies that

the mental state to which it is applied has become fixed, permanent, and not subject to change. The charge here adopted by the defendant was a doubtful equivalent for that statement of the law on the subject which is familiar to the profession in this state, and we are not disposed to affirm error of its refusal.

[12] An examination of the record discloses such conflict in the evidence on all points as to preclude the affirmative charge upon the whole case. Charges, other than those which have been discussed, amounted to directions to the jury on the theory that plaintiff had introduced no evidence whatever to sustain his case. Under the rule prevailing in this state in respect to the functions of court and jury in the determination of disputed issues of fact, these charges were properly refused, and this, notwithstanding our opinion that upon the whole evidence plaintiff's case was so thoroughly uprooted and overturned that the verdict of the jury should not have been allowed to stand against defendant's motion to set it aside, as against the great weight of the evidence.

[13] In one aspect of his case, plaintiff claimed that defendant caused a dangerous operation to be performed upon him, after assuring him that the operation to be performed would be a mere trifle, as operations go, and would involve no serious consequences. As has been stated, the operation not only failed to relieve plaintiff's ailment, but left behind injurious consequences of its own. If plaintiff's contention in this regard be true, and it had support in his testimony, defendant's conduct would seem to be indefensible. The cases so hold. *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N. S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303, and note. But a careful consideration of the evidence leaves us with an abiding conviction that the verdict, if rendered on this aspect of the case, ought not to be permitted to stand. Defendant was a reputable physician. He had attended the plaintiff at intervals since the latter's childhood, and through many months he had treated him for the specific disease of which it was proposed to relieve him by the operation in question. He had the plaintiff's confidence. The operation was performed in the presence of three other physicians, nurses, and three brothers of the plaintiff. It was dangerous, difficult, and of doubtful result at best. The defendant and two of the other physicians swear that the plaintiff was specifically informed of the nature of the operation which it was proposed to perform. The fourth was not examined on this point, and we assume that he knew nothing of the preliminary conferences with the patient. It is an undisputed circumstance of great and peculiar weight in this case that nearly a year elapsed after the operation before plaintiff, or any one for him, intimated that he had a grievance by bringing this suit or other-

wise, and that in the meantime plaintiff, without a word of complaint or reproach for the great wrong which he now says had been done him, returned to defendant for treatment, and consulted with him about having the operation repeated. Perhaps nothing short of a repetition of all of it could make clear how great was the weight of the testimony against the plaintiff's contention. The wrong attributed to the defendant was so utterly without motive, so wide a departure from the principles and practices of an honorable profession, the complaint so long delayed, and the general lack of verisimilitude so great, that, without going further into detail, and after indulging that large intendment in favor of the verdict of the jury and the judgment of the trial court which the law demands of this court on appeal, we state our conclusion that, if the verdict in this case is to be referred to that theory of the plaintiff's case now under consideration, it ought to have been set aside on the defendant's motion. It is true that plaintiff did not insist upon this theory of his case without qualification, for he testified, as an alternative, that if he was informed of the character of the operation he was so informed after his faculties had been so benumbed by an opiate, administered by the defendant, that he could not and did not understand or consent. But on this point the evidence was equally as clear, and the considerations referred to make this alternative as unworthy of belief as the other.

[14, 15] But appellee complained in the court below that the defendant had unskillfully or negligently diagnosed or treated his case. Of error in diagnosis there is not a particle of evidence. As for any unskillfulness or negligence which may have characterized the operation and affected its results, assuming, for the argument, that the jury were authorized to find there was such, that operation was not performed by defendant, but by another surgeon, under circumstances which have been stated. That this other surgeon did perform the operation, proceeding upon his own judgment as to what ought to be done and how, is without dispute. The defendant took part to the extent only of administering the anæsthetic, and advising that the effort to complete the operation be abandoned on account of the patient's ebbing vitality. There is no suggestion that in these things he showed any lack of skill or committed any error. Nor is there any suggestion in pleading or in proof that defendant negligently advised the employment of an unskillful or incompetent surgeon to perform the operation. Under these circumstances, the defendant was not responsible for any default on the part of the operating surgeon, who was practicing his profession as an in-

dependent agent. *Myers v. Holborn*, 58 N. J. Law, 193, 33 Atl. 389, 30 L. R. A. 345, 55 Am. St. Rep. 606. But it is argued, as we read the brief, that defendant contributed to the result of the operating surgeon's alleged negligence by furnishing an inadequately equipped place in which to perform the operation. This, however, leaves the question at issue to depend upon defendant's responsibility for the operating surgeon; for, if the condition of the hospital and its equipment was such as, in itself, to import an element of negligence or unskillfulness into an operation performed there, the responsibility for that element of the operation rested upon the surgeon, whose judgment determined upon and directed the operation. Moreover, the medical men who testified in the case including Dr. Waldrop, upon whose testimony plaintiff's case at last depended, and who had performed operations there, gave their approval to the hospital.

There seems to have been an effort to fasten responsibility upon defendant for some unskillfulness or neglect of Dr. Caldwell. Dr. Caldwell was associated in business with the defendant, and it was open to the jury to find that at a time prior to the operation he had given the plaintiff some unskillful advice about his case, and the extent and character of the operation which might be expected to effect a cure. But that was one reason why the defendant, Caldwell, and the operating surgeon were careful afterwards to inform plaintiff of the true nature of the operation. Dr. Caldwell was also present at the operation, and lent some assistance; but there is an entire absence of evidence to show that his advice was followed in any particular, or that he was guilty of any negligence in doing what it fell to him to do.

On consideration of the whole case presented by the record, which contains all the evidence, we conclude that the jury were more moved by sympathy for plaintiff, who had undergone an unsuccessful operation, than by a consideration of the law and the facts upon which the result should have been made to turn. There is no rule of responsibility which requires of the physician or surgeon infallibility in the diagnosis or treatment of diseases. *Hamrick v. Shipp*, 169 Ala. 171, 52 South. 932. In the exercise of its supervisory power over the findings of a jury, the court should proceed with great caution; but it should leave no evident mistake unrighted. The trial judge in this case deferred too much to the jury's finding. The judgment should have been set aside on the defendant's motion.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

**SLOSS-SHEFFIELD STEEL & IRON CO.
v. SMITH.**

(Supreme Court of Alabama. Nov. 28, 1911.)

1. MUNICIPAL CORPORATIONS (§ 116*)—ORDINANCES—IMPLIED REPEAL.

Birmingham Ordinance No. 181, providing that any person committing an offense, declared to be a misdemeanor by the state laws, shall be punished, which was enacted by the city in accordance with powers conferred by the Birmingham city charter (Acts 1890-91, pp. 114, 134, and Loc. Acts 1898-99, pp. 1413, 1414, § 25, subd. 23), both of which gave the city power to punish any act which is by law a crime or misdemeanor, was not repealed by the enactment of Code 1907, § 1251 (Acts 1907, p. 790, § 80), providing that municipalities shall have power to adopt ordinances, not inconsistent with the laws of the state, and section 200, repealing only those laws in conflict therewith.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 268-271; Dec. Dig. § 116.*]

2. MUNICIPAL CORPORATIONS (§ 48*)—ORDINANCES—CHARTERS.

A change in municipal charters does not affect existing ordinances in harmony with the new provisions.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 132; Dec. Dig. § 48.*]

3. MUNICIPAL CORPORATIONS (§ 120*)—ORDINANCES—CONSTRUCTION.

In determining the validity of ordinances, a reasonable construction should be given; the judicial inclination being to sustain them.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 274-280; Dec. Dig. § 120.*]

4. MUNICIPAL CORPORATIONS (§ 120*)—ORDINANCES—CONSTRUCTION.

A penal ordinance must be strictly construed.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 120.*]

5. MUNICIPAL CORPORATIONS (§ 120*)—ORDINANCES—ADOPTION BY REFERENCE.

As municipal ordinances are construed by the same rules as statutes, an ordinance may by reference adopt the provisions of statutes or other ordinances.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 120.*]

6. MUNICIPAL CORPORATIONS (§ 594*)—ORDINANCES—VALIDITY.

As all persons are bound by the criminal statutes of the state, a municipal ordinance, providing that any person found guilty of a misdemeanor under the state laws shall be punished, is not invalid for indefiniteness and uncertainty.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1316-1318; Dec. Dig. § 594.*]

7. MUNICIPAL CORPORATIONS (§ 592*)—ORDINANCES—VALIDITY.

Where a municipal ordinance provided that any person guilty of a misdemeanor under the state laws should be punished, the fact that there were state misdemeanor statutes, inapplicable to the exercise of municipal authority, would not render the ordinance void, but it would be valid as to those misdemeanors over which the municipality had authority.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.*]

Simpson and Sayre, JJ., dissenting.

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Chatley Smith against the Sloss-Sheffield Steel & Iron Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Tillman, Bradley & Morrow, for appellant. William Vaughan and W. L. Smith, for appellee.

McCLELLAN, J. Action for damages for false imprisonment.

[1] The bill of exceptions recites that the following ordinance of the city of Birmingham, under which the plaintiff was tried and convicted, "was regularly adopted and promulgated and in force and effect at and before the time of plaintiff's arrest and conviction": "Ordinance 181.—Be it ordained by the city council of Birmingham, that section 805 of the City Code of Birmingham be and the same is hereby amended so as to read as follows: Section 805: Violation of State Laws an Offense. Any person or persons committing an offense in the city of Birmingham, which is declared by any law or laws of the state of Alabama heretofore or hereafter enacted to be a misdemeanor, shall, upon conviction, be punished as provided in section 806 of the City Code of Birmingham."

In the act entitled "An act to establish a new charter for the city of Birmingham," approved December 12, 1890 (Acts 1890-91, pp. 114, 134), it was provided "that the said mayor and aldermen shall have full power and authority, * * * 2d. To punish all offenses against the peace, good order, morals, health or sanitation of the city, * * * and to punish any act which is by law a crime or misdemeanor against the state." (Italics supplied.) A similar provision to that italicized was contained in the charter of that city, approved February 23, 1890 (Local Acts 1898-99, pp. 1413, 1414, subd. 23), except that the words "a crime" were omitted. See Weakley's Local Laws, Jefferson County, p. 164, subd. 23. The ordinance under which plaintiff was convicted is practically identical in terms with the italicized charter provision.

Two questions, then, arise: First, has the ordinance been annulled by subsequent (to the charter of 1899) legislation; second, if not, is it void for uncertainty, indefiniteness?

[2] The only legislation, of which we are aware, that could possibly effect the repeal (and that by implication only) of the italicized charter provision is the Municipal Code, Acts 1907, p. 790 et seq. See Pol. Code, c. 32. That enactment purports, on its face (section 200), to repeal only those "laws and parts of laws, both general and special, in conflict" therewith. In section 80 (Pol. Code, § 1251), general powers to adopt ordinances.

not inconsistent with state laws, are given municipalities. Otherwise there are no provisions of the Municipal Code we can discover that affect the inquiry first stated. Obviously there is nothing in the section mentioned wherewith the italicized provision of the earlier charter is in conflict. Hence there was no repeal of the earlier charter power to punish all acts condemned by misdemeanor statutes. Besides, it is well settled that changes in municipal charters do "not affect existing ordinances in harmony with new provisions." *Ventress v. Town of Clayton*, 165 Ala. 349, 51 South. 763; *Ferrell v. City of Opelika*, 144 Ala. 135, 39 South. 249; 1 *Dillon on Munic. Corp.* (5th Ed.) § 233. This ordinance is within the rule.

[3] Is the ordinance void for uncertainty, indefiniteness? In determining the validity of ordinances, a reasonable construction will be given them; the judicial inclination being to sustain, rather than overthrow, them. 2 *Dillon's Munic. Corp.* (5th Ed.) § 646; *Orme v. Tusculumbia*, 150 Ala. 520, 43 South. 584. "Ordinances must, by fair and natural construction, be certain to a common intent." 28 *Cyc.* p. 354. "Common intent" is defined as "the natural sense given to words." 1 *Bouv. Law Dict.*; *Black's Law Dict.*

[4] Where an ordinance is penal, as here, it must be strictly construed in determining whether the act charged is within the prohibition of the ordinance, not merely within its spirit. *City Council of Montgomery v. L. & N. R. R. Co.*, 84 Ala. 127, 132, 4 South. 626. "The purpose of the rule (i. e., of strict construction of penal statutes) is to prevent acts from being brought within the scope of punishment, because courts may suppose they fall within the spirit of the law, though not within its terms." See, also, *Endl. on Interp. of Statutes*, § 329, p. 454; 2 *Lewis, Suth. St. Const.* §§ 520-527, and notes thereto.

[5] The ordinance under consideration would constitute municipal offenses of the violation of the misdemeanor statutes of the state. Of its purpose, there could be no doubt. In its form this ordinance falls within the category called, in respect of statutes, "reference statutes." It refers with absolute certainty to the misdemeanor statutes of the state. *Brickell, C. J.*, in *Phoenix Assur. Co. v. Fire Dept. of Montgomery*, 117 Ala. 631, 23 South. 843, 42 L. R. A. 468, said that such enactments were "statutes which refer to, and by reference adopt, wholly or partially, pre-existing statutes. In the construction of such statutes, the statute referred to is treated and considered as if it were incorporated into and formed part of that which makes the reference." *Ex parte Greene & Graham*, 29 Ala. 52; *Lewis, Suth. on Stat. Const.* §§ 405-507; *Endl. on Int. Stat.* § 493; *Matthews v. Sands*, 29 Ala. 136; *Hooper v. Bankhead*, 54 South. 549, 552; *Beason v. Shaw*, 148 Ala. 544, 42 South. 611, 18 L. R. A. (N. S.) 566. A reference statute may adopt the law generally which governs a

particular subject. *Lewis, Suth.* § 405, p. 789; *Culver v. People*, 161 Ill. 89, 97, 43 N. E. 812; *Gaston v. Lamkin*, 115 Mo. 20, 33, 34. 21 S. W. 1100; *Cole v. Wayne*, Judge, 106 Mich. 692, 64 N. W. 741; other authorities, *supra*. Municipal ordinances are construed by the same rules as are statutes. *Harbor Master, etc., v. Southerland*, 47 Ala. 511; 28 *Cyc.* pp. 388, 389, and notes thereon. No reason appears why ordinances and by-laws may not avail of the principles, whereby *reference statutes* are construed and given effect, provided, of course, the municipality has the power to ordain as undertaken.

[6] The argument, as respects its indefiniteness and uncertainty, against the ordinance necessarily is that the *reference* to the state's misdemeanor statutes is too broad; that is, brings in too comprehensive a list of laws, whereby the conduct of individuals is to be affected. If the misdemeanor statutes referred to in the ordinance were those of another sovereignty than the *parent* of the municipality promulgating this ordinance, there might be force in the suggestion. But, since the very statutes to which the ordinance refers apply and control, as by direct state authority, the conduct of every person upon whom the ordinance could have an influence or operate an effect, and since the the familiar presumption against ignorance of law imposes upon every person in the jurisdiction of the municipality of Birmingham the binding quality, as upon presumed knowledge, of the misdemeanor statutes to which the ordinance definitely refers, it is evident that no injustice, from ignorance of the substance of the ordinance—the conduct it would affect—could result to any person within that jurisdiction. To so affirm would impute ignorance of the commands of the ordinance, because the misdemeanor statutes of the state were *not set out* therein; whereas, by irrefutable presumption, perfect knowledge of those statutes, in force as the law of the state, was imputed to every person permanently or temporarily within the jurisdiction of the municipality. What the misdemeanor statutes of the state were or are could not be a matter of doubt. They are *enacted*, to employ the term in the ordinance, by the lawmaking powers of the state. They are written. They were or are *law* in the same jurisdiction in which the ordinance operated. Reference to them, in the ordinance, brought into the ordinance as definite a system of law, enacted by the *parent* of the ordaining authority, as was possible, without specifying, *eo nomine*, the particular enactments to which the ordinance had reference.

[7] If it be assumed that there were or are state misdemeanor statutes inapplicable or inappropriate to the exercise of municipal authority, this condition would not lead to the *invalidity* of this ordinance. "The fact that an ordinance covers matters which the city has no power to control is no reason

why it should not be enforced as to those which it may control." City Council, etc., v. Shaddox, 138 Ala. 263, 266, 36 South. 369; Ex parte Cowert, 92 Ala. 94, 9 South. 225; Kettering v. Jacksonville, 50 Ill. 39; Ex parte Byrd, 84 Ala. 17, 4 South. 397, 5 Am. St. Rep. 328. "An ordinance, like a statute, may be valid in some of its provisions and invalid as to others." Ex parte Byrd, supra; Ex parte Cowert, supra, and authorities therein cited; City Council, etc., v. Shaddox, supra. We therefore conclude that the ordinance first quoted before is not invalid.

The recent decision delivered in Krenlhaus' Appeal, 164 Ala. 623, 51 South. 297, 26 L. R. A. (N. S.) 492, involved an ordinance different in terms from that here considered; and, also, no account was taken of the italicized charter provision before quoted.

The survival of the plaintiff's cause of action, as here pleaded, was and is dependent upon the invalidity of the ordinance in question. Our conclusion is opposed to the plaintiff's contention. It was valid. Accordingly the affirmative charge requested by the defendant was erroneously refused.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, MAYFIELD, and SOMERVILLE, JJ., concur. SIMPSON and SAYRE, JJ., dissent. DOWDELL, C. J., not sitting.

JONES v. STATE.

(Supreme Court of Alabama. July 14, 1911.
Rehearing Denied Dec. 21, 1911.)

1. CONSPIRACY (§ 41*)—PERSONS LIABLE—ACTS OF CO-CONSPIRATORS.

Where by prearrangement, or on the spur of the moment, two or more persons enter on a common enterprise or adventure, and a criminal offense is contemplated, then each is a conspirator, and if the purpose is carried out each is guilty whether he did any overt act or not, on the theory that one who is present, encouraging, aiding, abetting or assisting the active perpetrator in the commission of the offense is a guilty participant, and, in the eye of the law is equally guilty with the one who does the act.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 74; Dec. Dig. § 41.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 3, p. 7613.]

2. CONSPIRACY (§ 47*)—CIRCUMSTANTIAL EVIDENCE.

The evidence of community of purpose or conspiracy which will render one a party to another's criminal act need not be proved by positive evidence.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105-107; Dec. Dig. § 47.*]

3. CRIMINAL LAW (§§ 59, 561*)—"AID AND ABET"—EVIDENCE.

The words "aid and abet" comprehend all assistance rendered by acts, or words of encouragement, or support, or presence, actual or constructive to render assistance should it be-

come necessary. No particular acts are essential. If encouragement be given to commit the felony, or if, giving due weight to all the testimony, the jury are convinced beyond a reasonable doubt that defendant was present with a view to render aid should it become necessary, then the fact that accused is an aider or abettor is made out.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 81; Dec. Dig. §§ 59, 561.*]

For other definitions, see Words and Phrases, vol. 1, pp. 291-293.]

4. CRIMINAL LAW (§ 59*)—AIDING AND ABETTING—PREARRANGEMENT—PRECONCERT.

If there is no prearrangement or preconcert between persons charged with crime, the mere presence of one of them to give aid if necessary, is not aiding or abetting, unless the principal knew of such presence with intent to aid.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71-81; Dec. Dig. § 59.*]

5. CRIMINAL LAW (§ 741*)—AIDING AND ABETTING—CONSPIRACY—QUESTION FOR JURY.

In a prosecution for homicide, evidence held to require submission to the jury of the question whether community of purpose in the premises existed between defendant and the others by whom the killing was actually accomplished, or whether defendant aided or abetted them.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 741.*]

6. CRIMINAL LAW (§ 782*)—TRIAL—INSTRUCTIONS—FORM.

An instruction that there was "no evidence" of a stated proposition was properly refused as announcing no legal proposition.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 782.*]

7. CRIMINAL LAW (§ 1166½*)—TRIAL—COUNSEL FOR PROSECUTION—PARTICIPATION IN TRIAL.

Though it was announced before the selection of the jury that counsel assisting the prosecution would not thereafter participate in the trial, the court qualified the jury as to relationship and connection with the firm of which such assisting counsel was a member, and its members. It did not appear that defendant would have employed his peremptory challenges otherwise, if he had known that such private counsel expected further to participate in the trial, nor that he would have challenged any member of the jury in the box when informed that the assisting counsel would participate in the trial. Held, that there was no prejudicial error in the court's declining to prevent such counsel to assist; the court having no right to forbid the entrance of properly engaged counsel in the trial at any stage of the proceedings.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1166½.*]

8. HOMICIDE (§ 180*)—EVIDENCE—SOBERNESS OF DECEASED.

The condition of deceased as to soberness several hours before the tragedy was irrelevant.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 180.*]

9. HOMICIDE (§ 169*)—EVIDENCE—DECLARATIONS OF DECEASED.

In a prosecution for homicide, evidence of what deceased told a witness several hours before the killing as to how he received certain other wounds from which he was then suffering was inadmissible.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 169.*]

10. CRIMINAL LAW (§ 417*)—DECLARATIONS OF THIRD PERSON.

A witness was not entitled to testify as to her father's state of feeling toward a codefendant who had been awarded a separate trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 417.*]

11. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

In a prosecution for homicide against defendant J. and others, the court did not err in allowing, over defendant's objection, questions asked by the state's solicitor on cross-examination of a witness, as to when, where, and how many times she saw J. the day of the tragedy; J.'s conduct on that day being a legitimate subject of inquiry.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 268.*]

12. CRIMINAL LAW (§ 338*)—EVIDENCE—RELEVANCY.

Where there was no claim that a witness had been improperly influenced as to his testimony by another person named, whether the witness had been talking with such person about the case was irrelevant.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 338.*]

13. CRIMINAL LAW (§ 413*)—EVIDENCE—SELF-SERVING DECLARATIONS.

Where in a prosecution for murder, the state claimed that defendant and J. and others intercepted deceased and another, and killed him, J.'s alleged declaration to his wife that he was going to hunt his mare, as he left the house on the occasion in question, was inadmissible as self-serving.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. § 413.*]

14. CRIMINAL LAW (§ 490*)—EVIDENCE—EXPERTS—IMPEACHMENT.

A physician testifying for defendant as an expert stated the character and location of alleged wounds on deceased's head after examining his skull, and testified that he did not see the skull while before the grand jury because he was not examined before that body. *Held*, that it was proper for the state to show in rebuttal that his statement that he did not testify before the grand jury was erroneous, as affecting his credibility.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 490.*]

Appeal from Circuit Court, Shelby County; John Pelham, Judge.

Will Jones was convicted of murder, and he appeals. Affirmed.

Brown, Leeper & Lapsley, for appellant. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

McCLELLAN, J. The indictment, comprising two counts, charged Roy Cardwell, Will Jones, Jim Jones, and Dock Jones, with the murder of Alonzo Jones. Upon a severance, this defendant (Will Jones) was tried alone.

[1] In the first count, the allegation is that the homicide was committed "by striking him with a rock," and, in the second count, "by striking him with a rock or rocks, and by assaulting and beating him."

While there was some evidence that this defendant had in his hand or pocket, a short

time before the fatal difficulty, a rock or rocks, there was no evidence that *he*, at any time, actually struck deceased with a rock or rocks. His guilt of this homicide, under this indictment, must, therefore, depend upon whether he aided or abetted the person who did strike the deceased with a rock or rocks, in causing his death, or whether he so conspired or preconcerted with such person as to render him culpable in consequence of the act of the person who did strike the deceased the fatal blow with the rock or rocks.

The substantive law, applicable to this prosecution—to the determination of the guilt or non of the accused—has been often declared by this court. These expressions of presently pertinent and controlling principles and rules are quoted, that brevity and accuracy may be better conserved.

By Code 1907, § 6219, it is provided that "all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid or abet in its commission, though not present, must hereafter be indicted, tried, and punished as principals, as in the case of misdemeanors."

[2] "When by prearrangement, or on the spur of the moment, two or more persons enter upon a common enterprise or adventure, and a criminal offense is contemplated, then each is a conspirator, and if the purpose is carried out each is guilty of the offense committed, whether he did any overt act or not. This rests on the principle that one who is present, encouraging, aiding, abetting, or assisting * * * the active perpetrator in the commission of the offense is a guilty participant, and, in the eye of the law, is equally guilty with the one who does the act. Such community of purpose, or conspiracy, need not be proved by positive testimony. It rarely is so proved. The jury are to determine whether it exists, and the extent of it, from the conduct of the parties and all the testimony in the case." *Morris v. State*, 146 Ala. 66, 88, 41 South. 274, 280—collecting many authorities.

[3] *Aid* and *abet* "comprehend all assistance rendered by acts or words of encouragement or support or presence, actual or constructive, to render assistance should it become necessary. No particular acts are necessary. If encouragement be given to commit the felony, or if, giving due weight to all the testimony, the jury are convinced beyond a reasonable doubt that the defendant was present with a view to render aid should it become necessary, then that ingredient of the offense is made out." *Ralford's Case*, 59 Ala. 106; *Tally's Case*, 102 Ala. 65 et seq., 15 South. 722.

[4] If there is no prearrangement or preconcert, mere presence, with the intent to give aid if necessary, is not *aiding* or *abet-*

ting "unless the principal knew of the presence, with intent to aid, of such person." Tally's Case, supra; Ralford's Case, supra; Morris' Case, supra; 1 Whar. Cr. Law, § 210.

"Conspiracy, or a common purpose to do an unlawful act, need not be shown by positive testimony. Nor need it be shown that there was prearrangement to do the specific wrong complained of." Martin's Case, 89 Ala. 115, 8 South. 23, 18 Am. St. Rep. 91.

"So, if, being present without preconcert," two or more persons "entered into a common illegal purpose, and one or more of them did the deed of violence, and the others were present, aiding, abetting, encouraging, or giving countenance to the unlawful act, or ready (with the perpetrator's knowledge of their intent to render assistance to him if necessary—Tally's Case, supra) to lend assistance if it should become necessary, * * * the other or others are as guilty as the actor or actors." Amos's Case, 83 Ala. 1, 4, 3 South. 749, 751 (3 Am. St. Rep. 682).

"To establish a conspiracy, it is not always necessary to show prearrangement to do the particular wrongful act committed. But it is true that, when two or more persons enter upon an unlawful purpose with a common intent to aid or encourage each other in carrying out their common design, they are each responsible, civilly and criminally, for everything which may consequently and proximately result from such unlawful purpose, whether specially contemplated or not." Green's Case, 97 Ala. 59, 12 South. 416, 15 South. 242.

[5] This tragedy occurred a short distance from the scene of a picnic. According to a phase of the testimony, and there was much conflict in it, deceased was, when he received the fatal blow, on his "all fours," with his head forced to the ground. The defendant was upon his back, striking him, on the head and back, with his fists. At this juncture, Roy Cardwell, from a distance of about five feet, threw a rock, evidently with great force, at the head of deceased, striking him in the back of the head, and thereby causing his almost immediate death. On the picnic grounds there was a dance platform. Near it ran a spring branch. Deceased and one Connell came to the grounds late in the afternoon. Deceased was drunk. Jim Jones, and his two sons Dock and Will (defendant), as was Roy Cardwell, were there, the first named appearing, from some of the evidence, to have had a part in the management or direction of the occasion. From a phase of the testimony it appears that Jim Jones undertook to restrain his son Dock from responding to a request of deceased for a talk with him. Soon after this, and after deceased and Connell had crossed the branch from the side of it on which Jim Jones was, Jim Jones, some of the testimony went to

show, made a hostile remark of a character readily susceptible of the interpretation that it referred to deceased and Connell, and which was capable of being understood as commanding the "boys" to take extreme measures against deceased and Connell if they undertook to recross the branch; to which Dock replied, "I'll do it." Deceased went off with Connell, something like 100 yards, from the picnic grounds. They stopped on the roadside, deceased sitting or lying down. Within a few minutes, Jim Jones and Charley Barnes went in the same general direction, but by another road. The defendant's contention was that Jim Jones and Barnes were in search of Jim Jones' horse. The theory of the prosecution seems to have been that their purpose was to intercept deceased and Connell or to strike the road on which they were, beyond them, and to return by the place where deceased and Connell were. Dock Jones, Roy Cardwell, and defendant remained upon or about the platform. Jim Jones and Barnes, according to some of the testimony, did come by deceased and Connell; whereupon Jim Jones and Connell, or deceased, or both, became involved in a controversy. There was testimony from which it could be reasonably found that Barnes, during, or immediately after, this controversy, returned to the platform and had a few words with Dock Jones; that Dock and the defendant, almost immediately, started at a rapid gait toward the place at which deceased and Connell were; that Roy Cardwell followed them a few steps behind, he being in a run; that Dock, upon his arrival at the place, first encountered Connell and entered into a fight with him; that defendant passed on a few feet, and, deceased having gotten up, he (defendant) assailed deceased with his fist, knocking him down; and that Roy Cardwell came up, and, while the situation and action, in respect of defendant and deceased, was as before stated, Cardwell struck deceased in the head with a rock, hurled with great force.

There was testimony tending to show that at times during the period intervening, stated to have ranged from 45 minutes down to 15 minutes between the arrival of deceased at the picnic grounds and the fatal blow, Jim Jones, Roy Cardwell, and defendant each had a rock in his hand or pocket.

Under the facts, acts of the parties, and circumstances shown by phases of the testimony, an outline (only) of which we have given, the questions, whether there was a conspiracy, prearrangement, entered into by Jim, Dock, and Will Jones (defendant) and Roy Cardwell, to assail deceased and Connell, or, whether there was a community of unlawful purpose, in the premises, existing between Dock and Will Jones and Roy Cardwell, or whether defendant aided or abetted Cardwell in the premises, were for the jury. The court took that view and so, correctly submitted those issues to the jury.

A great number of special charges were requested by defendant. Many were given. A large number were refused. Those refused are urged, in brief, as being erroneously so treated. The court has, with great care, considered each of these charges refused, and so in connection with those given at defendant's request. The major part of those refused were faulty in their pretermission of reference, in hypothesizing defendant's acquittal, to the jury issues of conspiracy, or prearrangement, *vel non*, or community of purpose.

[6] Some sought the instruction that there was no evidence of a stated proposition. Such charges may always be refused. They announce no legal proposition. Charge 50 is of this class. The remainder of those refused were covered by those given at defendant's request.

We discover no error in the excepted to excerpt from the oral charge of the court. It was a general statement of abstractly sound propositions.

[7] There was no prejudicial error in the court's declining, on defendant's motion, to prevent counsel assisting the prosecution from taking part in the trial *after* the selection of the jury and *after* it had been announced before the selection of the jury that the counsel later taking part in the trial would not participate therein. The court qualified the jury as to relationship and connection with the firm, and its members, thus late entering upon the trial. It does not appear that defendant would have employed his peremptory challenges otherwise than he did when under the impression that the assisting counsel would not participate in the prosecution; nor that he would have so challenged any member of the jury in the box when informed that assisting counsel would participate in the trial. We know of no right of any court to forbid the entrance of properly engaged counsel into a trial at any stage of the proceedings.

[8] The condition of deceased, as to sobriety, several hours before the tragedy was irrelevant. The evident object of questions in that connection and of that with respect to blood being on deceased's face about 1:00 o'clock, before his death at 5:00 o'clock, was to thereby account for bruises and wounds, other than that inflicted by Cardwell, seen on his face and head after his death. The court otherwise gave defendant the full benefit of the testimony of his witnesses to that effect. There was no error in sustaining objections to the questions indicated.

[9] And in this connection, what deceased told the witness Avery, several hours before the killing, as to how he received the wounds, was obviously inadmissible.

[10] Jim Jones not being on trial, the court properly disallowed the question to Venna

Hand, seeking to show her father's state of feeling toward Jim Jones.

[11] There was no error in allowing, over defendant's objection, the questions of the solicitor, on cross-examination of Rosa Roden, with reference to when, where, and how many times she saw Jim Jones the day of the tragedy. The court did not thereby permit undue latitude on that character of examination of a witness for the defendant. The conduct and acts of Jim Jones on that day were legitimate subjects of inquiry upon the issues in the case.

[12] Whether Barnes, a witness for defendant, had been talking with Mr. Hand, another witness, about the case was irrelevant. It was not attempted to be shown that Barnes had been improperly influenced in respect of his testimony by Hand.

[13] The alleged declaration of Jim Jones to his wife that he was going to hunt his mare, a statement tending to refute the prosecution's theory that his journey, on the occasion, was with a view to intercept or to encounter deceased and Connell, was inadmissible. It was self-serving. It was no more than a statement of his motive or purpose.

[14] Dr. Miller was introduced by the defendant, and testified as an expert. Among other subjects touched upon by him in his testimony was the character and location of alleged wounds, etc., upon the exhumed skull of deceased. In this connection he testified, substantially, that he did not see the skull while before the grand jury returning the indictment, for the reason that he was not examined before that body. It was competent for the state to show, in rebuttal, that his statement in this regard was erroneous. The matter went to his credibility and was not, as is obvious, immaterial.

No prejudicial error appearing, the judgment is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

A. DREHER & CO. et al. v. NATIONAL SURETY CO. et al.

(Supreme Court of Alabama. Dec. 21, 1911.)

1. BILLS AND NOTES (§§ 443, 467*)—REAL PARTY IN INTEREST.

Under Code 1907, § 2489, requiring the prosecution of actions in the name of the party really interested, a beneficial owner of a nonnegotiable instrument may sue thereon; but, where he does so, he should aver how or in what manner he became such owner.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1377-1423, 1480-1493; Dec. Dig. §§ 443, 467.*]

2. BANKRUPTCY (§ 302*)—ACTIONS BY TRUSTEE—COMPLAINT—REQUISITES.

A complaint, in an action by a trustee in bankruptcy on a bond executed by the bank-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rupts and sureties to creditors of the bankrupts, which fails to aver that the trustee is the beneficial owner of the bond, or that the bond was made for the benefit of the estate of the bankrupts, is demurrable under the rule that complaints on demurrer must be plain, positive, and specific, and not dependent on mere inferences to ascertain the right to recover.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 302.*]

3. BANKRUPTCY (§ 302*)—ACTIONS BY TRUSTEE—COMPLAINT—REQUISITES.

A complaint on a bond issued by principals subsequently becoming bankrupts and sureties, conditioned on the prosecuting of a writ of error to effect, which alleges that the creditors named in the bond as obligees sue for the benefit of the trustee in bankruptcy of the principals, and that the bankrupt estate and the creditors incurred liability for attorney's fees and expenses in the action, and that the same has not been paid, but which fails to show that the bond was made for the benefit of the estate, is bad on demurrer, though the creditors are, under Bankruptcy Act July 1, 1898, c. 541, § 64, subd. 3, 30 Stat. 562 (U. S. Comp. St. 1901, p. 8447), entitled to attorney's fees from the estate incurred in the litigation, and the estate of the bankrupts cannot be declared the beneficial owner of the bond simply because it may be liable to the creditors for attorney's fees.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 302.*]

4. PLEADING (§§ 192, 362*)—DEFECTS IN COMPLAINT—REMEDY.

Where a complaint shows a right of recovery, though only for nominal damages, the defect arising from the fact that it contains claims for unrecoverable damages should be reached by a motion to strike rather than by a demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 408-427, 1147-1155; Dec. Dig. §§ 192, 362.*]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Action by A. S. Cowan, as trustee in bankruptcy, against the National Surety Company and others for breach of a bond given to A. Dreher & Co. and others. From a judgment for defendants, plaintiff appeals. Affirmed.

The complaint was as follows: "Plaintiff, A. S. Cowan, suing in his capacity as trustee in bankruptcy of the estate of T. A. Moore, H. C. Moore, and Moore Bros., claims of the defendant the National Surety Company, a corporation, and T. A. Moore and H. C. Moore, the sum of \$6,500, for the breach of a condition of the bond made by the defendant and others on, to wit, the 9th day of December, 1908, which said bond was in words and figures as follows: [Here follows bond, executed by T. A. and H. C. Moore, and Moore Bros., a partnership composed of T. H. and H. C. Moore, as principals, and J. M. Robinson, Norton & Co., James R. Duffin, and the National Surety Company as sureties, to A. Dreher & Co. and certain other creditors of the bankrupt firm, in the sum of \$6,500, given as an appeal bond to reverse a judgment decreeing the firm and

the individuals as bankrupts, with the condition that the said principals shall prosecute said writ of error to effect and answer all damages in part if they fail to make their pleas good]—and which said bond was executed by Moore Bros. and T. A. and H. C. Moore, and the sureties therein named; and the plaintiffs aver that the condition of said bond has been broken, in this, to wit, on the 16th day of May, 1910, the writ of error referred to in said bond was decided by the United States Court of Appeals for the Fifth Circuit adversely to plaintiffs in error, and that the plaintiff herein is the trustee in bankruptcy of the estate of said bankrupt mentioned in said bond, and the said plaintiffs in error and their bondsmen have failed to answer for all damages and costs sustained by the bankrupt estate by reason of a suing out and prosecuting said writ of error." Demurrer 2 to this count was as follows: "It shows that the obligees in said bond are persons other than the plaintiff."

In the second count the creditors named in the bond are substituted as the plaintiffs, suing for the use and benefit of A. S. Cowan, as trustee in bankruptcy of the estate of H. C. and T. A. Moore and Moore Bros., bankrupts. The complaint from there down is like the first count, with the additional allegations following the last words in the first count are the following: "In that in the defense of said writ of error the said bankrupt estate or said petitioning creditors incurred liability for attorney's fees and expenses in and about said defense, for which said bankrupt estate is liable, and which has not been paid, and which said fees and expenses are within said amount claimed above; hence this suit. And plaintiff further avers that said A. S. Cowan, as trustee aforesaid, is the beneficial owner of the cause of action here sued on." The fifth ground of demurrer interposed hereto is as follows: "It fails to show that said A. S. Cowan, as trustee, has any right or interest or is in any wise connected with the alleged cause of action."

Tomlinson & McCullough, Estes, Jones & Welch, and Trotter & Odell, for appellant. London & Fitts, for appellees.

ANDERSON, J. [1] The bond, as set out in the complaint, not being a negotiable instrument, a suit thereupon might, under section 2489 of the Code of 1907, be brought by the beneficial owner; but, where the instrument is set out in the complaint and is made payable to another, the plaintiff who sues as the beneficial owner should aver that he is such owner, and good pleading should suggest that he aver how or in what manner he was or became the beneficial owner.

[2] Count 1 does not aver that Cowan is the beneficial owner, or that the bond was made for the benefit of the estate, and the only theory upon which he can maintain the suit on the bond is by drawing the inference that the bond was made for the benefit of the estate and not the obligees therein named, and complainants, on demurrer, must be plain, positive, and specific, and not dependent upon mere inferences in order to ascertain the plaintiff's right to recover.

Count 1 was subject to the defendants' demurrer No. 2.

[3] Count 2, while in the name of the obligees, is for the use or benefit of Cowan, the trustee of the estate, and who must be considered, under section 2490 of the Code, the sole party on the record. This count is no better as to an averment of interest or ownership than the first one. There is no averment that the estate is the beneficial owner, and to determine that fact we must draw legal inferences, from the status set out, that the bond was made for the use or benefit of the estate, which we cannot do in order to sustain a complaint on demurrer. There is nothing in the count to indicate that the bond was made to the creditors for the use or benefit of the estate, and, construing the same most strongly against the pleader, the bond was made to the obligees for their own use and benefit, and not as indemnity to the estate. The caption of the complaint does say that the suit is brought for the use and benefit of Cowan as trustee, but there is not a word or syllable in the body of the complaint claiming that Cowan is the beneficial owner, and we are put to legal inferences in order to read such an averment into the complaint, which cannot be resorted to in order to uphold the same against demurrer. The ownership may be averred in general terms (*Burns v. George*, 119 Ala. 504, 24 South. 718); but the ownership of Cowan as trustee, or that he or the estate is the beneficial owner, is not specifically averred in either count of the complaint.

The second count was subject to ground 5 of the demurrer, if not others.

On the other hand, if we should read the bankrupt act into the complaint, and hold that the petitioning creditors would be entitled to attorney's fees from the estate, incurred in having the debtor adjudicated a bankrupt (section 64, subd. 3, Bankruptcy Act [Act July 1, 1898, c. 541, 30 Stat. 562, U. S. Comp. St. 1901, p. 3447]; *Collier on Bankruptcy*, 687; *Smith v. Cooper*, 120 Fed. 230, 56 C. C. A. 578, 9 Am. Bankr. Rep. 755; *In re So. Steel Co.* [D. C.] 169 Fed. 702, 22 Am. Bankr. Rep. 476), yet, it would not necessarily follow that the bond in question was taken for the benefit of the estate, or that the obligees did not rely upon the bond for their attorney's fees and protec-

tion rather than the estate. They might be able to get said fees from the estate, but may prefer getting them on the bond and not looking to the estate for same. And if they got them on the bond, the estate might resist the payment of said fees a second time; but that is a matter between the petitioning creditors and the estate, and the estate cannot be declared the beneficial owner of the bond, as matter of law, simply because it might be liable to the petitioning creditors for attorney's fees in having the debtor adjudged a bankrupt.

[4] We are also aware of the rule that, where the complaint shows a right to recover, if only nominal damages, and contains claims for nonrecoverable damages, the defect should be reached by a motion to strike, rather than by a demurrer; but that rule applies where the party who sues is entitled to recover for the breach and the nominal damages, and not to cases where the suit is brought by one who is not the obligee in the contract, or who has no right to sue as for a general breach, and who grounds his whole claim or cause of action upon a certain element of damages growing out of a breach of the bond. Here, the plaintiff Cowan shows no recoverable right as for a breach of the bond, but bases his entire claim or cause of action upon costs and attorney's fees which may be incurred by the estate, and falls to aver that the bond was made as an indemnity to the estate as against this element of damages, or any other facts showing that said estate is entitled to recover said damages so claimed as against these defendants. In other words, the complaint shows no right to recover anything on the bond, by the plaintiff Cowan, nominal or any other damages, and was, of course, subject to demurrer.

The judgment of the city court must be affirmed.

Affirmed.

DOWDELL, C. J., and SAYRE and SOMERVILLE, JJ., concur.

JONES v. STATE.

(Supreme Court of Alabama. June 29, 1911.
Rehearing Denied Dec. 21, 1911.)

1. CRIMINAL LAW (§ 547*)—EVIDENCE—TESTIMONY OF WITNESS AT FORMER TRIAL.

Where a witness at a former trial had since died, the reporter's notes of his testimony given at such trial, though not signed by the witness, were admissible to prove his testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1237-1246; Dec. Dig. § 547.*]

2. CRIMINAL LAW (§ 409*)—INCULPATORY STATEMENTS—PREDICATE.

Where a constable testified that he had charge of defendant after the coroner's ver-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dict, and did not offer him any reward or threaten him in any way, or offer him any inducement to get him to talk or tell anything, such proof was sufficient foundation to justify the admission of inculpatory statements made by accused to the witness.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 409.*]

2. HOMICIDE (§ 174*)—EVIDENCE—FLIGHT.

In a prosecution for homicide, evidence that accused broke jail and fled was admissible as an inculpatory circumstance.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 365; Dec. Dig. § 174.*]

4. HOMICIDE (§ 174*)—EVIDENCE—FLIGHT—RECAPTURE.

Where defendant, after arrest for murder, broke jail and fled, it was not error to admit evidence as to the circumstances of his recapture, and also proof of defendant's statement that no one assisted him to escape.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 365-368; Dec. Dig. § 174.*]

5. WITNESSES (§ 277*)—CROSS-EXAMINATION OF ACCUSED.

Where accused became a witness in his own behalf, he was subject to cross-examination like any other witness, and was properly cross-examined as to his escape from jail, flight, etc.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-984; Dec. Dig. § 277.*]

6. CRIMINAL LAW (§ 539*)—TRIAL—ABSENT WITNESS—AFFIDAVIT.

It was not error to sustain the state's objection to the reading of the affidavit as to what an absent witness would testify, where it had once been read to the jury, and the evidence was not especially material.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 539.*]

7. HOMICIDE (§ 309*)—MANSLAUGHTER—INSTRUCTIONS—EVIDENCE.

The court did not err in omitting to charge on manslaughter, where there was no evidence on which a conviction for that offense could be predicated.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.*]

8. HOMICIDE (§ 287*)—INSTRUCTIONS—MOTIVE.

In a prosecution for murder, an instruction that the presence or absence of a motive in the commission of an offense is always a subject of inquiry, and is of more importance and deserving of more consideration when the identification of accused as a criminal agent depends on circumstantial evidence, was properly refused, as it could not have been given without another instruction that, if the criminal act and defendant's connection therewith were clearly proved, the absence of motive was immaterial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 592; Dec. Dig. § 287.*]

9. CRIMINAL LAW (§§ 807, 811*)—INSTRUCTIONS—PARTICULAR FACTS—ARGUMENTATIVENESS.

An instruction that the jury may look to the fact, if it be a fact, together with all the other facts and circumstances in the case, that defendant and decedent were friendly to each other, in determining whether defendant had any motive to murder him, was properly refused as argumentative and as giving undue prominence to particular facts.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §§ 807, 811.*]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Will Jones was convicted of murder in the second degree, and he appeals. Affirmed.

The facts as to the admission of the stenographer's notes as to Will Harvey's testimony sufficiently appear in the opinion. The witness J. E. King was permitted to testify that he is constable of Massey beat, and lived in that section, and had charge of the prisoner, Will Jones, after the coroner's verdict. "I had a conversation with him, and did not offer him a reward or threaten him in any way, or offer any inducement to get him to talk to me and tell anything. As we were going over that morning, he said that if he killed old man Ranse, nobody did not see him, and couldn't prove it, or something like that. Then, after we got there, he said, if they punished him for it, they would punish an innocent man. As we went on to Falkville, he asked me if I had ever heard of a white man being hurt for killing an old negro." And in answer to the question, if he made any statement after that, and what it was, he said, "It was not much harm to kill a negro anyway," and that was about all. Thomas R. Shipp was shown to be sheriff of said county, and his statements as to the statements made by the defendant are similar to those testified to by King, and the preliminary proof is practically the same. It is further shown by this witness that the defendant had escaped from jail and fled; that this occurred about three weeks ago. The court excluded the answer of the sheriff as to how he knew he broke jail, in which he said that he was gone, and the other prisoners in jail said that he broke out. The other exceptions to evidence sufficiently appear from the opinion.

The following charges were refused to the defendant: "(A) The presence or absence of a motive in the commission of an offense is always a legitimate subject of inquiry. It is of more importance and deserving of more consideration when the identification of the accused as a criminal agent depends upon circumstantial evidence. (B) Gentlemen of the jury, I charge you at the request of the defendant that you may look to the fact, if it be a fact, together with all the other facts and circumstances in the case, that the defendant and the deceased, Ranse Wilhite, were shown to be friendly to each other, in determining whether defendant had any motive to murder him."

P. M. Brindley, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

SIMPSON, J. The appellant was convicted of the crime of murder in the second degree.

[1] The state offered to introduce a type-

written copy of the testimony of Will Harvey, deceased, given at a former trial of this case, and taken down by a stenographer. The stenographer was sworn as a witness and identified the testimony as that taken down by her at the former trial, stating that she was not sworn at the time she took it down. The defendant objected to the introduction of the evidence, on the grounds that the stenographer was not under oath, at the time of taking down the evidence, at the former trial, and because the testimony was not signed by the witness. The objections were overruled, and the testimony, including the direct examination and cross-examination, was admitted.

It is the settled law of this state that the testimony of a witness at a former trial, since deceased, though not signed by him, may be introduced; and this court has said, "It was competent to introduce any witness who heard his statements." *Roberts v. State*, 68 Ala. 515, 525; *Lowe v. State*, 86 Ala. 47, 51, 5 South. 435; *Jeffries v. Castleman*, 75 Ala. 262, 264; *Marler v. State*, 67 Ala. 55, 61, 42 Am. Rep. 95.

This court has held that such evidence is admissible even when the previous testimony was not reduced to writing, provided the witness can state the substance of all the testimony of said witness at the previous trial. *Davis v. State*, 17 Ala. 354, 356, et seq.; *Harris v. State*, 73 Ala. 495, 497; *Thompson v. State*, 106 Ala. 67, 74, 75, 17 South. 512; *Degg v. State*, 150 Ala. 3, 43 South. 484.

This case is differentiated from the cases in other states, cited by appellant, in that, in the present case, the stenographer, who took down the testimony in the former case, was sworn as a witness in this case, and identified the typewritten copy as the testimony taken down by her in the previous trial, which is certainly more satisfactory than the testimony of a witness, merely from his memory, as to what was testified in the previous trial.

The notes made by stenographers have been admitted, where the stenographer had no independent recollection of the testimony, and the reasoning of the courts is sound. *State of Iowa v. Smith*, 99 Iowa, 26, 68 N. W. 428, 61 Am. St. Rep. 219; *Wright v. Wright*, 58 Kan. 525, 50 Pac. 444.

There was no error in admitting this testimony.

[2] A sufficient predicate was laid for the admission of the testimony of the witness J. E. King, as to inculpatory statements made by the defendant, and there was no error in admitting the same. *Bush v. State*, 136 Ala. 85, 88, 33 South. 878, and cases cited; also, the numerous cases cited in the brief of the Attorney General.

For the same reasons, there was no error in admitting the testimony of Thomas R. Shipp, as to statements made by the defendant.

[3] Proof of flight is always admissible, and there was no error in admitting the testimony as to breaking jail and flight by the defendant.

The court excluded the hearsay statements as to how he broke jail, so that the testimony was merely as to the flight.

[4] For the same reasons there was no error in allowing the testimony of Dr. White as to the circumstances of the capture of the defendant after he had escaped from custody.

There was no reversible error in permitting the witness Scott to testify as to statements by the defendant that no one had helped him to escape. It showed that his escape and flight was his own voluntary act.

[5] There was no error in permitting the questions to the defendant, on cross-examination, as to his escape from jail, flight, etc. A defendant who testifies is subject to cross-examination like any other witness.

[6] There was no error in sustaining the objection by the state to the reading of the showing as to what Nancy Blackwood would swear. It had already been read to the jury, and the witness could not state what the threats were. Besides, there was no evidence tending to show that Harry Wilhite was anywhere near the place of the killing, and the time fixed was a year before the killing.

[7] There was no error in the failure of the court to charge on the subject of manslaughter. Besides the fact that no specific charge was requested on that subject, there was no evidence in the case on which manslaughter could be predicated. See authorities cited in brief of Attorney General; *Williams v. State*, 147 Ala. 14, 41 South. 992.

[8] There was no error in the refusal to give charge A requested by the defendant. As said by Brickell, C. J., in discussing a similar charge, the charge "could not have been given without misleading the jury, unless additional instructions had been given, stating that if the criminal act and the connection of the appellant were clearly proved, the absence of evidence of motive was immaterial." *Clifton v. State*, 73 Ala. 474, 479; *Brunson v. State*, 124 Ala. 38, 39, 40, 27 South. 410.

[9] Charge B, requested by the defendant, was properly refused, being "argumentative in a sense, and singling out and giving undue prominence to the facts proposed thus to be brought to the attention of the jury." *Stone v. State*, 105 Ala. 70-71, 17 South. 114, and cases cited; *Fountain v. State*, 98 Ala. 41, 42, 45, 13 South. 492; *Campbell v. State*, 133 Ala. 81, 84, 88, 31 South. 802, 91 Am. St. Rep. 17.

There being no reversible error in the record, the judgment of the court is affirmed.

Affirmed.

DOWDELL, C. J., and MCLELLAN and MAYFIELD, JJ., concur.

BIXBY-THEISEN CO. v. EVANS.

(Supreme Court of Alabama. Nov. 28, 1911.)

1. APPEAL AND ERROR (§ 1042*)—RULINGS ON PLEADINGS—REVIEW.

Error may not be predicated on the court's refusal to strike matter from a complaint, since defendant may object to the evidence, except to the court's oral charge authorizing recovery, or request a special charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.*]

2. APPEAL AND ERROR (§ 1050*)—EVIDENCE—PREJUDICE.

Admission of parol evidence as to the time and place of conversations between plaintiff and defendant's president prior to the execution of the contract, not calling for the contents of such conversations, was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

3. DAMAGES (§ 175*)—BREACH—EVIDENCE.

In an action for breach of a contract to loan money, plaintiff was entitled to show that in the negotiations leading up to the contract, he had communicated to defendant's representatives information of the fact that he would be unable to get money elsewhere; notice of such fact being a condition to plaintiff's right to recover substantial damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 469-471; Dec. Dig. § 175.*]

4. DAMAGES (§ 120*)—CONTRACT TO LOAN MONEY—BREACH—PROFITS.

Defendant agreed to loan plaintiff not to exceed \$2,000, to reconstruct a band saw mill and a dam, and to furnish logs to be sawed by plaintiff at the mill in such a quantity as would make the bill for sawing, at the rates specified, equal to the amount loaned and no more, within five years, plaintiff agreeing to construct the mill and power and saw all defendant's logs at the price stipulated, and to the full capacity of the mill, if necessary, and to give defendant's business a preference over that of others. Held, that plaintiff, on breach of such contract, was entitled to recover the rental value of the old mill during the reasonable time required for its restoration, otherwise interest on the value of the mill, but not profits to be realized out of sawing logs in excess of the number sufficient to discharge the debt, and those which plaintiff might have realized by the operation of the mill in its old form during the period necessary for its restoration after the breach, or profits reasonably to be expected from defendant's business above the amount necessary to pay plaintiff's debt, nor profits to be earned during the time required for the restoration of the mill after defendant's breach, and which plaintiff might have earned but for the breach, nor profits he expected to earn by sawing enough logs to pay his debt.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291-305; Dec. Dig. § 120.*]

5. DAMAGES (§ 120*)—CONTRACT—BREACH.

In an action for breach of a contract to loan money to be used in part in reconstructing a water power attached to a sawmill, plaintiff was entitled to recover for actual losses including the cost of partially destroying the old dam preparatory to reconstructing it, the cost of restoring it to its former condition after breach of the contract and its rental value ad interim, from the time its use was lost to plaintiff by reason of the improvement undertaken, and until it could have been restored in the exercise of reasonable diligence after breach, and money

expended on the faith of the contract, as well as the value of labor, materials, and tools furnished by plaintiff and consumed in the proper prosecution of the work, and not otherwise figured into the damages assessed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291-305; Dec. Dig. § 120.*]

6. CONTRACTS (§ 45*)—LOAN OF MONEY—BREACH—ADVANCEMENTS BY BORROWER—DAMAGES.

Where a contract to loan money to be used in the construction of certain improvements on its face provided for defendant's advancement of the total sum agreed, at one time, and plaintiff's expenditure of additional sums only in case the advancement was insufficient to complete the improvement, but there was evidence that the parties agreed on a method by which plaintiff made expenditures for labor for which he was reimbursed by defendant on the presentation of pay rolls showing such expenditures, money expended by plaintiff under such arrangement, for which defendant subsequently refused to reimburse him, was recoverable.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 45.*]

7. CONTRACTS (§ 170*)—CONSTRUCTION BY PARTIES.

Where a contract to loan money for the improvement of a dam contained nothing indicating that the construction of a new water house above the dam was not contemplated, it was competent for the parties to interpret the contract as providing for construction of a new water house as a part of the dam.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.*]

8. CONTRACTS (§ 261*)—BREACH—EFFECT.

Where defendant contracted to loan plaintiff funds with which to make certain improvements, plaintiff's misappropriation of funds advanced by defendant, by diverting them to uses other than those contemplated by the contract, constituted a breach thereof, warranting defendant's refusal to further perform.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1174-1180; Dec. Dig. § 261.*]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Action by Milton H. Evans against the Bixby-Theisen Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Count 1 was as follows: "Plaintiff claims of defendant \$1,900 damages for the breach of a contract whereby defendant promised to loan plaintiff enough money to erect certain improvements upon certain lands belonging to plaintiff, not exceeding \$2,000; that the consideration of this promise was that plaintiff should tear away certain improvements already standing on said lands, and should erect certain new improvements, and after their completion should do certain work for defendant at agreed prices; that in pursuance of said contract plaintiff did tear away said improvements already on said land; that defendant broke its contract, in this: That it failed and refused to loan said money to defendant. And plaintiff avers that he has been damaged in this especially: He tore away the improvements on said land, which were of great value, to wit, \$500; he

expended much money for labor in tearing the same away, to wit, \$250; he was unable to obtain said loan elsewhere, and was unable to erect new improvements, and he has been damaged on account of the loss of the rent on such premises and improvements for a long time, to wit, 12 months; that the rental value, when completed, would have been a large sum, to wit, \$50 per month; that the value of said premises would have been great, had said new improvements been erected, to wit, \$3,500, whereas, they are not now worth over \$500; that, relying on defendant's promise, plaintiff purchased material for the purpose of erecting said new improvements, of great value, to wit, \$1,000, but that on account of defendant's refusal to furnish said money, and the delay on account thereof, said material had greatly deteriorated in value, to wit, \$500; that, relying upon the promises of defendant, the plaintiff was put to great expense and loss of time in making preparations to erect said new improvements, of great value, to wit, \$300, all of which has been lost and rendered worthless to plaintiff. And plaintiff avers that the several elements of special damages above set out were all within the reasonable contemplation of the parties at the time of making said contract and at the time of its breach by defendant."

Count 2: "Plaintiff claims of defendant the sum of \$1,900 for the breach of a contract entered into between them, whereby for a valuable consideration defendant agreed to furnish and deliver at plaintiff's sawmill logs to be sawed by plaintiff as lumber at specified prices per M. feet, board measure, to the amount of, to wit, \$6,000, and in addition thereto did agree to pay plaintiff the sum of 30 cents per M. feet, board measure, for stacking said lumber; and defendant did agree to loan plaintiff the money necessary to erect and equip said mill, not exceeding \$2,000, and that defendant had broken its said contract, in this: It refused to loan plaintiff said money, and thereby prevented plaintiff from complying with said contract, and defendant failed to furnish and deliver said logs, whereby plaintiff has been unable to saw said logs and stack said lumber, and because thereof plaintiff has lost a large profit, which he would have made on the sawing of said logs and stacking said lumber, to wit, the sum of \$1,999, and plaintiff avers that he has at all times been ready, able, and willing to perform his part of the said contract, if defendant would perform its part of the contract, which was necessary in order to enable plaintiff to perform."

John A. Lusk, for appellant. Street & Isbell, for appellee.

SAYRE, J. There was no error in the court's rulings on the pleadings. Bixby v. Evans, 167 Ala. 431, 52 South. 843, 29 L. R. A. (N. S.) 194, 140 Am. St. Rep. 47.

[1] The court overruled defendant's motion to strike from the complaint certain items of damages claimed. The rule here is not to predicate error of such rulings for the reason that the defendant may protect himself against injurious results, in case of error, by objections to the evidence, by exceptions to the court's oral charge authorizing recovery, and by special charges. *Vandiver v. Waller*, 143 Ala. 411, 39 South. 186; *Southern Ry. Co. v. Coleman*, 153 Ala. 266, 44 South. 837.

[2] Appellee was permitted, over appellant's objection, to adduce evidence of conversations between himself and the president of the defendant company prior to the formal execution of the contract. So far as these rulings related to questions of time and place, without calling for the contents of those conversations, if erroneous, they were entirely lacking in prejudicial effect upon defendant's case, and cannot avail for a reversal.

[3] It was competent for the plaintiff to show that in the course of the negotiations leading up to the contract he had communicated to the representatives of the defendant information of the fact that he would be unable to get money elsewhere. Defendant's notice of this special circumstance was a condition upon which plaintiff's right to the recovery of substantial damages depended. *Bixby v. Evans*, supra.

[4] When this case was here on the first appeal, after stating in a general way the contract between the parties, and the breach alleged by plaintiff, we said that actual damages shown might be recovered, but that profits such as the plaintiff may have expected to realize from the operation of the mill in its improved form could not be recovered because remote and incapable of that clear and satisfactory proof which the law requires to constitute recoverable damages. Perhaps it would have been better to discriminate somewhat with reference to the different circumstances under which the profits claimed were to be earned, though nothing of that was intimated in the briefs which seemed then, as now, to treat them as all standing upon the same footing. Plaintiff agreed to saw all logs defendant might carry to the mill during five years at a price stipulated and to the full capacity of the mill, if this should be necessary, to give the defendant's business a preference over that of other persons, and this agreement the defendant might, at its option, extend for a further period of five years. Defendant's undertaking, on the other hand, was to furnish logs to be sawed by plaintiff and in a quantity which would make the bill for sawing, at the rates specified, equal to the amount of money advanced by defendant; no more. As we read the contract defendant had the right to spread its compliance over the period of five years, at the end of which time the debt became due and payable. This agreement on the part of defendant provided the plaintiff

with a means of paying the debt which was also secured by a mortgage on the mill and the tract of land upon which it was located. As for those profits to be realized out of sawing logs in excess of the number sufficient to discharge the debt, and those which the plaintiff might have realized by the operation of the mill in its old form during the period necessary for its restoration with reasonable expedition after the contract was breached, it is clear that they are speculative and unrecoverable. No profits can be predicated upon the business to be furnished by defendant over and above the amount necessary to enable the plaintiff to repay his debt, for it cannot be known how many logs the defendant would have carried to the mill, or whether he would have carried any. No doubt the parties contemplated that defendant would carry other logs, but the defendant might have refrained from doing so without breaching his engagement. Profits to be earned during the time required for the restoration of the mill, and which plaintiff might have earned but for the alleged breach, are likewise uncertain. But for the loss of the use of his mill during the time required for its restoration, the law provides a reasonably certain measure of damages in its rental value, to be estimated on the basis of the property's former condition, provided that period was of such length that it could reasonably be said that the mill had a rental value; otherwise, interest on the value of the mill. *Southern Railway v. Coleman*, supra. As for those damages claimed in the way of profits lost, but which he expected to earn by sawing enough logs to pay his debt, plaintiff hardly seems to be in much better case. The contract fixes the price plaintiff should receive, it is true, but the cost to him of sawing logs to be furnished by defendant, and to be spread at defendant's option over a period of five years, is as uncertain as the other proverbial uncertainties of the sawmilling business. The conclusion that plaintiff should not be allowed to recover prospective profits as damages for defendant's breach of its contract to furnish money, if there was a breach, because such damages were too remotely connected in the contemplation of the parties with the alleged breach, and because they are speculative, we think is required of us by considerations of justice that ought to obtain in such cases and by the authorities cited in the opinion on the former appeal.

[5] But for actual losses, including herein the cost to the plaintiff of partially destroying the old dam preparatory to reconstruction, the cost of restoring it to its former condition after breach of the contract, and its rental value ad interim, that is, from the time its use was lost to plaintiff by reason of the improvement undertaken and until it could have been restored in the exercise of reasonable diligence after breach, and in-

cluding also money expended on the faith of the contract as well as the value of labor, materials, and tools furnished by plaintiff and consumed in the proper prosecution of the work, and not otherwise figured into the damages assessed—for these things the plaintiff may have a recovery, if entitled to recover at all.

[6] The contract provided that "the party of the first part (defendant) will advance to the party of the second part (plaintiff) a sum of money, but in no event to exceed \$2,000 to be used by the party of the second part as follows: The party of the second part is to furnish all the labor and material to construct and put in complete a stone and concrete dam across Town creek at a point where a wooden dam is now situated, and he will purchase and install complete a turbine wheel and band saw mill, * * * and the party of the second part for a valuable consideration guarantees that the sum of money to be advanced by the party of the first part will be sufficient for the purpose of the improvements herein specified, but in the event of such sum not being sufficient, he is to complete the same at his own expense." On the former appeal we said: "The contract speaks for itself, and conclusively, as to the expenditure by the plaintiff of money other than that to be advanced by defendant. It contemplated such expenditure only in the event that the sum agreed to be advanced was insufficient to complete the dam. Plaintiff was not, therefore, entitled to recover as special damages under the evidence sums so expended." This, for the reason that the contract on its face and without more must be construed as providing for the advancement of the total sum secured at one time. Now there are in the evidence contained in the record indications that the parties in executing the contract, as far as they went, agreed upon a method by which plaintiff made expenditures for labor for which he was reimbursed by defendant upon the presentation of pay rolls showing the expenditures. We hardly deemed it necessary heretofore to say that plaintiff could not have judgment for sums advanced by the defendant under these circumstances, but it seems proper now to say that if plaintiff expended under this arrangement any sums out of his own purse which defendant subsequently refused to reimburse, these may be recovered, provided of course plaintiff is entitled to recover at all.

Much is said about the water house. The contract provides for the construction of a dam and the purchase and installation of a turbine wheel and band saw mill. Nothing is said therein of the water house nor of the capacity of the wheel and band saw. There was evidence, properly admitted, to the effect that the water house constituted a part of the dam and that the parties mutually understood and intended that the wheel and band saw should be of a size and capacity which

rendered a new water house necessary to the execution of the contract. If so, the water house and dam proper ought to have been placed upon the same footing in estimating plaintiff's recoverable damages, and the trial court properly refused those requested charges which assumed that the water house was not a part of the dam within the meaning of this last term as used in the contract. [7] There being nothing to the contrary in the language of the contract, it was competent for the parties to so interpret it, in which event it was the duty of the court to enforce the contract according to the interpretation put upon it in practice by both parties. There was, on the other hand, evidence for the defendant which went to show an agreement that the water house was to remain undisturbed, and the court was requested by the defendant to instruct the jury that, if there was such an understanding or agreement, plaintiff was not entitled to recover money expended in tearing out the old water house or building the new. A charge to that effect should have been given.

[8] Defendant pleaded, and brought evidence tending to show, that plaintiff first breached the contract by the misappropriation of funds advanced by defendant by diverting them to uses other than those contemplated and agreed upon in the contract. There were no special replications to these pleas. Charges hypothesizing proof of these facts and directing a finding for the defendant on such hypothesis should have been given.

We will not be understood as passing upon the legal sufficiency of those pleas which were ruled in favor of the appellant. Whatever may be said of those pleas, the issues should have been stated to the jury as they were formulated in the pleadings. Of some of the pleas it may perhaps be properly said that they were nothing more than the general issue.

The trial court in some respects held to a theory of the law of the case different from that stated, and the judgment reached must be reversed.

Reversed and remanded. All the Justices concur.

ABINGDON MILLS v. GROGAN.

(Supreme Court of Alabama. June 15, 1911.
On Application for Rehearing,
Dec. 21, 1911.)

1. MALICIOUS PROSECUTION (§ 21*)—DEFENSE—CONSULTING ATTORNEY.

That defendant consulted a reputable attorney before instituting the alleged malicious prosecution, and the attorney advised the prosecution, is not of itself a defense to the action.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 40-44; Dec. Dig. § 21.*]

2. APPEAL AND ERROR (§ 232*)—PRESENTATION BELOW—OBJECTIONS TO EVIDENCE.

An objection that evidence was a mere opinion or conclusion cannot be first raised on appeal, where the objection below was upon another ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1430, 1431; Dec. Dig. § 232.*]

3. MALICIOUS PROSECUTION (§ 58*)—ACTIONS—ADMISSION OF EVIDENCE.

In an action against a corporation for malicious prosecution on a charge of enticing defendant's employes away, plaintiff could show that the deputy sheriff who arrested him was appointed at defendant's request, in determining whether he was acting as defendant's agent in arresting plaintiff, and not in his official capacity.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 117-124; Dec. Dig. § 58.*]

4. MALICIOUS PROSECUTION (§ 68*)—PUNITIVE DAMAGES.

Punitive damages may be recovered for a malicious prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 157; Dec. Dig. § 68.*]

5. DAMAGES (§ 208*)—PUNITIVE DAMAGES—JURY QUESTION.

The amount of punitive damages allowable in an action for malicious prosecution is a question for the jury under proper instructions; punitive damages being admissible.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 220; Dec. Dig. § 208.*]

On Application for Rehearing.

6. MALICIOUS PROSECUTION (§ 64*)—ACTIONS—SUFFICIENCY OF EVIDENCE—PROBABLE CAUSE.

Evidence, in an action against a corporation for malicious prosecution on its charge of enticing defendant's employes away, held not to show that there was probable cause for defendant to believe that plaintiff was guilty of the offense for which he was prosecuted.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 151-153; Dec. Dig. § 64.*]

7. MALICIOUS PROSECUTION (§ 71*)—ACTIONS—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.

In an action for malicious prosecution on a charge of enticing defendant's employes away, whether the prosecutions were instituted in good faith on the advice of counsel held a jury question.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 160-167; Dec. Dig. § 71.*]

Appeal from Law and Equity Court, Madison County; Tancred Betts, Judge.

Action by H. R. Grogan against the Abingdon Mills. From a judgment for plaintiff, defendant appeals. Affirmed.

Cooper & Cooper and Paul Speake, for appellant. Taylor & Drake and M. H. Lanier, for appellee.

MAYFIELD, J. This was an action by appellee against appellant to recover damages for malicious prosecution. The case was ultimately tried on counts 1 and 3. There are

no special pleas to these counts. Each declares upon a separate prosecution. This is the second appeal in this case; the first being reported in 167 Ala. 146, 52 South. 596. A number of the questions presented for review on this, the second appeal, were decided in the former; and as to these we see no reason to depart from our ruling heretofore announced.

The first insistence is that the plaintiff was guilty of enticing away employes of the defendant. This was the offense for which he was prosecuted; or at least the evidence showed conclusively that there was probable cause for believing him to be guilty of such offense, and that therefore the defendant should not be held liable to a civil suit for instituting this prosecution against the plaintiff.

We cannot agree with counsel in this contention. It was ruled on the former appeal in this case—if not expressly, by necessary implication—that under the evidence this was a question of fact for the jury, and that the trial court properly submitted it to the jury, under correct instructions. And there is no such difference between the evidence adduced on the first trial and that brought out on the second as to warrant the court's withholding this question from the jury.

The plaintiff, when arrested on these charges, waived a preliminary trial and gave bond to appear and answer any charge that might be preferred by the grand jury. The grand jury failed to indict the plaintiff, in either case, for the offense charged, but did return an indictment against him for carrying on the business of emigrant agent without a license—which, of course, was an offense separate and distinct from that of which he was charged.

It is next insisted that the prosecution of the plaintiff was instituted by the agents of the defendant, on the advice of reputable practicing attorneys, given on a full and fair statement of all the facts known to the affiant, or which by proper means could have been ascertained.

It is sufficient to say, as to this insistence, that whether or not that was done in the manner, to the extent, and with the purpose, to make it a complete defense to the action, was a question of fact for the jury, and not one of law for the court; and that the court did not err in submitting these questions to the jury under proper instructions, which the trial court seems to have given.

[1] The mere fact that a person desiring to institute a prosecution consults a reputable attorney before so doing, and that such attorney advises the prosecution, does not of itself amount to a complete defense to an action for maliciously instituting such prosecution. All this might be done, and yet the prosecution be maliciously instituted.

Whether the affiant made a full and fair statement of the facts to the attorney, wheth-

er he used proper diligence in order to ascertain the facts, and whether he consulted the attorney for the purpose of obtaining the advice of such attorney and acting upon it rather than upon his own judgment, or for other motives, were in this case (and are usually) questions of fact for the determination of the jury.

All the evidence in this record has been carefully read and considered, and we have reached the conclusion, not only that the trial court correctly submitted these questions of fact to the jury, but also that the action of the court was proper, in declining to award a new trial on account of insufficiency of the evidence, or on the ground that the jury acted contrary to the instructions of the court upon this question.

We do not think that the court erred in allowing secondary proof as to the contents of the affidavit and warrant. The case was reversed on the former appeal, and one of the grounds of the reversal was the admissibility of this secondary evidence.

The trial court evidently attempted to comply with the rule announced by this court on the former appeal, as to the admission of such evidence. The secondary proof was made by the officer who issued the warrant, and before whom the affidavit was taken, and he, of course, was the proper custodian of it. He testified that it was lost, and that he had made unavailing search for it; that the papers had gone up to the grand jury; and that the lost papers were not those of which plaintiff was custodian, but were quasi records of the proceedings in the justice court.

[2] It is insisted in the argument by the appellant that the secondary evidence of the witness, as to the contents of the affidavit and warrant, was a mere opinion or conclusion. This was not one of the grounds of objection assigned to the introduction of such proof, nor of the motion to exclude, and that question cannot be raised, for the first time, on appeal. The trial court evidently did not have that question presented to it for decision.

[3] It was ruled on the former appeal that the fact that Sanders, one of the defendant's agents, was appointed a deputy sheriff at the instance of the defendant, was a material inquiry. We can see no reason to recede from what we then said upon that question. The facts that the defendant's agent was thus, at its request, appointed to be a deputy sheriff, and that this agent, as such deputy, arrested the plaintiff under the warrant, the basis of this prosecution, were certainly a material inquiry upon this trial. Hence there was no error in allowing proof to be made as to such facts. As was said in this court in the former opinion, if he acted in the matter solely as a deputy sheriff, and not as the agent of the defendant, the defendant could not be held liable; but, on the evidence in this case, it was certainly

a question for the jury to say in what capacity he acted in instituting the prosecution against the plaintiff.

[4, 5] We are not prepared to say that the trial court erred in declining to grant the defendant's motion for a new trial. While the verdict and judgment are larger than usual in such cases, we cannot say that the award was the result of the bias, prejudice, or other improper motive or influence, on the part of the jury. There was evidence sufficient to warrant punitive damages. Each count declared upon a separate prosecution, which was alleged to be malicious; and this we have held to be also a question for the jury. If they believed from the evidence that the plaintiff had made out his case and was entitled to recover, and that the prosecution was malicious, wanton, and without probable cause, they were justified in awarding punitive damages. The amount of damages, in such cases, is a question for the jury, under proper instructions by the court.

While there may be instances in which the trial court or an appellate court could set aside a verdict because so excessive as to show that the jury were influenced by improper motives or agencies, rather than by the evidence, in fixing the amount, we think that this is not such a case. The verdict as originally rendered was for \$6,000; and, upon the motion for a new trial on the ground that the verdict was excessive, the trial court, which had heard all the evidence and had every opportunity to observe the witnesses, announced that a new trial would be granted, for this reason, unless the plaintiff remitted \$2,000 of such verdict; whereupon the plaintiff in open court remitted \$2,000 of the verdict, and the court then overruled the motion for a new trial and rendered a verdict for \$4,000.

After a careful examination of all the evidence in this case, and due consideration of the fact that the suit was for two malicious prosecutions, we are not willing to put the trial court in error for declining to award a new trial, after the plaintiff had remitted \$2,000 of the damages as fixed by the verdict of the jury.

Finding no error, the judgment of the trial court must be affirmed.

Affirmed.

SIMPSON, ANDERSON, and McCLELLAN, JJ., concur.

On Application for Rehearing.

MAYFIELD, J. It is most earnestly insisted by counsel for appellant that a rehearing should be granted in this case; that there is manifest error in this record, in that the trial court should have given the affirmative charge, as requested, to find a verdict for defendant.

After several careful examinations of this record, we are not able to agree with the

contention of counsel for appellant, for the following reason, which we will again epitomize, on account of the repeated and earnest insistences of counsel for appellant.

The action is for malicious prosecution, claiming damages as for two malicious prosecutions of plaintiff by the defendant, on the charges of "enticing away laborers" of the defendant. The undisputed evidence shows that these two prosecutions, as alleged, were instituted and prosecuted by the agents of the defendant, and that the grand jury failed to indict in both cases, and that the prosecutions were ended in favor, and by the discharge, of plaintiff before this action for malicious prosecution was begun; that the plaintiff was arrested, detained, and imprisoned in jail, in consequence of the prosecution, and as the result of the acts, agency, and advice, of the defendant or of its attorney.

These facts being undisputed, they were certainly sufficient to carry the case to the jury upon the general issue.

The defendant undertook to rebut plaintiff's case, and to show that there was probable cause for the institution of the prosecutions, and that there was no malice, which, if conclusively done, would have entitled it to the affirmative charge.

But was the evidence conclusive as to this? We think not.

[8] It is most earnestly insisted by counsel for appellant, on this rehearing, that plaintiff was actually guilty of the charges preferred by the defendant, and for which he was prosecuted, notwithstanding the grand jury had twice refused to indict him on an ex parte hearing. Our answer to this is that, if that is true, the record before us does not so show it; and of course we are bound by the record. We do not so find that all evidence in this record shows that plaintiff was guilty as charged, or that there was probable cause for defendant's agent's believing him to be so guilty.

The mere fact that plaintiff was in Huntsville on the occasion when arrested, for the purpose of accompanying certain persons from Huntsville to Atlanta, and to pay their transportation and expenses, and that those persons were employes of defendant, does not conclusively show that plaintiff had enticed such employes away from defendant, within the meaning of the Criminal Code. Certainly plaintiff's evidence did not show conclusively, nor admit, that he was guilty of the criminal offense charged. A part of his evidence is as follows: "The charge on which I was arrested from Vaught's court was 'enticing laborers from the Abingdon Mills.' I did not solicit anybody, and did not offer anybody any sum of money or higher wages at all. I came here with the money for the purpose of paying transportation of certain hands who had already been hired to go to Atlanta. I did not employ or offer

to employ any one, and did not have any authority from the Fulton Bag & Cotton Company to employ anybody, or offer any hands employment. After my arrest, and after I made bond, I went back to Atlanta that afternoon. I did not return to Huntsville until the following January, when I came back for trial. I was tried for carrying on the business of an emigrant agent, without license, and was tried in this courthouse. Mr. Pride and Capt. Humes were the attorneys for the prosecution on my trial for carrying on the business of an emigrant agent. Mr. Sanders and Mr. Herring and Mr. Brown were all present at the trial, and I think they were all witnesses against me, and they were assisting the attorneys. Immediately after that trial I was re-arrested in the courthouse before I had gotten out of the courthouse, on a charge of enticing away laborers from the Abingdon Mills. * * * When I was carried up to Mr. Vaught's office that night in August, Mr. Herring said to me, 'I am glad we got you, old fellow, not on your account, but on account of the Fulton Bag & Cotton Mills.' Mr. Herring was assistant superintendent of the Abingdon Mills."

There is abundant evidence in this record tending to show that the arrangements for the hands to go from the Huntsville Mill to the Atlanta Mill were made by correspondence between the Huntsville employes and the Atlanta employers, and without any criminal participation therein on the part of this plaintiff or of any other person. We do not understand that this statute absolutely prohibits employes of one cotton mill from ever seeking or obtaining employment elsewhere, and that, if they ever do thereafter obtain employment in another mill, all other persons who aid them in going to such new employer or cotton mill are guilty of violating this statute.

The plaintiff further testified: "The only parties whose expenses or debts I had authority to pay were shown by some letters I had, which were written to Mr. S. F. Brown. The hands I now remember were Maggie Clutch, Mr. Schrimsher and his family, Jim Couch, and Bessie Merritt. That money was simply an advance on the part of the mill to these people. When I was in Huntsville before, in 1906, I was here as a drummer, and did not know anything about the Abingdon Mills. I did not make any contract with Maggie Clutch and the parties who came to see me at the hotel. I notified them that I was here for the Fulton Bag & Cotton Mills, to carry them back to Atlanta, and that I would buy the tickets, pay freight on household goods, etc. I did not offer any money to any others."

The defendant also insists that it was entitled to the affirmative charge, for the reason that the prosecutions were instituted and prosecuted under the advice of counsel, and

were therefore with probable cause and without malice.

We do not think the evidence in this case was so conclusive as to take the questions from the jury. It is true that the evidence does show that two attorneys were consulted and advised with, about the prosecutions; but it also shows that one of these attorneys was a stockholder, an officer, and a director, of the defendant corporation, and that he was employed by it to prosecute the plaintiff, in addition to the prosecuting attorney for the state. The other attorney consulted was the county solicitor. He was twice examined as a witness, and testified, in part, as follows: "Capt. Humes assisted me in the trial of the case against Grogan, in the law and equity court, and suggested the writing of this affidavit. He assisted me in prosecuting Mr. Grogan, and it was at his suggestion and dictation that I made out this affidavit. That affidavit and warrant were written in the courtroom immediately after the trial of Grogan on the charge of carrying on the business of an emigrant agent without license. The matter was discussed with Mr. Brown, Mr. Herring, and Mr. Sanders, my recollection is, in the courtroom. We discussed the verdict in the other case, and then it was that this complaint was prepared, and the warrant issued. Brown and Herring and Sanders did all the talking to me all the time. I did not request Capt. Humes to assist in the prosecution of that case. Mr. Brown told me that they were going to have Capt. Humes assist. I told Mr. Sanders and Mr. Herring and Mr. Brown, when they came to consult me about having Grogan arrested, that I thought it would be best to wait until we could find out that some of the employes had signed up, or gone to the depot, to be there and see that they started to move to the depot. I wanted them to be sure and know that he was here for that purpose before they made any arrest. I advised them all the time not to make arrest until they were certain that he had committed some overt act before he was arrested, and I felt that we would be pretty certain of his guilt if he had done these things that I have related. When the affidavit was sworn out in the courtroom after the first trial, Capt. Humes and I and Mr. Sanders were present, and I think Mr. Brown, Capt. Humes, and I heard all the evidence on the trial of Grogan for carrying on the business of the emigrant agent. Capt. Humes was a reputable practicing attorney and dictated the affidavit to me, after we had heard all the evidence. I concurred with Capt. Humes, in thinking that, under the evidence in that case, Grogan was guilty of enticing away laborers; but I thought at the time, and so told Capt. Humes that I thought, it would be dangerous for the company to swear out the second affidavit. I did not think it good policy to swear out the second affidavit."

[7] It has been repeatedly held that the question as to the bona fides of obtaining the advice of counsel, and whether a full and fair statement of the facts was made to counsel, is usually one for the jury. 2 Greenl. Ev. 459; McLeod v. McLeod, 73 Ala. 42. See former report of this case, 167 Ala. 146, 52 South. 596-599. So these were all clearly questions for the jury.

We do not mean to say that there was no evidence in conflict with that quoted above; but the testimony quoted was in evidence, besides the undisputed facts which we have before stated. This, under all the authorities, was sufficient to carry the questions to the jury. For the trial court to have taken all these questions, and instructed a verdict for the defendant, would clearly have been a usurpation by the court of the functions of the jury. This case has already been tried twice, each time by a different jury, and each jury has found for the plaintiff and for substantial damages. There is nothing to show bias or prejudice against this defendant or in favor of the plaintiff. The plaintiff, who was prosecuted, was a nonresident of the state at the time of his arrest and at the time of his trial, while those who procured and instituted the prosecutions were resident citizens of the state and the county. A trial court has twice heard all the evidence, seen the witnesses, and observed their manner and demeanor; and in each instance it refused the defendant's motion to set aside the judgment. Two grand juries of Madison county have refused to indict the defendant on ex parte hearings of the prosecutors, and a petit jury has refused to convict him of a kindred offense of being or acting as an emigrant agent without a license. This court, on a former appeal, when the evidence was practically the same as it is now, held that the right of the plaintiff to recover was a question of fact for the jury, and reversed the case for another trial; and it would have been unusual for the trial court, on a second trial, with the evidence practically what it was before, to instruct the jury to find for the defendant, when this court had held that it should not so instruct the jury.

So the application for a rehearing on this appeal is, for all practical purposes, the second application as to the question of the general affirmative charge. We are therefore somewhat surprised that counsel for appellant should have been so severely shocked at the court's action, on this second appeal, in saying exactly what it had said on the former appeal. It is no doubt often hard for counsel to see the correctness of verdicts and judgments against their clients. It is likewise a natural and meritorious trait of character that counsel should feel a deep interest in the result of the suits of their clients;

but it does seem that in this case, after so many trials with the same result, and after consideration of all the undisputed facts, counsel should become reconciled to its loss, without thinking that the court has failed to give it the proper attention.

KIRKLAND v. PILCHER.

(Supreme Court of Alabama. Dec. 19, 1911.)

1. DETINUE (§§ 24, 25*)—JUDGMENT—REQUISITES.

Where plaintiff in detinue recovers, the verdict and judgment must be as required by Code 1907, § 3781, in the alternative, for the specific chattels sued for, or, if they are not to be had, for the value thereof as assessed by the jury.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 44, 47-50; Dec. Dig. §§ 24, 25.*]

2. JUDGMENT (§ 248*)—CONFORMITY TO COMPLAINT.

A judgment not responsive to the complaint, or which cannot be based on the cause of action therein set out, is invalid.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 434; Dec. Dig. § 248.*]

3. APPEAL AND ERROR (§ 223*)—OBJECTIONS IN LOWER COURT—ERRONEOUS JUDGMENT.

A mere money judgment in detinue is not responsive to the complaint and must be reversed, though no objection was taken thereto in the trial court, notwithstanding Code 1907, § 4143, providing that no judgment can be set aside for any matter not previously objected to where the complaint states a cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1338-1352; Dec. Dig. § 223.*]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action between W. J. Kirkland and G. W. Pilcher. From a judgment for the latter, the former appealed to the Appellate Court, and it certifies a question to the Supreme Court. Question answered.

See, also, 57 South. 49.

Certificate to the Supreme Court of Alabama:

"In the above-entitled case, the judges of the court being unable to reach a unanimous conclusion or decision, the undersigned judges of said court, pursuant to the provision of the statute in such cases made and provided, hereby certify to the Supreme Court of Alabama the following question of law, as to which the undersigned judges differ:

"The complaint states a cause of action in detinue, but the verdict and judgment in favor of the plaintiff are for a certain sum, assessed as damages, without a finding or judgment against either party for the property sued for or its alternative value. Does section 4143 of the Code of 1907 operate to prevent this court from reversing such a judgment on appeal, no objection having

been made to the verdict or judgment in the court below?

"The above question is submitted as an abstract proposition, as directed by the statute; reference being made to the case in which the question arises for the convenience of the Supreme Court.

"R. W. Walker,
"Presiding Judge.
"Ed. De Graffenried,
"John Pelham,
"Judges."

R. D. Crawford, for appellant.

ANDERSON, J. Section 3781 of the Code of 1907 prescribes the kind of verdict and judgment in detinue.

[1] Where the plaintiff recovers, the verdict and judgment should be in the alternative for the specific chattels sued for, or, if they are not to be had, for the value thereof as assessed by the jury. *McCullough v. Floyd*, 103 Ala. 448, 15 South. 848; *Brown v. Brown*, 5 Ala. 508. A mere moneyed verdict and judgment is not responsive to the complaint and is foreign to the cause of action therein stated. This court has frequently reversed cases in detinue, when the verdict and judgment did not substantially conform to the statute. *Jernigan v. Willoughby*, 159 Ala. 650, 48 South. 812, and cases there cited, as well as other cases not there cited.

[2] This court has often held that a complaint which did not support a cause of action would not support a judgment. We also think that a judgment not responsive to a complaint, or which cannot be based upon the cause of action therein set out, is invalid. It would be monstrous to hold that a complaint in assumpsit would support a verdict and judgment in ejectment, or that a complaint in unlawful detainer would support a moneyed judgment alone; and a moneyed judgment upon a complaint in detinue is equally as inconsistent and is a legal impossibility. *Munday v. Vail*, 34 N. J. Law, 423. "A judgment upon issues not made by the pleadings is at least erroneous, and may be set aside or reversed in a proper proceeding for that purpose; but many cases go even further, and hold that judgments based upon issues not made by the pleading are coram non iudice and void, and subject to be set aside or disregarded even in a collateral proceeding." 11 Am. & Eng. Ency. of Pl. & Pr. 879, and cases cited in note 1. We agree with what seems to be the weight of authority, that a judgment which cannot be rendered under the complaint is just as invalid as if it was rendered upon a complaint which failed to state a cause of action. In passing upon the validity of judgments, the complaint is jurisdictional and should be considered. *L. & N. R. R. Co. v. Williams*, 113 Ala. 405, 21 South. 938.

[3] We do not think that the complaint

in question will support the moneyed judgment, and that it was erroneously rendered and should be reversed. It is true that section 4143 says: "No judgment can be arrested, annulled, or set aside for any matter, not previously objected to, if the complaint states a substantial cause of action." We think the meaning of this statute, if it now applies to appeals, is that the complaint must state such a cause of action as will support the judgment in question, and that it does not mean that the judgment should be sustained if determining a right or cause of action not set up in the complaint. We do not think that it means that a moneyed judgment can be upheld upon a complaint in detinue, or that a judgment in ejectment should be upheld if the complaint states only a substantial cause of action on a promissory note. In the cases in which this statute was invoked to save the judgments, the said judgments conformed to the cause of action set up in the complaint, and were not foreign thereto. *Smith v. Dick*, 95 Ala. 311, 10 South. 845; *Ritch v. Thornton*, 65 Ala. 310; *Government St. R. R. v. Hanlon*, 53 Ala. 70.

Whether or not the transfer of section 4143 from the article to which it originally belonged to its present position in an article that applies to "satisfying, annulling, or setting aside of judgments" upon motions, is significant that it does not apply to appeals, we need not determine (*Woodward Co. v. Brown*, 167 Ala. 319, 52 South. 830), for the reason that, if it does apply to appeals as well as motions under article 7 of chapter 85 of the Code of 1907, we think that "a substantial cause of action," as there used, means one that will support the judgment and verdict, and not one that might support some other verdict and judgment.

The error is fatal to an affirmance of the case, notwithstanding the point was not taken in the trial court.

SIMPSON, SAYRE, and SOMERVILLE, JJ., concur in the opinion. McCLELLAN and MAYFIELD, JJ., concur in the conclusion.

MAYFIELD, J. Section 4143 of our Code is one, or a part of one, of the numerous statutes of Jeoffries or amendments, passed first by the English Parliament and subsequently by the Legislatures of the various states. This one, as is well known, was intended to prevent the arrest or reversal of judgments as for mere defects in the form of the declaration, complaint, bill, or petition; and to require that as to such formal defects advantage should be taken by special demurrer or other special pleading, so that such formal defect could be amended while the pleading was in fieri. Before the passage of such statutes, judgments were constantly arrested and reversed for merely formal defects, and though such defects were

never complained of until after verdict and judgment.

So the object and purpose of this particular statute was to change this rule, and limit objections to the judgment, or to the motion in arrest thereof, or objections in proceedings to amend, to those of substance only; and if the declaration, complaint, bill, or petition contained a substantial cause of action, no objection could be taken to it on motion in arrest, or in independent proceedings to amend or reverse, unless the objection was previously made—that is, before rendition.

This particular statute or its progenitor has been in force in this state for a hundred years, since even before the state was admitted into the Union. It was enacted by the Legislature of the Mississippi Territory, in the year 1811, and has been with us continuously ever since. It therefore appeared in our first Code (of 1852) as section 2405. It was intended, and has always been construed, to be applicable only to the sufficiency of the declaration, complaint, bill, or petition, and not to the sufficiency of the verdict or the judgment. There are other statutes and rules of law that relate to the sufficiency of the verdict and judgment. The one in question has no relation to, and can have no effect whatever upon, the sufficiency of a verdict to support a given judgment, or the responsiveness of a verdict to the issues.

This section therefore has no application to the question involved in the case certified to us by the Court of Appeals. That question is whether a given verdict responds to the issues made by the pleadings sufficiently to support the judgment rendered by the trial court and appealed from. No objection is taken, nor appears tenable, to the sufficiency of the declaration or complaint, so the statute in question can have no application.

The verdict in question was clearly not responsive to the issues, and, while the judgment follows the verdict, it is bad, of course, because the verdict was bad, and it has nothing to stand upon. The verdict in question is no more responsive to the issues than would be a proper verdict in a detinue suit to an action of assumpsit; and no one would contend that a complaint in assumpsit, though perfect as to form or substance, would support a verdict in detinue.

The statute in question relates exclusively to the sufficiency of a declaration or complaint to support a judgment, and not to the sufficiency of a verdict, nor to whether it responds to the issues.

The rules of law applicable to the case at bar are thus stated in the books:

"Judgment is sometimes arrested, when the pleadings are good, for faults in the *verdict*. If the verdict *varies substantially* from the issue (as if, instead of finding the matter in issue, either way, the jury find something *foreign* to it), judgment must be arrested, because the finding does not ascertain the matter of fact in issue, and cannot therefore

show for which party judgment ought to be given.

"The rule is the same when the verdict finds only *part* of the matter in issue—omitting to find, either way, another *material* part. For it is the duty of the jury to ascertain, and that of the court to give judgment upon, *all* the material facts, put in issue by the pleadings. But a verdict, finding the whole *substance* of the issue is good, although it be silent as to what is *immaterial*, since the latter cannot affect the merits of the controversy." Gould's Pleading, §§ 55, 56, p. 521; Stephen's Pleading, 2d Appendix, note 7, p. cxxviii.

The true test of the sufficiency of a verdict to support a judgment was first announced by Washington, J., in the case of *Patterson v. United States*, 2 Wheat, 221, 4 L. Ed. 224, as follows: "A verdict is bad, if it varies from the issue in a substantial matter, or if it find only a part of that which is in * * * issue. Whether the jury find a general or special verdict, it is their duty to *decide the very point in issue*, and although the court, in which the cause is tried, may give form to a general finding, so as to make it harmonize with the issue, yet, if it appears to that court, or to the appellate court, that the *finding is different from the issue*, or is confined to a part only of the matter in issue, no judgment can be rendered on the verdict. If the jury find the issue, and something more, the latter part of the finding will be rejected as surplusage; but this rule does not apply to a case where the facts found in a verdict are substantially variant from those which are in issue."

This was quoted and adopted as the true rule, by this court, in the case of *Moody v. Keener*, 7 Port. 235, 236, and has been followed ever since, notwithstanding the statute in question, or its progenitor not different in substance, has been continuously in force since the year 1811. In *Moody's Case*, supra, the court concluded as follows: "The view we have taken is also confirmed by the case of *Stearns v. Barrett*, 1 Mason, 153 [Fed. Cas. No. 13,337], in which Judge Story observes 'that where a verdict is not expressed substantially in the terms of the issue, the case ought to be extremely clear, that should induce a court to make it the ground of a final judgment.' As the verdict is not responsive to the issue for this defect, the judgment of the circuit court must be reversed, and the cause remanded." 7 Port. 237.

The above case was cited and followed, in both the majority and dissenting opinions, in the cases of *Wittick v. Traun*, 27 Ala. 562, and *Traun v. Wittick*, 27 Ala. 570, in which cases, after full discussion (with the identical statute now in force), it was decided, and with dissenting opinions, as follows: "In detinue for eight slaves, a trial being had on the plea of the general issue, the jury returned a verdict that 'they find for

the plaintiff, and assess the value of the slaves sued for as follows,' etc. (specifying by name, and assessing the separate value of, all the slaves, except one, as to whom the verdict was entirely silent), 'and they also find the hire of said slaves to be \$200.' Held, that the verdict was not sufficient to authorize the rendition of judgment; while Rice, J., dissenting, held that it was a good finding for the plaintiff for the seven slaves named, with their hire as damages for their detention, and against the plaintiff as to the slave not named in the verdict."

In the case of *Handley v. Lawley*, 90 Ala. 527, 8 South. 101, the two cases above quoted, from 27 Ala., are reviewed and overruled, by Stone, C. J., in the following language: "The opinions of the majority of this court in *Wittick v. Traun*, 27 Ala. 562 [62 Am. Dec. 778], and in *Traun v. Wittick*, 27 Ala. 570, are relied on in support of the contention that the verdict in this case did not authorize the judgment rendered. In our opinion the views of the dissenting justice in those cases are supported by the stronger reasoning, and we concur with him. The issues in this case authorized a separate finding, and we hold that, when the jury found in favor of the plaintiffs against one defendant, and said nothing as to the other, this was equivalent to a finding in favor of that other. 'Expressum facit cessare tacitum.'"

But the rule announced by the text-writers, and by our court in the case of *Moody v. Keener*, supra, has never been departed from nor doubted, by this, or any other court, so far as I know. In none of these cases has it ever been supposed that section 4143 of the Code, or its progenitors, had any application to the question of the sufficiency of a verdict.

KIRKLAND v. PILCHER.

(Court of Appeals of Alabama. Dec. 19, 1911.)

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action between W. J. Kirkland and G. W. Pilcher. From a judgment for the latter, the former appeals. Reversed and remanded.

R. D. Crawford, for appellant.

PER CURIAM. This case was tried in the lower court on a complaint in detinue in the Code form. The verdict and judgment rendered was for a certain sum as damages. No objection was made in the lower court to the verdict or judgment, and the question of the availability on appeal as error of the rendition of the erroneous judgment was, under the statute (Acts 1911, p. 96, § 2), certified to the Supreme Court to determine; the proposition certified being as follows: "The complaint states a cause of action in detinue, but the verdict and judgment in favor of the plaintiff are for a certain sum, assessed as damages, without a finding or judgment against either party for the property sued for or its alternate value. Does section 4143 of the Code of 1907 operate to prevent this court from reversing such a judgment on appeal; no objection having been made

to the verdict or judgment in the court below?" On the authority of the decision rendered by the Supreme Court on the certification (*Kirkland v. Pilcher*, 57 South. 46 present term of Supreme Court) the case is reversed.

It is unnecessary to discuss the other assignments of error.

Reversed and remanded.

LASSETER v. DEAS.

(Court of Appeals of Alabama. Dec. 19, 1911.)

APPEAL AND ERROR (§ 123*)—JUDGMENTS APPEALABLE.

Statement in a bill of exceptions that motion for a new trial, being understood and considered by the court, was granted on a specified day, does not show a judgment granting a new trial and vacating the judgment previously entered, and is insufficient to support an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 875-881; Dec. Dig. § 123.*]

Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge.

Action between L. Lasseter and J. C. Deas. From the judgment, Lasseter appeals. Appeal dismissed.

J. Lee Holloway, for appellant. W. P. McGaugh, for appellee.

WALKER, P. J. The action of the court on the motion for a new trial is not otherwise indicated in the record than by the statement, contained in the bill of exceptions, that, "the motion being understood and considered by the court, the court granted the same on the 13th day of July, 1910." Following previous rulings on the subject, it must be held that such a recital does not constitute a judgment granting a new trial and vacating the judgment previously entered, and is insufficient to support an appeal. *Chambers v. Morris*, 144 Ala. 626, 39 South. 375; *Randall v. Worthington*, 141 Ala. 497, 37 South. 594. This being true, the appeal must be dismissed.

Appeal dismissed.

DIXIE INDUSTRIAL CO. v. MANLY.

(Court of Appeals of Alabama. Dec. 21, 1911.)

ACCOUNT, ACTION ON (§ 6*)—COMPLAINT—ALLEGATION OF BALANCE DUE.

A count in a complaint, which alleges that plaintiff claims of the defendant \$500 due by account, is demurrable, as not stating from whom the amount is due (Code 1907, p. 1195, No. 10).

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 8-12; Dec. Dig. § 6.*]

Appeal from Circuit Court, Tallapoosa County; S. L. Brewer, Judge.

Action by G. F. Manly against the Dixie Industrial Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Riddle, Ellis, Riddle & Pruett, for appellant. George A. Sorrell, for appellee.

DE GRAFFENRIED, J. In the case of *Smythe v. Dothan Foundry & Machine Co.*, 166 Ala. 253, 52 South. 398, the Supreme Court uses the following language: "The first assignment of error is to the overruling of defendant's demurrer to the first count of the complaint. The count is in these words: 'The plaintiff claims of the defendant \$202.28, balance due on account, on, to wit, the 1st day of August, 1908.' The ground of demurrer is that the count does not aver by whom the account is due. By reference to the form laid down in the Code (Code 1907, p. 1195, No. 10) it will be noticed that the words 'from him,' in the form, are omitted in this count, so that the count does not show whether the account sued on is due by the defendant or some one else. The forms in our Code have reduced the allegations of the complaint to a minimum, and this court does not feel called upon to reduce them further by construction. * * * The demurrer should have been sustained."

In the case now under consideration, the first count was in the following words: "The plaintiff claims of the defendant \$500 due by account on the 1st day of December, 1908." The defendant demurred to this count of the complaint on the ground that it "fails to show that account declared on was due from the defendant to the plaintiff." The slightest comparison of the count set out in *Smythe v. Dothan Foundry & Machine Co.*, supra, with the first count of the complaint in this case, will show that the two counts are identical. The ground of demurrer assigned to the first count of the complaint in *Smythe v. Dothan Foundry & Machine Co.*, supra, was the same ground which the defendant assigned to the first count of the complaint in the instant case. It is therefore evident that we must hold that the trial court committed reversible error in not sustaining the demurrer of the defendant to the first count of the complaint.

This cause is therefore reversed and remanded.

Reversed and remanded.

MOBILE LIGHT & R. CO. v. GEORGE.
(Court of Appeals of Alabama. Dec. 19, 1911.)
COURTS (§ 121*)—JURISDICTION—AMOUNT IN CONTROVERSY.

Under Const. 1901, § 143, providing that the circuit court, in civil cases other than suits for libel, slander, assault and battery, and ejectment, shall have no original jurisdiction, except where the amount in controversy exceeds \$50, the court has no original jurisdiction of a suit for negligent personal injury, where the complaint demands exactly \$50.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 121.*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by L. P. George against the Mobile Light & Railroad Company. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

William G. Caffey and Gregory L. & H. T. Smith, for appellant. F. K. Hale, Jr., for appellee.

DE GRAFFENRIED, J. This suit was brought in the circuit court of Mobile county by the appellee against the appellant, and the amount sued for in his complaint was exactly \$50. The appellee claimed the above sum of the appellant, because he alleged that an animal of his, through the negligence of the servants of the appellant, acting within the scope of their employment, was killed. There was a trial by jury, a verdict for something less than \$50, and a judgment on said verdict, and this appeal is taken to reverse said judgment.

Section 143 of the Constitution provides that the circuit court, "in civil cases, other than suits for libel, slander, assaults and battery, and ejectment, shall have no original jurisdiction except where the matter or sum in controversy exceeds \$50." Section 3255 of the Code provides that the circuit court has authority "to exercise original jurisdiction of all felonies and misdemeanors; of all actions for libel, slander, assault and battery and of ejectments, without regard to the amount involved; and of all other suits and actions at law when the matter or sum in controversy exceeds \$50."

As the appellee brought this suit in the circuit court, and as it is not a suit for libel, slander, assault and battery, or ejectment, but is a civil suit, and as the amount claimed in the complaint is exactly \$50, it is evident that the circuit court had no original jurisdiction to try this case, and the judgment rendered by it against the appellant is therefore manifestly void. *McLure v. Lay*, 30 Ala. 208. We have, therefore, in this case, an appeal from a void judgment, and this court has nothing therefore before it. The appeal is dismissed.

Appeal dismissed.

BIRMINGHAM RY., LIGHT & POWER CO. v. CAMP.

(Court of Appeals of Alabama. Nov. 30, 1911.)

1. STREET RAILROADS (§ 117*)—INJURIES—ACTIONS—JURY QUESTION.

In an action against a street car company for injuries by a car striking plaintiff's buggy as it rounded a curve, evidence held to make it a jury question whether the injury was caused by negligence in passing the buggy while it stood so close to the track as to be struck by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the projecting car, or by the buggy having been moved while the car was passing.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

2. TRIAL (§ 142*)—DIRECTION OF VERDICT.

An instruction to find for plaintiff if the jury believe the evidence should not be given, if there is any evidence supporting an inference which would prevent plaintiff's recovery.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 337; Dec. Dig. § 142.*]

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

Action by Oscar L. Camp against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Tillman, Bradley & Morrow and L. O. Leadbeater, for appellant. Bowman, Harsh & Beddow, for appellee.

WALKER, P. J. [1] We are of opinion that the trial court was in error in giving the general affirmative charge at the request of the plaintiff. The following statement, made in the opinion rendered on the former appeal in this case (*Birmingham Railway, L. & P. Co. v. Camp*, 161 Ala. 456, 49 South. 846), applies to the record now before the court: "The testimony is without conflict that the rear end of the car was the part thereof inflicting the damage, and that by reason, as the plaintiff contended, of the 'overhang' of the rear end as the car passed over the curve. One of the theories asserted by the defendant was that the injury was the result of the backing by the horse of the buggy into the rear end of the car, and not of the unaided (thereby) collision of the car with the vehicle." It cannot be said that this theory adduced by the defendant was without support in any tendency of the evidence. The conclusion that there was a movement of the buggy while the car was passing might have been a legitimate deduction from circumstances disclosed by the evidence, though no eyewitness testified that there was such movement. From the facts, if so found by the jury, that a vehicle drawn by a horse was standing far enough from the track as the front end of a car passed it to be out of the way of danger, and was found nearer the track when the rear end of the car passed, it might be inferred that the vehicle was moved by the horse while the car was passing. The witness Griffith, who stated that he saw the buggy just before it was struck by the car, and where it was just after the accident, testified: "I don't know but what the buggy backed into the car; I did not see when the horse backed into the car." The witness Hardwick, who was the motorman, testified that when he pulled the car around the curve the plaintiff's buggy, as it stood between the car track and the sidewalk curbing, "appeared to be perfectly in the clear; my mind was

satisfied that it was." Our construction of his statement in this connection is that when he pulled around the curve the buggy was so situated that the car would pass it without touching.

With this testimony in the case, it was a question for the jury whether the injury was attributable to negligence in running past the buggy, as it stood so close to the track as to be struck by the rear end of the car as it projected in rounding the curve, or to the fact that the position of the buggy was changed while the car was passing, so as to expose it to a collision with the rear end of the car. If the buggy was "perfectly in the clear" when the motorman, standing on the front end of the car, passed it, the court was not justified in denying to the jury the right to draw the conclusion from the evidence that the collision was not due to negligence in running the car past a vehicle so situated.

[2] If there is any evidence which would support an inference that would hinder the plaintiff's right to recover, an instruction to find for the plaintiff if the jury believe the evidence should not be given. *Western Union Telegraph Co. v. Louisell*, 161 Ala. 231, 50 South. 87. It was for the jury to determine what, if any, weight should be given to the evidence tending to show that the buggy was brought into dangerous proximity to the car while it was passing, and whether the injury to the plaintiff's property was attributable to a change in the position of the buggy while the car was passing, which might not have been anticipated by the person in control of the movement of the car, though he was exercising reasonable diligence, or to negligence in running the car past a buggy and horse so situated in reference to the track as the car approached and started to pass them. There were diverging tendencies in the evidence, which should have been left to the jury to pass upon.

The questions presented by the other assignments of error need not be ruled on, as they can be avoided in another trial.

Reversed and remanded.

McGUIRE et al. v. STATE.

(Court of Appeals of Alabama. Dec. 21, 1911.)

WITNESSES (§ 343*)—IMPEACHMENT—EVIDENCE—CHARACTER EVIDENCE—AFTER COMMISSION OF OFFENSE.

Evidence of bad character of an accused, who had testified in his own behalf, can only refer to the time prior to the commission of the offense charged against him.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1124; Dec. Dig. § 343.*]

Appeal from Circuit Court, Tallapoosa County; A. H. Alston, Judge.

Freeman and Ernest McGuire were con-

victed of assault and battery, and they appeal. Reversed and remanded.

Riddle, Ellis, Riddle & Pruett, for appellants. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. The defendants having testified as witnesses in their own behalf, the prosecution sought to impeach them by testimony in rebuttal touching their general character or reputation. The bill of exceptions recites: "Cicero Bentley was sworn and examined as a witness in behalf of the state in rebuttal, and testified substantially as follows: 'I know the defendants. I know their general character in the community in which they live. I live two miles from them. Have known them 10 years.' The solicitor asked the witness, 'Is their character good or bad?' The witness made no answer, and the court asked the witness, 'You know their character?' The witness answered, 'So far as I was concerned, I didn't know more than these cases.' Then the solicitor asked the witness: 'You say you know their general character. Is it good or bad?' The witness answered and said, 'I hear lots of reports talked about these cases.' And the solicitor asked the witness, 'Say whether it is good or bad—their general character in the community.' Whereupon the court says to the witness: 'That means the community around where they circulate and range.' The defendants then and there objected to the question in reference to their general character unless it is confined up until the time of the alleged offense for which these indictments were found. The court overruled the objection, and to this ruling of the court the defendants then and there reserved an exception, and the witness answered the question, and said, 'There are a lot of bad reports.' The witness was cross-examined by the defendants' counsel, and testified substantially as follows: 'The reports I have heard on the defendants are in reference to these indictments. I never heard anything against the defendants until they were indicted in these cases.'" The colloquy with the witness before the defendants made the objection which was overruled clearly indicated that whatever he might say in his answer that would be derogatory of the character of the defendants would be based upon reports circulated about them consequent upon their being charged with the criminal offense for which they were on trial. This fact was only the more clearly brought out by the statement of the witness on his cross-examination.

The objection to the question was made under such circumstances as to make it apparent that the overruling of it was in disregard of the rule that evidence of the bad character of one charged with crime, who has testified in his own behalf, must refer to

a period prior to the making of the charge against him which is under investigation. *Griffith v. State*, 90 Ala. 583, 8 South. 812; *Brown v. State*, 46 Ala. 175; *Underhill on Criminal Evidence* (2d Ed.) § 83. The shield of protection which the law furnishes to one charged with crime in the presumption of his innocence until his guilt has been proved beyond a reasonable doubt might be of little avail to him, if it could be destroyed by evidence of his disrepute resulting from rumors or reports having their origin or brought to light as the result of discussion occasioned by the fact that the criminal charge which is under investigation had been made against him.

Other questions presented by the record need not be considered, as they may not arise on another trial.

Reversed and remanded.

CENTRAL OF GEORGIA RY. CO. v. CLEMENTS.

(Court of Appeals of Alabama. Dec. 1, 1911.)

1. EVIDENCE (§ 571*) — EXPERTS — MEDICAL WITNESS — EFFECT.

Expert testimony as to physical condition, disease, injury, etc., goes to the jury to be weighed by them, with other evidence, in passing on the true cause of the disease in question, if a material subject of inquiry.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2395-2398; Dec. Dig. § 571.*]

2. EVIDENCE (§ 493*) — INJURIES — NONEXPERT OPINION.

Plaintiff's breast was pierced with an umbrella rib. A physician testified that when he saw the injury it had a scab on it, and he did not pull off the scab or probe. There was no evidence whether the wound was merely on the surface, or whether the rib penetrated the chest, nor did the physician testify as to any injury to plaintiff's lungs or speaking organs. *Held*, that plaintiff should not have been permitted to testify that the injury received to his chest had affected his lungs or speaking organs.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2277; Dec. Dig. § 493.*]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by W. F. Clements against Central of Georgia Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

B. F. Reid, for appellant. H. L. Martin, for appellee.

DE GRAFFENRIED, J. [1] 1. The most difficult practical science of which we have knowledge is the science of medicine. It is a matter of common knowledge that the most eminent diagnosticians frequently disagree as to the true nature or actual cause of a disease. While for some of the simple and common ailments, such as colds, indiges-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

tion, headaches, etc., the ordinary man suffering therefrom may, in a rough, practical way, assign the cause, nevertheless, when the cause of a disease or of some material ailment of an important organ of the human body is the subject of inquiry, only the opinion of a diagnostician, of a man skilled in the mysteries of medicine, can ordinarily be resorted to. And when this is done the law knows that the opinion of an expert is not infallible, and such opinion, when rendered upon a given state of facts, goes to the jury as evidence to be weighed by them, along with the other evidence, in passing on the question as to the true cause of the disease or ailment, if that is a subject of material inquiry before them. *Mobile Life Ins. Co. v. Walker*, 58 Ala. 290; *Zinn v. Rice*, 161 Mass. 571, 37 N. E. 747.

2. The appellee, after he had alighted, or in attempting to alight, from a train of appellant, received certain injuries, but whether they were received by him through the negligence of appellant's servants while acting in the line of their employment was a matter in grave dispute. If the evidence of appellee contained the true version of the matter, there was evidence from which the jury were authorized to find a verdict in his favor. On the other hand, if appellant's witnesses swore truthfully, then there should have been a verdict for the appellant. Their testimony tended to show that appellee's injuries were received *after* he had alighted from the train, and were caused by reason of the fact that appellee fell over a stool.

[2] 3. A few days after receiving the injuries, the appellee was attended by a physician, who, testifying as a witness in behalf of appellee on the trial in the court below, said: "I also found that something had pierced his breast apparently, and took it for granted that it was an umbrella rib that had pierced it. It had a scab on it, but I would not pull it off, and did not probe it." Whether this wound was a mere surface wound, or whether the instrument which made it went through the chest, the evidence fails to disclose. In this evidence of this physician, there is nothing to be found about any injury to appellee's *lungs* or *speaking organs*, and the evidence of this physician was appellee's evidence. It appeared from the evidence, that, certainly at one time, and possibly at the time of the trial, appellee complained of a throat or lung trouble, or both, and the court, against the seasonable objection of appellant, permitted the appellee to testify that the injury received by him to his chest had affected his lungs or speaking organs.

It is not pretended that appellee was a physician or a medical expert. It is our un-

derstanding that a witness who is *not* an expert may testify to facts, but, as above stated, as a general rule, not to deductions or conclusions from facts. In case of an injury, he may state the facts, his symptoms, etc.; but he cannot, as a rule, state that such injuries resulted in some particular disease to some organ *not actually* injured. In the present case, it was entirely permissible for appellee to state that the rib of an umbrella stuck into his chest, that his hands were bruised, his fingers and ribs broken, and his hips injured, and it was also permissible for him to say that after that time he had suffered from a cough and a sorethroat; but we think that only an expert could say that his lungs or speaking organs, neither of which organs was actually injured by the fall, had become involved by reason of injuries to the above other parts of his body. This deduction was one only which a medical expert could draw from the facts, or the jury in their exclusive province as triers of the facts. Suppose a few weeks after the alleged injuries the appellee had been taken with a fever. Could he be permitted to say that, in his opinion, the injuries were the cause of his fever? Suppose he had, shortly after the injuries, been attacked with pneumonia. Could he be permitted to say that such pneumonia was caused by his injuries? The questions, it seems to us, formulate their own answer. Whether the alleged cough or throat trouble was due to tuberculosis, la grippe, or to the injuries received by him was certainly not for appellee, a nonexpert, but, at best, for a medical expert or the jury, under all the facts, to say. "It is, as a general rule, not permissible to examine as to the opinions or conclusions of a witness, for these are to be formed by the jury, unless where the opinion is an inference of skill and judgment. The legal course is to ask such questions as will elicit facts from which the jury may draw their own conclusions." *Bullock v. Wilson*, 5 Port. 338; *Western Steel Car & Foundry Co. v. Bean*, 163 Ala. 255, 50 South. 1012.

We are therefore of opinion that the court committed reversible error in permitting the above testimony to go to the jury. The record does not affirmatively show that the admission of this evidence was not prejudicial to appellant, for we do not know what weight the jury attached to it in estimating appellee's damages.

4. There are a number of other questions presented by the record, but, as they may not arise on a subsequent trial of this case, we refrain from discussing them.

The judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

MONTGOMERY CANDY CO. v. WERTHEIMER-SWARTS SHOE CO.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. GARNISHMENT (§ 148*)—ANSWER.

A garnishee's denial of indebtedness in his written answer to the writ may be overcome by disclosures made on his oral examination, under Code 1907, § 4316; and when the facts so disclosed show that he was indebted to defendant after service of the writ, plaintiff is entitled to judgment on the garnishee's answer, without contesting it.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 279; Dec. Dig. § 143.*]

2. GARNISHMENT (§ 116*)—EFFECT OF WRIT.

A writ of garnishment operated to intercept debts owing by the garnishee to defendant while the proceeding was pending, and any payment by the garnishee meanwhile was at his risk.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 237; Dec. Dig. § 116.*]

3. GARNISHMENT (§ 116*) — LIABILITY OF GARNISHEE.

Garnishment of salary could not be avoided by the garnishee intrusting claims to defendant for collection and permitting him to retain the amount of his salary out of the proceeds.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 237; Dec. Dig. § 116.*]

Appeal from City Court of Montgomery; William H. Thomas, Judge.

Action by the Wertheimer-Swarts Shoe Company against S. B. Kent. From a judgment for plaintiff, on garnishment directed to the Montgomery Candy Company, the garnishee appeals. Affirmed.

The Wertheimer-Swarts Shoe Company obtained a judgment in the city court of Montgomery at the October term, 1909, against one S. B. Kent for the sum of \$118.15, and on February 8, 1910, procured garnishment on said judgment, on proper affidavit, to be issued to the Montgomery Candy Company. On the 11th day of February, 1910, the garnishee filed a formal written answer denying indebtedness. On June 3, 1910, the garnishee was summoned to answer orally. On the 7th day of June, 1910, the garnishee appeared and answered that Mr. Kent went to work for him in September, 1909, at a salary of \$75 per month. After some parleying, the books were brought into court. It appeared that up to the 4th of June, the time of the service of the garnishment, Mr. Kent was indebted to the company in the sum of \$98, and that after that time the company paid him about \$300.

W. E. Andrews, for appellant. Arrington & Houghton, for appellee.

WALKER, P. J. [1] A garnishee's denial of indebtedness in his written answer to the writ may be overcome by the disclosure made on his oral examination, required as authorized by the statute; and when, on the

facts as so disclosed, it is made to appear that the garnishee was indebted to the defendant after the service of the writ, the plaintiff is entitled to judgment against the garnishee upon his answer, without contesting it. Code, § 4316; *White et al. v. Kahn*, 103 Ala. 308, 15 South. 595.

[2, 3] In the case at bar the oral answer of the garnishee disclosed that between the dates of the service of the writ and of the oral answer it was indebted to the defendant, for salary or wages, payable at the end of each month, in an amount exceeding in the aggregate the amount of the judgment in favor of the plaintiff, and that this indebtedness was paid as it accrued by permitting the defendant to retain the amount of his salary out of collections made by him as an agent or traveling salesman of the garnishee; in other words, the mode of payment was to intrust the defendant with claims for collection, and to permit him to retain the amount of his salary out of the collections made. The writ operated to intercept debts owing by the garnishee to the defendant while the proceeding was pending; and any payment by the garnishee to the defendant on a debt accruing to the latter during the pendency of the proceeding was at the risk of the garnishee, and could not avail to defeat the lien of the writ. *Lady Ensley Furnace Co. v. Rogan & Co.*, 95 Ala. 594, 11 South. 188. The salary payable to the defendant was a debt subject to the writ; and that the mode of payment resorted to did not have the effect of releasing it from the lien of the writ is well shown by the ruling on a quite similar state of facts in the case of *Ely v. Blacker, Gerstle & Co.*, 112 Ala. 311, 20 South. 570. The court was not in error in overruling the garnishee's motion for a new trial.

Affirmed.

GRAMLING-SPALDING CO. et al. v. PARKER.

(Court of Appeals of Alabama. Nov. 28, 1911.)

1. ATTACHMENT (§ 377*) — WRONGFUL ATTACHMENT—CLIENT'S LIABILITY.

A plaintiff is not liable in exemplary or vindictive damages for procuring an attachment, if he acted in good faith, under advice of his attorney, who was on the ground at the place where the attachment was made.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1389-1392; Dec. Dig. § 377.*]

2. ATTACHMENT (§ 375*) — WRONGFUL ATTACHMENT—INJURY TO DEFENDANT.

In an action by a retail merchant against a wholesaler for wrongful attachment of land not connected with plaintiff's business, it was error to permit the jury to consider whether the attachment resulted in loss of customers to plaintiff.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1378-1385; Dec. Dig. § 375.*]

3. ATTACHMENT (§ 375*)—WRONGFUL ATTACHMENT—DAMAGES.

Plaintiffs can derive no right to recover for consequences not legally entering into their damages, though they are stated in the complaint; and hence, in an action for wrongful attachment, plaintiff cannot recover on the theory of loss of customers, though such loss was pleaded, where no loss could have been sustained, since the attachment was levied against land not connected with his business.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1378-1385; Dec. Dig. § 375.*]

4. ATTACHMENT (§ 375*)—WRONGFUL ATTACHMENT—RIGHT TO RECOVER.

A retail merchant can recover damages sustained to his credit by wrongful attachment, though the levy was upon land not connected with his business.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1378-1385; Dec. Dig. § 375.*]

Appeal from Circuit Court, Coosa County; S. L. Brewer, Judge.

Action by F. L. Parker against the Gramling-Spalding Company and others for damages for the suing out of an attachment and the levy of same upon and the sale of certain lands. Judgment for plaintiff in the sum of \$465, and defendants appeal. Reversed and remanded.

Lackey & Bridges and S. J. Darby, for appellants. Felix L. Smith and J. M. Chilton, for appellee.

DE GRAFFENRIED, J. The appellant is a wholesale shoe merchant residing in Atlanta, Ga., and appellee is a retail merchant who resides in Coosa county, Ala.

The appellee became indebted unto appellant for shoes sold him, and, being unable to pay the account, the appellant placed it in the hands of an attorney in Coosa county for collection. The attorney wrote appellee, demanding payment of the account, but heard nothing from him.

It appears from the undisputed evidence that appellee was a man of small means, and that his assets consisted principally of a stock of goods worth, according to his testimony, from \$1,000 to \$1,500, and a tract of land, consisting of 280 acres, which appears to have been sold by appellant under a venditioni exponas, and which brought at the sale \$105.

It further appears from the undisputed evidence that appellee was, prior to the time when the claim was placed in the hands of an attorney, and up to the time the attachment was sued out, pressed for money. He was writing to his creditors that times were hard with him, and asking for indulgence.

It further appears from the undisputed evidence that after the attorney received the claim for collection he received information that appellee was attempting to dispose of his land, and thereupon he prepared an affidavit, stating that appellee was about to fraudulently dispose of his property; that ap-

pellee was indebted to appellant in the sum of \$366.44; and that the attachment was not sued out for the purpose of vexing or harassing the appellee, or for any other improper motive, and forwarded it, along with the customary attachment bond, to his correspondent in Atlanta for the signature of appellant, and stated, at the time he sent the papers, "that Parker was trying to sell his real estate; that the real estate was the only property out of which the indebtedness could be realized; and that the attachment was necessary and proper." Thereupon appellant made the affidavit, which had been so prepared and forwarded, before a notary public in Fulton county, Ga., executed the bond, and returned the papers to the attorney in Coosa county. The attorney filed the papers with the circuit clerk, and a writ of attachment was thereupon issued and placed in the hands of the sheriff. The lands of appellee were levied upon, and, after a judgment was rendered in favor of appellant against appellee for the amount of its indebtedness, the lands were sold by the sheriff, for the satisfaction of the judgment, under the orders of the court in which the judgment was rendered.

It appears that appellant did not send its claim against appellee direct to the attorney in Coosa county, but delivered it to a collection agency or some attorney in Atlanta, who forwarded it in the usual course of business, for collection, to the attorney in Coosa county; but this fact has no bearing upon any question involved in this case.

This suit was brought by appellee against appellant for damages, both actual and vindictive, for the breach of said attachment bond. A judgment was rendered in favor of the appellee against appellant in the court below, and this appeal is prosecuted to reverse that judgment.

[1] 1. The law requires a party who desires to engage in the practice of law to undergo certain special training, and to be examined by certain specified officers, before he is permitted to engage in the practice of the profession, and he cannot then do so until he receives a license from certain designated courts. A lawyer is an officer of the courts, and as such is under oath to perform his duties in the manner required of him by the law. It would be difficult for justice to be administered through the courts without the aid of such officers, and as they are presumed to be learned in their profession, and are permitted by the law to hold themselves out to the public as reasonably qualified to meet the requirements of the courts in their efforts to orderly and properly administer the law, it is necessary that the citizens shall be protected, as far as justice will permit, when he is innocently led into error by the mistake of his counsel. For this reason, it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is the general rule that, in an action for malicious prosecution, the defendant makes out the defense of probable cause when he shows that he submitted all the facts within his knowledge, or which, by the exercise of reasonable diligence, he could have ascertained, relating to the matter, to a disinterested lawyer in good standing, and acted in good faith under the advice of such counsel and in accordance therewith. 26 Cyc. 34.

For the same reason, "if a claim in a distant locality be intrusted to a reputable attorney for collection, and that attorney informs his client that there is ground for suing out an attachment, and the creditor thereupon, at the attorney's request, furnishes sureties to him to make the bond, in the absence of other knowledge or information, vexatiousness or malice cannot be imputed to the creditor, and he is not responsible for exemplary or vindictive damages. In the absence of the actual ground for the issue of the attachment, the creditor would be liable for the actual damage done, but he would not be without probable cause for believing he had grounds for suing out the attachment, and therefore would not be liable for vindictive damages." *City National Bank v. Jeffries*, 73 Ala. 183.

It is evident from all the evidence in this case that this attachment was sued out because the attorney of appellant in Coosa county, who was on the ground and, presumptively, knew the law of the state of Alabama, advised appellant that the attachment "was necessary and proper." Appellant according to the record, knew nothing of appellee, except what it had gathered of him through his letters; and it is also evident from the record that when the claim was placed in the hands of its attorney in Coosa county it was so placed because appellee had neither paid nor secured the indebtedness, and that it was so placed in the hands of said attorney in the usual course of business. No agent of appellant gave this attorney any information with reference to the conduct of appellee, and it is evident that in signing the affidavit and executing the bond in the attachment proceeding appellant, a nonresident, having the right to rely upon the good faith, integrity, and legal knowledge of its counsel, did so solely on the faith of his advice. The fact that appellant received this information, not direct from the attorney, but through his correspondent in Atlanta, can make no difference. It signed the papers sent to it for its signature by the attorney in Coosa county, because that attorney advised that it was necessary and proper for such papers to be signed and forwarded to him. It had the right to presume that one learned in the law, and who was on the ground, had in his possession sufficient evidence to justify him in advising that the attachment was necessary and proper, and there is no tendency

in the evidence authorizing a contrary conclusion.

[2, 3] 2. In the present case, the levy was not made upon the stock of merchandise or any of the personal property of appellee, and there was therefore no interruption, by reason of such levy, of his business as a merchant. The attachment was only levied upon land. For this reason, we are unable to see how appellee, under any phase of the testimony, was entitled to any damages which it is claimed were suffered by him by reason of his loss of customers on account of the issuance of the attachment. As we have above stated, his goods and accounts were not disturbed, and it appears from the evidence that his mercantile business was continued by him up to the time of the trial. Damages for loss of customers cannot be legally traced to the mere suing out of an attachment and its levy upon land. In all cases in which suits were brought upon attachment bonds, and in which damages have been allowed for loss of customers in a mercantile business, there has been, by reason of the levy of the attachment, some active interference with the mercantile business of the defendant in attachment itself; and we can find no case in which damages for loss of custom have been allowed where there was no levy of the attachment, or merely a levy upon real estate.

It is true that the complaint alleges, as one of the elements of damage to appellee, the consequent loss to him of customers in his business; but that does not aid appellee in the matter. A plaintiff can derive no right to recover for consequences which cannot legally enter into his damages, although they are stated in the complaint. *Goldsmith, Forchheimer & Co. v. Picard*, 27 Ala. 149.

It seems to us that, where there is no levy upon the merchandise of a merchant, or any other sort of interference with his business as a merchant, it would be the broadest sort of speculation for a court to undertake to determine whether such merchant had lost customers on account of the issuance of such attachment.

[4] 3. If it be true, as claimed in the complaint, that appellant suffered damage to his credit by the wrongful suing out of the attachment, he is entitled to recover such damage, although the levy of the attachment was only upon land. The credit of a merchant, his standing in the mercantile world—in short, his reputation for honesty, promptness, and all those qualities which render his business desirable to other merchants—is a valuable asset, and when that credit is injured or destroyed by the wrongful suing out of an attachment this constitutes an element of actual damages, for which a recovery may be had on the attachment bond, whether there is a levy or not. *Flournoy & Epping v. Lyon & Co.*, 70 Ala. 308.

The court on the trial of this case permitted the jury to consider, in passing upon appellee's damages, the subject of vindictive damages, and also the question as to whether the suing out of the attachment had resulted in loss of customers to appellee, and, in our opinion, the court erred in so doing.

For the error pointed out, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

McGUIRE v. STATE.

(Court of Appeals of Alabama. Nov. 30, 1911.)

1. WITNESSES (§ 333*)—IMPEACHMENT—GENERAL BAD CHARACTER.

A witness may be impeached by mere proof of general bad character, but such proof is admissible only for purpose of impeachment.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 333.*]

2. WITNESSES (§§ 337, 380*)—IMPEACHMENT—GENERAL BAD CHARACTER.

Accused, who testified in his own behalf, may be impeached by proof that he has been convicted of crime involving moral turpitude, that he has made contradictory statements, or that he is a person of general bad character; but the proof of general bad character must be limited for purpose of impeachment.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1113, 1129-1132, 1214; Dec. Dig. §§ 337, 380.*]

3. WITNESSES (§ 318*)—IMPEACHMENT—GENERAL BAD CHARACTER.

Where accused testified in his own behalf, affirmative evidence of his general bad character can only be considered with the other evidence in passing on the question of his guilt, and cannot be considered in passing on the question of his credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1084-1086; Dec. Dig. § 318.*]

4. CRIMINAL LAW (§ 673*)—TRIAL—INSTRUCTIONS—APPLICABILITY OF EVIDENCE.

Where evidence is admissible for one purpose only, the instructions should restrict it to such purpose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872-1876; Dec. Dig. § 673.*]

5. CRIMINAL LAW (§ 783*)—TRIAL—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

Where accused testified in his own behalf, and the state introduced evidence of his general bad character, a charge that the law does not hold that a man of bad character cannot tell the truth, but does hold that a man of bad character is more apt to violate the law and to testify falsely than a man of good character, was objectionable as leading the jury to believe that they could consider the impeaching testimony, not only on the question of accused's credibility as a witness, but on the substantive question of his guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1872-1876; Dec. Dig. § 783.*]

6. CRIMINAL LAW (§ 783*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Where the court so charged that the jury may have believed that they could consider the testimony of the state as to the general bad character of accused testifying in his own be-

half, not only on the question of his credibility, but on the substantive question of his guilt, the refusal to charge that accused's character was not involved further than in considering the weight of his testimony was erroneous.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 783.*]

Appeal from Circuit Court, Tallapoosa County; A. H. Alston, Judge.

Harve McGuire was convicted of violating the prohibition law, and he appeals. Reversed and remanded.

Riddle, Ellis, Riddle & Pruett, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. [1] In the case of Ward v. State, 28 Ala. 53, Mr. Justice, afterwards Chief Justice, Stone in an able dissenting opinion states that, to preserve the harmonies of the law, evidence as to character introduced for the purpose of impeaching a witness should be confined to general evidence affecting his credit for veracity, and that evidence of the general bad character of the witness should not be allowed. The majority of the court, however, held that the law makes no such restriction, but allows a broader inquiry into general character. The broader inquiry is allowed, not that the jury may consider such evidence of general bad character of a witness for any purpose other than for the purpose of ascertaining the weight to be given his testimony, but because "it would be unjust that a witness who has made no general character as to truth, but whose general character is notoriously bad and infamous, should find protection by a restriction which might enable him to obtain equal credit with a man of unsullied general character." Rice, O. J., in Ward v. State, supra.

The above case has, since its rendition, been uniformly followed, and the settled rule in Alabama is that, for the purpose of impeaching a witness, general bad character simply may be proved, without asking the further question of the impeaching witness, if he would believe him on oath in a court of justice. Byers v. State, 105 Ala. 31, 16 South. 716.

[2] A defendant who testifies as a witness in his case may be impeached in the same manner as other witnesses by showing that he has been convicted of crime involving moral turpitude, that he has made contradictory statements, or that he is a person of general bad character. Thompson v. State, 100 Ala. 70, 14 South. 878. While the above is true, the evidence of general bad character of a witness is, of course, as above stated, admissible for the purpose of impeachment, and for no other purpose; and, as the general bad character of a de-

fendant who has not offered previous evidence of his general good character can only be introduced by the prosecution when the defendant testifies in his case as a witness, such evidence of the general bad character of the defendant is admissible for the purpose of impeaching him as a witness and for no other purpose.

[3] When a defendant testifies as a witness in his own behalf, and then offers, affirmatively, evidence of his general good character, such evidence cannot be considered by the jury to support or sustain the testimony given by him; for in such a case the jury can only consider his testimony as if there was no evidence of his general good character. In other words, under such a state of facts, the evidence of the general good character of the defendant can only be considered by the jury, along with the other evidence in the case, in passing on the question of the guilt vel non of the defendant, and cannot be considered by them in passing on the question as to his credibility as a witness, and charges to that effect will be upheld. *Gibson v. State*, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96.

[4] The sum and substance of the whole matter is that, when evidence is admissible for one purpose and one purpose only, justice requires that it shall be restricted to the purpose for which it is admitted. *Williams v. State*, 81 Ala. 1, 1 South. 179, 60 Am. Rep. 133.

[5] In the present case the defendant testified as a witness in his own behalf, and offered no evidence tending to show that he was a man of general good character. The state then introduced evidence of his general bad character, which, under the authorities above cited, was admissible for the purpose of affecting his credibility as a witness. The defendant, while this evidence was being introduced, undertook to induce the court to limit the testimony on the subject of his general bad character for truth and veracity, but the court refused to so limit the testimony, and in this the court committed no error. *Ward v. State*, supra; *Byers v. State*, supra.

In its oral charge to the jury the court, on the subject of the defendant's character, used the following language: "Several witnesses have been introduced by the state who have testified that the defendant is a man of bad character. I recall no witness offered by the defendant to rebut this testimony by undertaking to prove a good character for the defendant. Gentlemen, the law does not say that a man of bad character can't or won't tell the truth, but does hold that a man of bad character is more apt to violate the law, more apt to testify falsely than a man of good character. The test is whether or not this witness has testified truthfully or falsely. In this

case you, and you only, can determine that by looking at all the evidence and all the circumstances surrounding the whole transaction." The defendant excepted to the above part of the oral charge of the court as a whole, but, as it was certainly good in part, the exception was not well taken. *Alston v. State*, 109 Ala. 51, 20 South. 81. The charge certainly had a misleading tendency because from the expression that the law "does hold that a man of bad character is more apt to violate the law," considered in connection with the other parts of the charge, the jury may have inferred, and probably did infer, that they had the right to consider the impeaching testimony, not only on the question of defendant's credibility, but on the substantive question of the probability of his guilt.

[6] Before the jury retired, the defendant requested the court, in writing, to give the following charge to the jury: "I charge you that the defendant's character is not involved in the decision in this cause further than in considering how much weight you may give the defendant's evidence." We have frequently held that the trial court will not be reversed because of an elliptical expression in its oral charge, or because such a charge might possess a misleading tendency, but that the remedy of the party aggrieved is to ask an explanatory charge. *B. R. L. & P. Co. v. Murphy*, 58 South. 817. The above charge requested by the defendant constituted an effort on his part to have the misleading tendency of the quoted portion of the oral charge corrected, and while the charge, under circumstances not presented by this record, might have been refused, nevertheless, in view of all the evidence in this case and of the misleading tendency of the oral charge of the court as to the effect of the evidence of the bad character of the defendant, we are of the opinion that the charge should have been given to the jury.

We have considered all the other questions presented by the record, and they are without merit.

For the error pointed out, this case is reversed and remanded.

Reversed and remanded.

HIGDON et al. v. FIELDS.

(Court of Appeals of Alabama. Nov. 30, 1911.)

1. PLEADING (§ 8*)—FACTS OR CONCLUSIONS—DUTY OWED BY DEFENDANT.

Where the gravamen of an action is the nonfeasance or misfeasance of defendant, the complaint must allege the facts out of which a duty owed by defendant to plaintiff arises, though a breach of the duty so shown may be averred by a general allegation.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 12-28½; *Dec. Dig.* § 8; *Negligence*, Cent. Dig. § 182.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. SHERIFFS AND CONSTABLES (§ 106*)—FAILURE OF SHERIFF TO LEVY WRIT OF ATTACHMENT—LIABILITY.

To put a sheriff under a duty to make a levy in attachment, it must appear that defendant owned property subject to levy, which the sheriff would have found with diligence.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 176, 178; Dec. Dig. § 166.*]

3. SHERIFFS AND CONSTABLES (§ 137*)—FAILURE OF SHERIFF TO LEVY ATTACHMENT—LIABILITY—PLEADING.

A complaint, in an action against a sheriff for failing to levy an attachment, which alleges that the sheriff could have levied the writ on the property of the defendant named therein in a designated county, and which does not show that such defendant had any property subject to levy, is demurrable for failing to show that the sheriff was under a duty to plaintiff to make a levy.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 280-289; Dec. Dig. § 137.*]

Appeal from Circuit Court, Jefferson County; E. C. Crow, Judge.

Action by W. M. Fields against E. L. Higdon and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

A. Leo Oberdorfer, for appellants. Bowman, Harsh & Beddow, for appellees.

WALKER, P. J. [1] In view of the emphatic declarations accompanying the announcement of recent rulings on the subject, it is not believed that anything more than a reference to some of the controlling authorities is called for in stating the propositions, that, when the gravamen of the action is the alleged nonfeasance or misfeasance of another, the complaint must show the existence of a relation between the parties out of which arises a duty owing from the defendant to the plaintiff, and that the modern practice of recognizing that a breach of the duty so shown may sufficiently be averred by the use of general and informal allegations of negligence, constituting the default complained of, amounting to little, if any, more than statements of the pleader's conclusions on the subject, has not been so extended as to have application in the matter of pleading the existence of the duty claimed to have been breached, but that in this matter of alleging that the defendant owed the plaintiff a duty appropriate averments of the facts or circumstances out of which the duty springs are required, leaving it for the court to determine from the facts set out what, if any, duty is shown by the averments to have been owing by the defendant to the plaintiff, a statement of the pleader's conclusion on this subject not being regarded as sufficient. *Tennessee Coal, Iron & R. Co. v. Smith* (Sup.) 55 South. 170; *Republic Iron & Steel Co. v. Williams*, 168

Ala. 612, 53 South. 76; *Alabama Consolidated C. & I. Co. v. Hammond*, 156 Ala. 253, 47 South. 248; *Leach v. Bush*, 57 Ala. 145.

The demurrers to the complaint in this case raised the question of the sufficiency of its averments to show the existence of a duty owing by the sheriff to the plaintiff to make a levy under the writ of attachment mentioned.

[2] To put a sheriff under a duty to make a levy under such a writ, something more must be shown than the mere fact that it came to his hands. He was under no duty to make a levy under it unless the defendant in the writ owned, or at least was in possession of, property legally subject to be levied on, and which the sheriff would have found if he had been duly diligent. Unless there was property subject to levy within reach of the sheriff, and which, by the exercise of reasonable diligence, he could have found, he could have been guilty of no neglect of duty in not levying. *Governor v. Campbell*, 17 Ala. 566. *Smith, Stewart Co. v. Castellow*, 88 Ala. 355, 6 South. 750, was an action against the sheriff and the sureties on his official bond for his failing to make the money on an execution. The expressions contained in the opinion delivered in that case indicate that the court recognized the necessity of the complaint in such an action specifically averring that the execution debtor had property subject to execution; but it was held that the complaint in that case was not subject to demurrer on that ground, because it alleged the actual levy of the execution on a house and lot as the property of the defendant; the court regarding that his act in making such levy involved an admission by the sheriff of the fact of ownership by the debtor of the property levied on and that it was subject to levy.

[3] The complaint in the present case shows that no levy of the writ of attachment was made, and does not show that the defendant in the writ had any property subject to levy. Its averment to the effect that the sheriff could have levied the writ on the property of the defendant in Jefferson county does not amount to an averment that the defendant had property in that county subject to levy under the writ. In the absence of any averments in the complaint showing that the defendant in the attachment had property which could have been found and levied on by the sheriff, we are of opinion that it fails to show that the sheriff was under the duty to the plaintiff to make a levy, and that the demurrer raising this objection to the complaint should have been sustained. *State v. Roberts*, 12 N. J. Law, 114, 21 Am. Dec. 62; *Montgomery v. State*, 53 Ind. 108; 35 Cyc. 1978.

Reversed and remanded.

MONTGOMERY COOPERAGE CO. v. CARTER et al.

(Court of Appeals of Alabama. Dec. 1, 1911.)

LOGS AND LOGGING (§ 3*)—CONVEYANCES—CONSTRUCTION.

Defendants conveyed to plaintiff certain timber rights, the title to which defendants agreed to warrant and defend for 32 months. The deed further provided that defendants agreed to sell all timber suitable to making barrel staves and headings, which should be selected by plaintiffs and should be paid for at a stipulated price after deducting the above-mentioned payment. *Held* that, conceding that the original payment was merely an advance, plaintiffs, though they had not during the life of the contract cut enough timber to recoup themselves for the advance payment, could not recover it back, if there was upon the land timber of the aggregate value of the payment.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

Assumpsit by the Montgomery Cooperage Company against J. D. and F. C. Carter. Judgment for defendants, and plaintiff appeals. Affirmed.

The following is the deed referred to in the opinion: "State of Alabama, Marengo County. Know all men by these presents, that we, J. D. Carter and wife, Nora Carter, F. C. Carter and wife, Anna Carter, for and in consideration of \$500.00, in hand paid us by the Montgomery Cooperage Company, a corporation of Montgomery county, with its principal office in Montgomery county, receipt of same is herein acknowledged, together with other considerations hereinafter mentioned, we grant, bargain, sell, and convey, and covenant with the said Montgomery Cooperage Company, all our right, title, and interests in and to the following described stumpage standing and growing on the following lands, to wit, and following conditions: S. W. $\frac{1}{4}$ of fractional section 7, containing 58 acres; N. E. $\frac{1}{4}$ of fractional section 13, containing 90 acres; S. $\frac{1}{2}$ of section 17, containing 320 acres; N. E. $\frac{1}{4}$ of section 18, containing 160 acres; S. $\frac{1}{2}$ of section 16, containing 320 acres—all in township 15, range 1 east, containing in all 950 acres, more or less. In consideration whereof, we, J. D. Carter and wife, Nora Carter, F. C. Carter and wife, Anna Carter, agree to sell the Montgomery Cooperage Company, all the white oak, cow oak, over cup oak, red oak, water oak, willow oak, cypress, and ash that is suitable for making tight barrel staves and headings. And the said Montgomery Cooperage Company shall be the judge, and the sole judge, of such trees that will make tight barrel staves and headings, at the price and sum of \$1.50 per M pieces, staves and headings, for such staves and headings as will make tight barrel, to

be paid for as cut and shipped, after deducting the above-named five hundred dollars, then and thereafter to be paid for as cut and shipped as heretofore mentioned. To have and to hold, we warrant and defend the title of above-mentioned stumpage to the said Montgomery Cooperage Company for a period of 32 months from date hereof, as against all lawful claims from any person or persons whomsoever, together with the right of ingress, egress, or regress, together with the rights to make such roads as the Montgomery Cooperage Company may deem proper to do so, over or across said lands and all other lands owned by us, for the purpose of cutting or removing said stumpage. Given under our hands and seals this the 1st day of May, 1907. J. D. Carter. Nora Carter. F. C. Carter. Anna Carter. Witnesses: I. E. Boyett, W. E. Buckenridge." This deed was duly acknowledged and recorded.

The receipt referred to is as follows: "Received of J. C. Tolbert, by the Montgomery Cooperage Company of Montgomery, Ala., \$162.78, being part of the \$500.00 advanced to us by the Montgomery Cooperage Company on stumpage contract of May 1, 1907, and by mutual consent we have charged the Montgomery Cooperage Company with said account, and credited said Tolbert's account with the \$162.78 above mentioned, said amount to be charged up against stumpage contract of May 1st. [Signed] J. D. Carter and Brother."

Chambliss Keith, for appellant. I. I. Canterbury, for appellees.

PELHAM, J. The appellant sued as plaintiff in the court below for money due by account and for money had and received. The case was tried on the plea of the general issue interposed by the appellees, and resulted in the general charge being given by the trial court in favor of the appellees, the defendants below. The trial court's action in giving the general charge in favor of the appellees, and in refusing a like charge in behalf of the appellant, plaintiff below, is assigned as error.

It is the appellant's contention that the receipt given on or about the 28th day of November, 1907, should be taken and construed in connection with the deed conveying the timber executed May 1, 1907, and that when so taken and construed in connection with the deed the \$500 paid under the terms of the deed will be deemed to be merely an advance of that amount on account of certain timber to be cut at the rate of \$1.50 per thousand. (The reporter will set out the deed dated May 1, 1907, and the receipt given November 28, 1907, in the statement of the facts of the case.)

The deed, or contract of sale, is an abso-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lute conveyance of certain timber by the appellees to the appellant for a consideration of \$500, providing that all over \$500 worth of a certain kind of timber designated in the contract, at the rate of \$1.50 per thousand, which is cut by appellant, shall be paid for at the designated price as cut and shipped. The contract, or conveyance, contains no warranty that there is sufficient timber of the kind designated, at the price stipulated per thousand, to amount to the price paid, to wit, \$500; nor does it contain any stipulation for return of any part of the purchase price paid as a cash consideration, if there is not sufficient timber of the kind designated to amount to the price paid at the stipulated price. But even though the receipt, construed in connection with the conveyance, warranted such a construction as contended for by appellant, and the \$500 paid as a cash consideration should be considered and held to be an advancement made by the appellant, it could not recover any part of it from the appellees, as due by account or for money had and received, if during the term or life of the contract there was a sufficient quantity of the designated timber on the land at \$1.50 per thousand to amount to the sum of \$500, the stipulated price. For aught that appears from the testimony, there may have been a sufficient amount of the timber at \$1.50 per thousand to aggregate the total amount paid of \$500, which appellant negligently failed or purposely refused to cut during the term of the contract. There was no proof whatever offered on the trial to show that there was not timber of the designated kind on the land sufficient to aggregate \$500 at \$1.50 per thousand. True, the appellant was to be the judge of the suitability of the timber for the purpose for which it was purchased; but it was not shown but that there was such timber on the land during the period that the contract was in force which the appellant deemed suitable and purposely did not avail itself of the right of using.

The \$500 was undisputedly paid for certain timber on certain land, and if the timber was there in sufficient quantity at the agreed price to aggregate the amount paid, and was not cut or used by appellant through no fault of the appellees, then no part of the \$500 paid by the appellant to the appellees could be recovered in this suit. The appellant testified that "the staves and headings cut under said contract amounted to \$168.61"; but how much more timber was on the land suitable for cutting, even in the judgment and discretion of the appellant, for staves and headings, does not appear from the evidence. The bill of exceptions purports to set out all of the evidence; but, for anything that appears to the contrary, there may have been more than sufficient timber, at the agreed price, to amount

to the purchase price of \$500, and, if so, then, even if we construe the deed and receipt together, and consider the price paid as an advance at so much per thousand for the timber, as is the appellant's contention, yet it would not be entitled to recover back from the defendants any part of the purchase price paid them, in the absence of all proof that there was not sufficient timber of the designated kind on the land to amount in the aggregate to \$500 at \$1.50 per thousand feet.

Viewing the evidence in the most favorable light to the appellant, and giving the contract and receipt the construction contended for by it, the appellant would still be without right to recover, and the court committed no error in giving appellees the general charge. It follows that there was no error in refusing the general charge in behalf of the appellant, and the case will be affirmed.

Affirmed.

HANKINSON v. STATE.

(Court of Appeals of Alabama. Dec. 19, 1911.)

INDICTMENT AND INFORMATION (§ 110*)—LANGUAGE OF STATUTE—HOMICIDE.

An indictment for an assault with intent to murder is sufficient, if it follows the exact language of the Code form.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

Appeal from Criminal Court, Jefferson County; M. Frank Cahalan, Judge.

John Hankinson was convicted of an offense, and he appeals. Affirmed.

Frank S. Address, for appellant. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. The indictment in this case is in the exact language of the form prescribed by the Code for an indictment for an assault with intent to murder. It was, therefore, not subject to the demurrer which the defendant interposed to it. "We have made very many rulings on the sufficiency of the forms of indictment furnished in the several Codes. 'When the Legislature, either in the body of the statute, or in a prescribed form, declares what shall be a sufficient indictment, such legislative direction is pronounced controlling, and an indictment pursuing such form will be pronounced good.' *Smith v. State*, 63 Ala. 55; *McCullough v. State*, 63 Ala. 75; *Wilson v. State*, 61 Ala. 151. 'An indictment conforming to the form prescribed by the Code is sufficient, though matters of substance are omitted.' *Weed v. State*, 55 Ala. 13. See, also, 3 Brick. Dig. 280, § 459, where it is affirmed that indictments conforming to the form prescribed by the Code are sufficient,

whether charging a felony or a misdemeanor." *Ballay v. State*, 99 Ala. 143, 13 South. 568.

There is no error in the record, and the judgment of the court below is affirmed.
Affirmed.

LONG v. STATE

(Court of Appeals of Alabama. Nov. 20, 1911.)

1. CRIMINAL LAW (§ 1091*)—APPEAL AND ERROR—BILL OF EXCEPTIONS—NECESSITY.

The refusal of accused's motion to exclude the statement of a witness will not be reviewed, where the bill of exceptions does not show that the statement was not made in answer to a question, and that the question had been objected to.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1091.*]

2. CRIMINAL LAW (§ 415*)—EVIDENCE — ADMISSIBILITY.

In a prosecution for homicide, an objection by the state to a question propounded by defendant to his witness as to what the witness said to deceased and what deceased said to the witness, after the difficulty was over and at a place other than that at which the fatal blow was struck, concerning a knife which deceased held in his hand, was properly sustained; there being no showing that the statement by deceased was so connected with the difficulty as to make it a part of the *res gestæ*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 937-949; Dec. Dig. § 415.*]

3. CRIMINAL LAW (§ 1091*)—APPEAL AND ERROR—EXCEPTIONS.

Where the bill of exceptions failed to show that accused's objection to and motion to exclude a statement by the solicitor in his closing argument to the jury was taken or reserved pending the trial and before the jury had retired, the error cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1091.*]

4. CRIMINAL LAW (§ 728*)—TRIAL — ARGUMENTS OF COUNSEL.

Objections to and motions to exclude statements of counsel must be made during trial and before the jury has retired.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689-1691; Dec. Dig. § 728.*]

Appeal from Law and Equity Court, Lee County; Lum Duke, Judge.

Lee Long was convicted of manslaughter in the second degree, and he appeals. Affirmed.

Barnes & Denson, for appellant. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

WALKER, P. J. [1] From anything that appears from the bill of exceptions, the statement of Lucius Pope, a witness for the state, that "I saw the place where the knife stabbed him," may have been in response to a question clearly seeking to elicit such a statement. It not appearing that the question calling for the statement was objected to, it cannot be said that the defendant was

entitled to have his motion to exclude that statement sustained, conceding that the testimony would have been subject to objection duly interposed.

[2] The court was not in error in sustaining the objection to the question of the defendant to his witness Blackmore: "What did you say to him, and he to you, at O'Grady's store, after the difficulty was over, about the knife in his hand?" What the witness may have said to the deceased sometime after the difficulty, at a place other than that at which the difficulty occurred, clearly was not admissible over the objection duly interposed by the state to such evidence; nor was it made to appear that the statement of the deceased which was called for by the question was so connected in time and place with the difficulty to which it referred as to constitute it a part of the *res gestæ* of the occurrence which was under investigation.

[3, 4] It does not appear from the bill of exceptions that the defendant's objection to, or his motion to exclude, a statement made by the solicitor in his closing argument to the jury, was taken or reserved pending the trial, or before the jury had retired to consider its verdict. For anything disclosed by the record, both the objection and the motion to exclude may not have been made until after the jury had retired, and, if so, they were too late. *Donahoo & Matthews v. Tarrant*, 55 South. 270; *Moore v. State*, 40 South. 345.¹

Affirmed.

JONES v. STATE

(Court of Appeals of Alabama. Nov. 30, 1911.)

CRIMINAL LAW (§ 1036*)—APPEAL—REVIEW — INSUFFICIENCY OF EVIDENCE—QUESTION NOT RAISED BELOW.

The question of the evidence of the corpus delicti having been insufficient cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2641; Dec. Dig. § 1036.*]

Appeal from Macon County Court; M. B. Abercrombie, Judge.

Robert Jones was convicted of crime, and appeals. Affirmed.

O. S. Lewis, for appellant. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. The defendant was indicted and convicted of petit larceny, and appeals.

The bill of exceptions fails to show that the defendant reserved any question for our consideration, except the action of the trial court in refusing to allow him to introduce

¹ Reported in full in the Southern Reporter; reported as a memorandum decision without opinion in 146 Ala. 687.

certain evidence which was manifestly irrelevant. He now insists that he is entitled to a reversal, because, he says, there was not sufficient evidence introduced on the trial tending to establish the corpus delicti to warrant the submission of the case to the jury. In the case of *Woodson v. State*, 54 South. 191, the Supreme Court of Alabama, speaking on this subject, says: "Where the evidence is deemed insufficient to warrant a conviction, a ruling of the trial court on that proposition must be properly (usually by special instructions requested) invited, in order to invoke or justify a review of the question, as raised below, by this appellate court." In the present case, as in the *Woodson Case*, supra, the trial court had jurisdiction of the subject-matter and of the person, and, the judgment being grounded in a verdict accurately responding to the indictment, the adjudication of guilt and the sentence therefor cannot be void, even if there was not sufficient evidence of the corpus delicti to warrant the submission of the case to the jury. Having failed to reserve an exception in any manner to the action of the trial court on the subject, the defendant has presented nothing to us for review. *Woodson v. State*, supra.

The judgment of the court below is affirmed.

Affirmed.

B. J. WOLFE & SONS v. McKEON.

(Court of Appeals of Alabama. Dec. 21, 1911.)
CORPORATIONS (§ 336*)—OFFICERS—PERSONAL LIABILITY—ULTRA VIRES ACTS.

Where the president of a corporation signed the corporate name to an accommodation note, which the corporation had no power to execute, under a mistake as to the corporation's powers, and without any intention of making himself liable personally, he would not be so liable.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 336.*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by B. J. Wolfe & Sons against J. T. McKeon. From a judgment for defendant, plaintiffs appeal. Affirmed.

It was admitted that the Gamma Transportation Company, by J. T. McKeon, its president, executed the note to the plaintiffs, and that the Bay City Lumber Company, by Joe. T. McKeon, president, indorsed said note, and it was further admitted that it was an accommodation indorsement, and that the Bay City Lumber Company was a manufacturing corporation organized in 1897, and had no authority to enter into such contract of indorsement. It was further admitted that the plaintiffs had filed their suit against the Gamma Transportation Company as maker and the Bay City Lumber Company

as indorser, and that the Bay City Lumber Company had filed a plea setting up want of authority to enter into a contract, and that the contract was ultra vires and void, that judgment had been rendered for the Bay City Lumber Company.

McMillan & Grayson, for appellants. Stevens & Lyons, for appellee.

WALKER, P. J. The appellee was sought to be charged individually on an accommodation indorsement made in the name of the Bay City Lumber Company, a corporation, by him as its president. The indorsement did not bind the corporation because of its lack of power to become an accommodation indorser (the complaint containing allegations to this effect), and it did not purport to bind the appellee individually. The action was in contract, and, so far as the evidence showed, the facts were known to both parties. In the making and acceptance of the indorsement there was a mere mistake of law as to the capacity of the corporation in the name of which the indorsement was made to bind itself by such a contract. In case of such a mistake of law as to the liability of the principal, the fact that it cannot be bound is no ground for charging the agent, whose connection with the attempt to make the contract was obviously in his capacity as agent. *Schloss & Kahn v. McIntyre*, 147 Ala. 557, 41 South. 11; *Ware, Murphy & Co. v. Morgan & Duncan*, 67 Ala. 468; 31 Cyc. 1550.

Affirmed.

BANKS v. STATE

(Court of Appeals of Alabama. Dec. 21, 1911.)

1. CRIMINAL LAW (§ 584*)—CONTINUANCE—STATUTORY RIGHTS.

Where one charged with crime at a jury term of the court, created by Loc. Acts 1907, pp. 369-377, providing for a jury trial, when demanded by accused, at the first regular term of the court at which the case is triable, and that when a jury is demanded the court must continue the case to the next jury term, demands and receives a jury trial, he cannot complain of the refusal to continue the case to the next jury term; the purpose of the act being to secure to accused, making a demand therefor, a jury trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 584.*]

2. CRIMINAL LAW (§§ 586, 1151*)—RULINGS ON APPLICATIONS FOR CONTINUANCE—DISCRETION—REVIEW.

Rulings on applications for a continuance rest largely within the discretion of the trial court, and, in the absence of an abuse of discretion, they will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1811, 3045-3049; Dec. Dig. §§ 586, 1151.*]

3. CRIMINAL LAW (§ 1038*)—INSTRUCTIONS—REVIEW—OBJECTIONS—EXCEPTIONS.

In the absence of an objection or exception reserved in the trial court to the manner in

which a written requested charge by accused was given, or to the judge's failure to make the customary indorsement on it, the court's action is not available on review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.*]

4. TRESPASS (§ 81*)—CRIMINAL RESPONSIBILITY—NOTICE—REQUISITES.

The warning required by statute to support a conviction of trespass implies a notice to accused not to go on the premises; and the testimony of prosecutor, that within six months of the commission of the offense he told accused to stay off the premises, and that he told accused several different times to do so, shows a sufficient warning.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 171; Dec. Dig. § 81.*]

Appeal from Clarke County Court; Thomas W. Davis, Judge.

John Adam Banks was convicted of trespass, and he appeals. Affirmed.

The evidence for the state tended to show that within six months prior to the time the offense was committed Green had told the defendant to stay off the land; that he had told the defendant several different times to stay off the land, but that defendant had gone on his land with a wagon, and had cut some bushes with an ax along the road; and that the road was not a public one, but was an old private road along the prosecutor's land.

Travis J. Bedsole, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. The act creating the county court of Clarke county (Local Acts of Alabama 1907, pp. 369-377) provides (section 7) for a trial by jury when the person standing charged before the court with a misdemeanor makes a demand for a jury trial "at the first regular term of said court at which said case is triable." Section 6 of the act provides for regular terms of the court on the third Monday in each month of the year, and that the regular terms in each January and July shall be for the trial of jury cases. Section 8 provides that when a jury trial is demanded by the defendant the court must make an order continuing the case to the next jury term.

The bill of exceptions in this case states that the defendant, before proceeding to trial, moved the court to quash the affidavit and warrant upon which the defendant was brought before the court, which motion was granted. Another affidavit was made and warrant issued, upon which the defendant was tried. The defendant, upon being arraigned on the charge thus preferred, demanded a trial by jury, and moved for a continuance of the cause, upon the ground that it was a new case. The court overruled the motion, and the defendant duly excepted. This proceeding was had during the regular jury term of the court in July, and the de-

fendant was put upon his trial and given a trial by jury.

[1] The manifest purpose and legislative intent of the provisions of the statute referred to is to secure to a defendant, making a seasonable demand therefor, a trial by jury; and the provisions of section 8 of the act, requiring an order of continuance "to the next jury term of said court" when a demand has been made for a jury trial, could have had no other purpose than to secure a continuance to such a time as the defendant could be accorded a trial by jury, and has application, as referable to continuances, to a demand being made at one of the many terms of the court provided for when no jury was in attendance on the court, and no opportunity for a jury trial to be had at that term. The defendant, being charged at a jury term with the commission of an offense, and demanding a trial by jury, receives all the benefit intended to be conferred upon him by statute when he is accorded a jury trial; and the provisions of the statute in his behalf and the legislative intent is fully accomplished by giving him such trial.

[2] Whether or not the defendant was entitled to a continuance for the purpose of preparing a defense, having his witnesses summoned, etc., was largely a matter of discretion with the trial court; and the record shows no abuse of the discretion. *Murph v. State*, 153 Ala. 67, 45 South. 208; *Kelly v. State*, 160 Ala. 48, 49 South. 535.

[3] No objection was made or exception reserved to the manner in which the written charge requested by the defendant was given to the jury, or for failure of the judge to make the customary indorsement on it; and, the charge having been given, the court's action in these particulars, urged by appellant in brief as error, in the absence of an objection or exception reserved below, is not available on review. *Jenkins v. State*, 82 Ala. 25, 2 South. 150.

[4] The evidence was sufficient to support a finding of guilty of the offense charged. The previous warning required by the statute to support a conviction implies a notice to the defendant not to go upon the premises. The notice testified to by the state's witnesses constituted a sufficient warning. *Motes v. Bates*, 74 Ala. 374, 378; *Owens v. State*, 74 Ala. 401.

No reversible error is shown by the record, and the case will be affirmed.

Affirmed.

V. J. FORRESTER & BRO. v. J. A. MAY CO. (Court of Appeals of Alabama. Dec. 19, 1911.)

1. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

In an action for the conversion of property which defendant claimed was sold to him by a witness for plaintiff, the witness having, on

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key Ne. Series & Rep'r Indexes

his direct examination, admitted a conversation with defendant, but denied the sale, it was proper for defendant to cross-examine him as to the details of the conversation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 268.*]

2. WITNESSES (§ 372*)—CROSS-EXAMINATION BY.

In an action for the conversion of property which defendant claimed to have purchased from a witness for plaintiff, but which the witness denied, and testified to a sale to plaintiff, questions propounded by defendant to the witness on cross-examination, tending to elicit answers showing that plaintiff agreed to pay the witness more for the property than defendant claimed to have contracted to pay, were not improper, as they tended to show a motive or interest on the part of the witness to claim that no sale had been made to defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.*]

3. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR.

The exclusion of testimony later admitted is harmless, if erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200-4206; Dec. Dig. § 1058.*]

4. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

A question merely calling for a detail of a matter to which a witness had deposed on his direct examination is not improper cross-examination.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 268.*]

5. WITNESSES (§ 240*)—LEADING QUESTIONS. Leading questions are improper upon the direct examination of a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 837-839, 841-845; Dec. Dig. § 240.*]

6. TRIAL (§ 74*)—OBJECTIONS.

Where the form of a question did not indicate either that it sought to elicit illegal evidence, or what response the witness was expected to make, an objection to the question was properly overruled, since, if the answer was considered irrelevant or improper, the remedy was to object thereto and reserve an exception.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 74.*]

7. TROVER AND CONVERSION (§ 37*)—EVIDENCE—ADMISSIBILITY.

In an action for the conversion of goods, defendant claimed that he purchased the goods from the person who afterwards sold them to plaintiff, and that the seller put him in possession of the goods, upon the agreement that defendant would pay the price when they reached a nearby town, evidence of defendant's tender of the purchase price at the proper time and place was admissible to rebut a contention that the seller rescinded for nonpayment of the price.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 37.*]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by V. J. Forrester & Bro., for the use of Grimsley Bros., against the J. A. May Company. From a judgment for defendant, plaintiff appeals. Affirmed.

B. F. Reid, for appellant. Pace & Lee, for appellee.

WALKER, P. J. The property alleged to have been converted had belonged to V. J. Forrester & Bro., who made a conditional sale of it to Shinholster Bros.; the contract of sale providing that no title to the property should pass to the purchasers until they had fully performed the terms of the contract. The claim of the plaintiffs (appellants here) to the property rests upon an alleged sale by Forrester & Bro. of their interest in the property, after the death of a member of the firm of Shinholster Bros. and the failure in business of that firm; while the contention of the appellee is that, before that alleged sale was made, it had already purchased from Forrester & Bro. their interest in the property. The case turns upon the inquiry whether what occurred between W. H. Forrester, a member of the firm of Forrester & Bro., and J. A. May, representing the appellee, on the occasion of an interview between them at Shinholster Bros.' mill, amounted to a sale to the appellee by Forrester & Bro. of their interest in the property. [1] According to the testimony of W. H. Forrester, examined as a witness for the plaintiffs, he offered to sell the property for cash, but when May said that he did not have the money there the witness "then told him it was all off then." On the other hand, the testimony offered by the defendant tended to show that a sale was then consummated; the price being agreed upon and the property delivered, under an agreement that the price would be paid on the return of May to town. Plainly there was no merit in the objections made to questions asked the witness Forrester, on his cross-examination, as to the details of the conversation between him and May, in reference to which the witness had testified.

[2] The questions asked the same witness on his cross-examination, in reference to the plaintiffs paying him more for the property than the defendant claimed to have agreed to pay for it, were not subject to the objections interposed to them, as they had a tendency to disclose a motive or interest on the part of the witness to claim that a sale of the property to the defendant had not been made.

[3] Without regard to the propriety of that ruling, it is apparent that the plaintiffs were not harmed by the action of the court in sustaining an objection to a question to the same witness in reference to what was said, and to the witness objecting to the moving of the property when he saw it in the possession of agents of the defendant during the night following the day of the interview between the witness and May, as the witness afterwards was permitted to detail what was said on the occasion inquired about.

[4] As to the rulings on the objections to

two questions asked the plaintiffs' witness A. M. Grimsley on his cross-examination, it is enough to say that the first question was not subject to objection, as it merely called for a detail of a matter in reference to which the witness had deposed on his direct examination; and that his answer to the second question negated the existence of the fact which the defendant, in asking the question, was seeking to elicit.

[6] Under the rule which forbids leading questions on the direct examination of a witness, the assignments of error, based upon the action of the court in sustaining objections of the defendant to questions which the plaintiffs asked their witness A. M. Grimsley when he was recalled, cannot be sustained.

[6] J. A. May, in proceeding to detail what occurred between him and W. H. Forrester at the mill of Shinholster Bros. in reference to the property in question, and immediately following his statement that "something passed between me and Mr. Forrester," was asked the question, "Who came to you about it?" The form of the question did not indicate that it sought to elicit illegal evidence, nor what response the witness was expected to make to it. This being true, the court is not to be put in error for overruling the objection to the question. If the plaintiffs regarded the answer to the question as irrelevant or immaterial evidence, objection should have been made to the answer, and the exception directed against its admission in evidence. *Tolbert v. State*, 87 Ala. 27, 6 South. 284.

[7] The interview between Forrester and May in regard to the sale of the property in question occurred in the country. The evidence for the defendant was to the effect that when the terms of sale were agreed on May remarked that he did not have a check or the money with him, but would pay the price on their return to Dothan, to which suggestion Forrester assented, and May thereupon took charge of the property, and had it moved. "If the goods are put into the possession of the buyer, on the understanding or agreement that he will pay for them immediately, and he fails or refuses to do so, the seller may recover the goods." *Shines v. Steiner*, 76 Ala. 458; *Drake v. Scott*, 136 Ala. 261, 33 South. 873, 96 Am. St. Rep. 25. It was proper to admit proof of a tender of the agreed price made in behalf of the defendant, upon the return of May to Dothan, in order to negative the conclusion that the seller, by the failure or refusal of the buyer to make payment as stipulated, acquired any right to recover or reclaim the property.

We discover no error in the rulings of the court in giving or refusing instructions to the jury. The suggestion of the counsel for

the appellant that there was error in the written charge given at the instance of the defendant, in that it involved the unwarranted assumption that there was evidence tending to show a purchase by the defendant of the papers evidencing the title of Forrester Bros. to the property in question, when the only evidence of a purchase was as to a purchase of the property, is not only hypercritical, but is based upon a misconception of the evidence as set out in the bill of exceptions. J. A. May expressly stated that his conversation with Forrester at the mill was "about taking up the paper." Whether in that conversation the parties to it spoke of the "property" or of the "papers" held by Forrester Bros., it was apparent that the subject dealt with was the interest of that firm in the property in question.

Affirmed.

OLIVE v. STATE.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. HOMICIDE (§ 190*)—THREATS—EVIDENCE.

Threats of decedent, to be admissible, must have direct reference to accused, or must be made under such circumstances as to be reasonably capable of being construed as referring to him.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 399-413; Dec. Dig. § 190.*]

2. HOMICIDE (§ 190*)—THREATS—EVIDENCE.

Threats to kill some one not definitely designated, when made shortly before the commission of the offense to which they may be construed to refer, are admissible, in connection with other explanatory circumstances, and on proof of the corpus delicti.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 399-413; Dec. Dig. § 190.*]

3. HOMICIDE (§§ 190, 339*)—THREATS—EVIDENCE.

Where accused showed that on the afternoon and night of the homicide decedent was drinking, that he was a dangerous man when drinking, that on the afternoon and night shortly before the homicide he cursed accused, and stated that he intended to kill him that night, or get killed, threats by decedent, made shortly before the killing and near the place where it occurred, to the effect that he had killed one man, and would kill another that night, or get killed, and inquiring at the same time where accused was, were admissible, because justifying the inference that they related to accused, and the refusal to admit proof of such threats was reversible error.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 399-413; Dec. Dig. §§ 190, 339.*]

Appeal from Circuit Court, Fayette County; Bernard Harwood, Judge.

Elmer Olive was convicted of manslaughter in the first degree, and he appeals. Reversed and remanded.

Daniel Collier and R. H. Scrivner, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. In this case the evidence was such that the defendant had

the right to introduce evidence of threats made by the deceased against his life. The court permitted the defendant to prove by two or three witnesses that they heard, on the day of the homicide, the deceased make threats against the life of the defendant. One of these witnesses testified that he saw the deceased a few hours before the homicide, and heard him say: "I want to find that damned son of a bitch, Elmer Olive. I am going to kill the damned son of a bitch to night." Another of these witnesses testified that he saw the deceased on the night of the homicide (the homicide seems to have occurred about 8 o'clock that night), and that the deceased "asked me if I had seen anything of Elmer Olive. I told him that I had not. He said that he was looking for him, and that he was going to kill him that night, or get killed." Thereupon the defendant offered to prove by a witness that on the night of the homicide, and shortly before the fatal difficulty, and near the place where it occurred, the deceased said: "I am a God-damned black snake. I killed one man over in Mississippi, and I am going to kill another tonight, or get killed"—that deceased did not say *what* man he intended to kill, but that in this same conversation the deceased asked the witness where the defendant was, saying that he was looking for him. The court refused to allow this evidence to go before the jury, the defendant excepted, and this action of the court is before us for review.

The above testimony, which the court refused to allow to go before the jury, was not merely corroborative of other evidence which the court permitted to go to the jury, but was independent evidence of a distinct threat about which no witness had testified, or was permitted by the court to testify. The court, as we understand the record, refused to allow the defendant to make the above proof, because the deceased, if he made the threat as claimed, did not name the defendant as the party whom he intended to kill.

[1] In cases like the present, threats of the deceased, to be admissible, must have direct reference to the defendant, or must be made under such circumstances as to be reasonably capable of being construed as referring to the defendant. If they are mere general threats, made under such circumstances, or at such a time, that they cannot be reasonably construed as being made against the defendant, they are not admissible. *Knight v. State*, 160 Ala. 58, 49 South. 764.

[2] "Threats to kill or injure some one not definitely designated, especially when made

shortly before the commission of the offense to which they may be construed to refer, are unquestionably admissible, in connection with other explanatory circumstances, and on proof of the corpus delicti." *Ford v. State*, 71 Ala. 896.

[3] In the present case, the evidence of the defendant tended to show that on the afternoon and night of the homicide the deceased was drinking, and that he was a dangerous and turbulent man when drinking, that he was, on that afternoon and night, shortly before the homicide, cursing the defendant, and stating that he intended to kill him that night, or get killed, and that, on that night, he made an assault with a knife on the defendant, and was killed by the defendant while making such assault. In fact, the evidence of the defendant tended strongly to show that, if the deceased made the threats which the court excluded from the jury, because they were not specifically directed against the defendant, he meant the defendant, and no other person. In fact, the excluded threats, if made, were accompanied by an inquiry, made by the deceased, as to the whereabouts of the defendant, with the statement that he was looking for him. Certainly, under such circumstances, it was a matter of inference for the jury to say whether the defendant came within the scope of the alleged threats. Their weight and probative force was a question for the jury; but they were admissible as evidence to go before the jury for their consideration, along with the other evidence in the case.

In the case of *Knight v. State*, supra, the Supreme Court held that a remark of the defendant, made a few days prior to the difficulty, "that he would get him a damned man before he was 21 years old," was inadmissible, because it was made under such circumstances that no reasonable inference could be drawn from it that the defendant meant the deceased at the time he made it. In the present case, the alleged threats of the deceased against the defendant were made under entirely different circumstances, and under such circumstances as, in our opinion, rendered them relevant; and the court committed reversible error in refusing to allow them to go before the jury.

There are certain other questions presented in this record for our consideration. Some of them cannot arise on the next trial of this case, and the others may not do so, and for this reason we do not consider them.

For the error pointed out, the judgment of the court below must be reversed and the cause remanded.

Reversed and remanded.

WHEAT v. STATE.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. WEAPONS (§ 17*)—PRESENTING AT ANOTHER—PROSECUTION—EVIDENCE.

Prosecutrix's friendly relations with defendant after the alleged commission of the offense, the time of her first complaining, whom she told about the occurrence, and why she did not sooner swear out the warrant, are irrelevant, on a prosecution under Code 1907, § 6893, for presenting at another a firearm.

[Ed. Note.—For other cases, see Weapons, Dec. Dig. § 17.*]

2. WITNESSES (§ 372*)—CROSS-EXAMINATION TO SHOW BIAS.

To show bias or feeling on the part of prosecutrix, she may on cross-examination be asked if she is not "mad" with defendant because of a mortgage he has on her property.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 372.*]

Appeal from Macon County Court; M. B. Abercrombie, Judge.

Richard Wheat was convicted, and appeals. Reversed and remanded.

O. S. Lewis, for appellant. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

PELHAM, J. [1] The prosecutrix's friendly relations with the defendant after the commission of the alleged offense (the defendant being charged with a violation of section 6893 of the Code of 1907), when she first complained, and whom she told about the occurrence, and why she did not sooner swear out the warrant, are all matters having no tendency to prove or disprove the issues before the court, are therefore irrelevant, and were not admissible for any purpose.

[2] On cross-examination the prosecutrix was asked, "Are you not mad with defendant because of a mortgage he has on your property?" This was a legitimate and proper question on cross-examination to show bias or feeling on the part of the prosecuting witness, and the court erred in sustaining the state's objection to the question. *Sanford v. State*, 143 Ala. 78, 83, 39 South. 370; *Fincher v. State*, 58 Ala. 215; *Shepherd v. State*, 135 Ala. 9, 33 South. 266.

The judgment must be reversed for the error shown.

Reversed and remanded.

NEWELL & ALLEN v. PORT HURON ENGINE & THRESHER CO.

(Court of Appeals of Alabama. Nov. 30, 1911.)

PRINCIPAL AND AGENT (§ 81*)—CONTRACT FOR COMMISSIONS—ACTION—CONDITIONS PRECEDENT.

In an action by an agent on certificates of commission issued to him on his sales of machinery, but which were not to become payable on the principal's failure to collect the purchasers' notes or if collected by an attor-

ney, and as to which the contract of agency provided that no commission was to be paid on any order not filled nor any machinery taken back for any cause whatever, and that the proceeds on foreclosure sales, on allowances and compromises, on changing the time of payment, on changing the evidences of indebtedness and on obtaining judgment or selling the property, should not be considered as collections, the agent is not entitled to recover where the principal shows that the conditions precedent were not performed, although he does not show the necessity of taking back machinery sold or collection by attorney, etc.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 81.*]

Appeal from City Court of Montgomery; William H. Thomas, Judge.

Action by Newell & Allen against the Port Huron Engine & Thresher Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The action was on the common counts and upon counts setting up special contracts on what are called "commission certificates," issued by the defendant to the plaintiff. The following are the pleas referred to:

"(5) For further answer to the plea as amended, and each count thereof, severally and separately, the defendant says and avers that it is not liable to the plaintiff in this cause, for that the alleged liability of the defendant arose out of an agency contract between the defendant and the plaintiffs, dated November 7, 1906, under which the plaintiffs, as agents, took orders for certain machinery from divers persons, which machinery was delivered to said persons by the defendant, and certain notes and contracts of shipment by the defendant for all, or the larger portion, of the purchase price, the defendant retaining the title to such machinery until fully paid for. The defendant avers that certain commission certificates were issued by the defendant to the plaintiffs on account of said conditional sale, and that each of such commission certificates issued to the plaintiffs, subjects of this suit, contained a clause in words and figures as follows, to wit: 'There will be due Newell & Allen, agents at Birmingham, Alabama, the sum of \$——, upon return of this certificate and note by them at any time after payment in full is received by the Port Huron Engine & Thresher Company at its office in Port Huron, Mich., of the note numbered ——, given to said company by ——, due ——, less the pro rata cost of collection or discount that may be made on said note, subject to the terms of the agency contract under which the sale was made, and to the Port Huron Engine & Thresher Company's right to compromise, renew, or extend such notes at its discretion. And it is understood and agreed that this obligation is to become null and void, and this certificate surrendered, in case of failure of said Port Huron Engine & Threshing Com-

pany to collect said note, or if said note was collected by an attorney or by suit.' And defendant avers that the blank places left therein are filled up by the amount, name of the party, number of the note, date, etc., in the appropriate places in one of the certificates issued to said plaintiff, and signed by the defendant. The defendant avers that the contract referred to in said certificate is a contract, and a supplement thereto made between the plaintiffs and the defendant, dated November 7, 1906, and in section or paragraph 13 of said contract, it is provided as follows: 'Said commission being in full compensation and consideration for transacting the business and fulfilling the conditions herein required, specified, and implied. Commission certificates shall be issued by the company to the agent as notes are paid in cash. The commission on each sale made for all cash on delivery may be retained from the proceeds of such sale, but in each sale made on time, or part cash and part time, the commission is included in and is payable pro rata as the notes are paid. If the note is paid in full, and the proceeds thereof received by the company in cash at its office in Port Huron, Mich., the company is to account to the agent for that portion of commission included in said note, less the proportion of discount and expense allowed or incurred in said note. No commission is to be paid or allowed on any order not filled, nor any machines returned or taken back for any cause whatever. No commission is to be allowed upon the proceeds of foreclosure sales, on allowances and compromise, changing the time of payment, changing the evidence of indebtedness, obtaining judgment, nor the sale of property. None of them shall be considered as collections. Any commission due or to become due shall at all times be subject to any debt, liability, or obligation due or to become due from the agent to the company, whether arising from this agreement or otherwise, and the company has the right to apply said commission on such obligation at its option.' And the defendant avers that it has paid to plaintiffs their pro rata of commission on all amounts collected in cash on sale, either absolute or conditional, made by the plaintiffs for the defendant, and avers, as to the notes referred to in the commission certificates held by plaintiff and sued on, that it has collected no cash on any of said notes, and avers that after one or more of the notes given to the defendant by each of the several purchasers in each of the sales, or conditional sales, made by plaintiffs for machinery, for which notes were taken, payable to the defendant, and on which commission certificates were issued by the defendant to the plaintiffs, there was default in payment by the maker of one or more of such notes in each case where there was a sale or conditional sale, for a long

time after maturity of one or more of the notes, and default in payment had been made by the makers in each case of each of said sales or conditional sales, and because said note was not paid when due the defendant took back the machinery under its contract; and the defendant avers that no other payment has been made to it on account of any of said transactions, except the taking back of its said machinery after there had been a default in payment of one or more of said notes."

(6) Similar to 5, and sets forth the same commission certificate and the same contract, and concludes as follows: "And defendant denies that it has received any cash on account of any of said transactions, except the first or cash payment made on the machinery in each of the several cases, out of which defendant avers that plaintiffs shall receive their pro rata of the commission, and, to the extent that there was any collection of any of said notes referred to in the commission certificates, it was only a collection made by an attorney by taking back the machinery after there had been a default made in the payment of one or more of said notes given to the defendant for such machinery in each of the several cases, and after payment of said note had been refused by the maker severally at maturity."

"(7) The defendants aver that they are not liable to plaintiff in this cause, for that the alleged liability arose out of certain transactions under and pursuant to a contract between plaintiffs and defendant, dated November 7, 1906, whereby the plaintiffs were acting as agents of the defendant in selling machinery to divers certain persons; and the defendant avers that in section or paragraph 13 of said contract it is provided: [Here follow the provisions of the contract set out in plea 5.] And plaintiffs sent defendant orders for machinery from divers persons, which machinery was to be shipped by the defendant to such persons, and notes taken by the plaintiffs from the purchasers of such machinery, payable to the defendant, whereupon the defendant issued to the plaintiffs certain commission certificates, being the certificates sued on, each of which certificates contains the following clause, to wit: [Here follows the commission certificate as set out in plea 5.]"

Plea 8 is similar to plea 7, down to and including the commission certificate set out, and contains the additional averment: "And defendant avers that no amount has become due on either of said certificates issued by the defendant to the plaintiffs, because no payment had been made to the defendant in cash on either of the notes referred to in either of said commission certificates held by the plaintiffs, and because the machinery in each of the several cases for which notes were given, referred to in the commission certificate, was taken back by the defend-

ant, because the several makers of such note failed to say that such one or more of the notes in each of the several cases, respectively, at maturity, and for a long time after the maturity, of such notes, such machinery in each case being taken back only after the failure of the maker of such notes to pay one or more of said notes first maturing, and because, after the first one or more of the notes maturing in each of the several cases where sales were made and commission certificates issued to the plaintiffs, the maker of the notes failed to pay the first one or more of the notes at maturity, and after such failure or default in payment the defendant placed said note in the hands of an attorney for collection, he took back the machinery for which said notes had been given, this being the only collection made on any of the first notes."

Tyson, Wilson & Martin, for appellant. R. L. Harmon, for appellee.

WALKER, P. J. According to the averments of pleas 5, 6, 7, and 8 the claim of the plaintiffs arose out of an agency contract between them and the defendant, under which the plaintiffs, as agents, took orders for certain machinery from divers persons, which machinery was delivered by the defendant to the several purchasers, who gave their notes for all or the larger part of the purchase price, the defendant retaining title to the machinery until fully paid for; and "commission certificates" on account of such sales were issued by the defendant to the plaintiffs, each of which certificates recited that there would be due to the plaintiffs a named sum "upon return of this certificate, indorsed by him, at any time after payment in full is received by" the defendant "at its office in Port Huron, Michigan," of a described note given by the purchaser of the machinery, "subject to the terms of the agency contract under which sale was made," and contained also the following provision: "And it is understood and agreed that this obligation is to become null and void, and this certificate surrendered, in case of failure of said Port Huron Engine & Thresher Company to collect said note, or if said note is collected by an attorney, or by suit." The agency contract, under which these "commission certificates" were issued, contained the following provisions: "Commission certificates shall be issued by the Co. to the agent, showing the amount due the agent as notes are paid in cash. The commission on each sale made for all cash on delivery may be retained from the proceeds of such sale; but in each sale made on time, or part cash and part time, the commission is included in, and is payable pro rata, as the notes are paid. After the note is paid in full and the proceeds thereof received by the Co. in cash, at its office in Port Huron, Michigan, the Co. is to ac-

count to the agent for that portion of the commission included in said note, less the proportion of discount and expenses allowed or incurred on said note. No commission is to be paid or allowed on any order not filled, nor any machine returned or taken back for any cause whatever. No commission is to be allowed upon the proceeds of foreclosure sales; on allowances in compromises; changing the time of payment; changing the evidence of indebtedness, obtaining judgment, nor the sale of property, shall none of them be considered as collections." Each of the pleas alleged that the defendant had paid to the plaintiffs their pro rata of commissions on all cash collections made on sales negotiated by them. In reference to the "commission certificates" held by the plaintiffs, upon which it is averred their claim in this suit is based, the fifth plea alleges that no other payment has been made to the defendant on account of any of the transactions in which such certificates were issued except the taking back by the defendant of its machinery after there had been default in payment of one or more of the notes given therefor. The sixth plea alleged that the only collection made on any of the notes corresponding with the "commission certificates" held by the plaintiffs was by an attorney taking back the machinery after default had been made in the payment of one or more of such notes, and payment of the same had been refused by the makers, severally, at maturity. The seventh plea alleged that no payment has been made to the defendant in cash on either of the notes referred to in either of the commission certificates held by the plaintiffs. And the eighth plea alleged that no payment in cash has been made to the defendant on either of such notes, that in each case the machinery was taken back after failure of the maker of the notes to pay one or more of them after maturity, and that the only collection made on such notes was by an attorney taking the machinery back after default had been made in the payment of one or more of such notes, and they had been placed in the hands of such attorney for collection.

It is urged in argument by the counsel for the appellants that the demurrers to the above-mentioned pleas should have been sustained on the authority of the ruling in the case of Taylor Manufacturing Co. v. Key, 86 Ala. 212, 5 South. 308. It is insisted that that case is "on all fours in every respect with this case," and is "an exact counterpart of it," and that that ruling establishes the proposition that in such a case as the one at bar the agent could not be made to lose his right to any part of his commission as the result of the principal, without the agent's consent, taking back from the purchaser the machinery sold, unless there was a necessity for his so doing; and it is insisted that each of the above-mentioned

pleas failed to set up a valid defense, in that it did not show a necessity for the principal to take back the machinery in consequence of an inability to enforce collection of the notes given for it. We cannot assent to this claim. In the case cited, where, as to one of the sales of machinery on which the plaintiff claimed a commission, it appeared that the principal, without the consent of the agent, made a settlement with the purchaser by taking back the machinery and accepting a conveyance of part of the land which had been mortgaged to secure the purchase price, though the purchaser was solvent and the mortgaged property was of sufficient value to pay the indebtedness and no necessity was shown for the seller taking back the machinery, it was held that the agent did not lose his right to the commission by the provision of the agency contract that "no commission shall be allowed or paid on any article taken back, or on any order taken and not filled, on machinery not settled for, or on any sale to irresponsible persons." It seems plain enough that there was nothing in the terms of that contract to indicate that the agent consented to forego any part of his commission where the debt for the property sold was collectible in any way, and that the provision that "no commission shall be allowed or paid on any article taken back" could not have been intended by the parties to apply to the case of the principal voluntarily accepting from a solvent purchaser in full settlement of his claim, a return of the machinery sold together with a conveyance of part of the land mortgaged as security for the purchase price, the whole of which could have been collected in cash if the seller had chosen to enforce his claim. No such contract or state of facts is presented in the case at bar. By the express terms of the agency contract under which the plaintiffs negotiated sales of machinery they were to receive from the defendant commission certificates "showing the amount due the agent as notes are paid in cash"; and "no commission is to be paid or allowed on any order not filled, nor any machine returned or taken back for any cause whatever;" and the commission certificates issued to the plaintiffs, constituting the evidence of any right they acquired to commissions not already paid, provide that the sums named therein as commissions are to be due "after payment in full is received by" the defendant of the purchaser's note described in such certificate, and, further, that the obligation thereby evidenced is to become null and void "in case of failure of" defendant "to collect said note, or if said note is collected by attorney, or by suit." So it appears by the plain terms of the contract between the parties that the part of the commission evidenced by commission

certificates was payable only in the event of the actual payment, by the purchasers, of the corresponding notes, and that in several contingencies provided for it was not payable at all, though the seller might be able to enforce collection of the corresponding notes after default in the payment thereof at maturity. As to one of the sales on which a commission was claimed by the plaintiff in the case of Taylor Manufacturing Co. v. Key, supra, it appeared from the evidence that only part of the purchase price had been collected. The contract between the parties provided for the payment of commissions to the agent on each sale proportionately out of the cash and the proceeds of notes when collected. The court seems to have had no difficulty in reaching the conclusion that, under that provision of the contract, the plaintiff was not entitled to recover commissions on the uncollected portion of the purchase price. This branch of that case bears more resemblance to the case now before the court than the feature of the decision on which the counsel for the appellants place their reliance. Whatever right the plaintiffs had to commissions on sales is evidenced by the agency contract and the commission certificates issued in pursuance of that contract. Each of the pleas above mentioned alleged the existence of a state of facts under which, by the terms of the contract between the parties, the plaintiffs were not entitled to the part of the commissions evidenced by the commission certificates now held by them. It was not necessary for the pleas to go further and show that the defendant was under a necessity of taking back the machinery sold in consequence of an inability to enforce collection of the purchase-money notes, as there was nothing in the contract between the parties preserving to the agent the right to the part of the commissions evidenced by the commission certificates unless such necessity existed for the seller to take back the machinery sold. The court was not in error in overruling the demurrers to the above-mentioned pleas.

Affirmed.

NORRIS et al. v. MERCHANTS' NAT. BANK.

(Court of Appeals of Alabama. Dec. 21, 1911.)

BILLS AND NOTES (§§ 369, 373*)—DEFENSES—BONA FIDE HOLDERS.

It is no defense against a note in the hands of a bona fide holder that the note as signed was delivered to the payees under agreement that it should not take effect unless other persons should sign, and that the payees made misrepresentations and committed fraud in procuring defendants' signatures.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 951, 966-970; Dec. Dig. §§ 369, 373.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Appeal from Circuit Court, Walker County; T. L. Sowell, Judge.

Action by the Merchants' National Bank against J. A. Norris and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Bankhead & Bankhead and Norman Gunn, for appellants. A. F. Fite and J. B. Powell, for appellee.

WALKER, P. J. To the complaint, counting on a promissory note alleged to have been signed by the defendants (the appellants here) as makers, they interposed several pleas, setting up that the note as signed was delivered to the payees under an agreement that it should not take effect unless other named persons should sign the same as makers, and also alleged misrepresentations made and fraud committed by the payees in procuring the defendants' signatures to the note. To these pleas the plaintiff filed a special replication, which alleged that the note sued on is commercial paper, and was purchased by the plaintiff of the payees in good faith, for value, before maturity, and without any notice of any of the misrepresentations, agreements, statements, fraud, or deceit, or other defenses set up in said pleas. The demurrer to this replication was properly overruled. Authorities cited by the counsel for the appellants bearing upon the question of the right of a surety to plead, in defense of the instrument sued on, that he signed the same as surety under a condition as to the right of the principal to deliver it to the obligee, and that it was delivered without a compliance with such condition (*White Sewing Machine Co. v. Saxon*, 121 Ala. 399, 25 South. 784; *Guild, Register, v. Thomas*, 54 Ala. 414, 25 Am. Rep. 703), have no application in favor of the maker of commercial paper as against a holder thereof who acquired it in good faith, for a valuable consideration, before maturity, and without notice of any matter of defense to it (*First National Bank of Decatur v. Johnston*, 97 Ala. 655, 11 South. 600; 4 Am. & Eng. Ency. of Law [2d Ed.] 335, 337).

Affirmed.

ROWE v. STATE.

(Court of Appeals of Alabama. Dec. 21, 1911.)

1. CRIMINAL LAW (§ 1053*)—APPEAL—REVIEW—NECESSITY OF EXCEPTIONS—TRIAL WITHOUT JURY.

Under Code 1907, § 6243, as to necessity of exception for review, exception to the putting of defendant on trial before the court sitting without a jury is necessary.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1053.*]

2. CRIMINAL LAW (§ 338*)—EVIDENCE.

Allowing a witness to answer a question is not improper, where the answer will merely tend to fix the date of an occurrence to which he has testified.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 338.*]

3. CRIMINAL LAW (§ 644*)—TRIAL—OFFICERS—COMMUNICATIONS WITH COUNSEL.

The impropriety thereof not being made to appear, complaint may not be made of the action of court, on a prosecution for illegal fishing, allowing communication with the solicitor by the game warden, while his son was testifying.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 644.*]

4. CRIMINAL LAW (§ 1121*)—APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE—RECORD.

The question of sufficiency of the evidence to prove venue cannot be reviewed, where the record does not purport to set out all the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2938, 2939; Dec. Dig. 1121.*]

Appeal from Winston County Court; John S. Curtis, Judge.

Love Rowe appeals from a conviction. Affirmed.

W. F. Finch, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. [1] The appellant cannot here complain of the action of the court in putting him to trial before the court sitting without a jury, as no exception was reserved to that action of the court. Code 1907, § 6243.

[2] Elzie Lovett, a witness for the state, having testified that he saw the defendant seining in the creek below O'Mary's Mill in the year 1911, it was not improper to allow the witness to answer the following question asked by the prosecuting attorney: "Was it before or after laying-by time?" An answer to the question would merely tend to fix the date of the occurrence in reference to which the witness had deposed.

[3] Nor is it made to appear that it was improper for the court to permit the game warden, who was the father of the witness above mentioned, to have communication with the solicitor while that witness was under examination.

[4] The bill of exceptions does not purport to set out all the evidence adduced on the trial. For anything that appears, there may have been evidence to prove the venue which is not set out. Plainly this court cannot review the question of the sufficiency of the evidence to prove the venue, when the record does not purport to set out all the evidence.

Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

HUNNICUTT LUMBER CO. v. MOBILE & O. R. CO.

(Court of Appeals of Alabama. Nov. 30, 1911.)

1. ACCORD AND SATISFACTION (§ 25*)—AGREEMENT—PLEADING.

Plaintiff lumber company sued on a demand made up of a series of distinct invoices for lumber sold defendant, and the complaint alleged that the several amounts were due, with interest, and defendant set up as an accord and satisfaction that the bill for each invoice was paid before the commencement of the suit, and payment accepted by plaintiff in full settlement for said invoices. *Held*, that the facts alleged constituted a valid agreement in accord and satisfaction, and a demurrer to the plea, on the ground that it was not alleged that the acceptance was in full settlement or the satisfaction of the debt sued on, was properly overruled.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 151-161; Dec. Dig. § 25.*]

2. INTEREST (§ 26*)—SALE OF LUMBER—INTEREST ON AMOUNT DUE—PAYMENT OF PRINCIPAL.

Plaintiff made several shipments of lumber to defendant, under an agreement that each shipment should be paid for within 60 days from the date of shipment. The amount of each shipment was paid by defendant, but not within 60 days, and plaintiff receipted for each amount "in full of the above account." The contract contained no provision for interest. *Held*, that plaintiff could not recover interest, as, under the circumstances, interest was merely an incident to the principal debt, and the acceptance of the principal extinguishes the right to recover the interest, in the absence of any agreement or understanding that the right to claim interest is reserved.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 7-10; Dec. Dig. § 26.*]

3. EVIDENCE (§ 408*)—PAROL EVIDENCE—RECEIPTS.

A receipt in full for shipment of lumber is open to explanation or contradiction by parol evidence; but testimony of the person who signed the receipt, that the matter of interest on the amount due for lumber was not mentioned, and denying that the execution of the receipt had the effect which the law imputes to it, does not contradict the receipt, or tend to show that there was any agreement on the subject of interest, other than that expressed in writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1829-1842; Dec. Dig. § 408.*]

4. ACCORD AND SATISFACTION (§ 27*)—QUESTION FOR JURY.

Evidence, in an action by a lumber company to recover for a series of shipments of lumber made to defendant, *held* sufficient to make the question whether part of the principal remained unpaid, as to withdraw it from the operation of an alleged accord and satisfaction, one for the jury.

[Ed. Note.—For other cases, see Accord and Satisfaction, Dec. Dig. § 27.*]

5. TRIAL (§ 260*)—REPETITION OF INSTRUCTIONS.

Where a requested instruction by plaintiff is fully covered by a written charge given at the request of plaintiff, he cannot complain of the court's refusal to repeat the proposition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

6. APPEAL AND ERROR (§ 701*)—QUESTIONS FOR REVIEW.

The bill of exceptions showed that, by a written charge requested, plaintiff referred to a written agreement as being in evidence in the case, and requested a ruling as to its legal effect, but the bill did not set out or otherwise refer to the agreement, and contained a statement that the evidence set out was all the evidence in the case. *Held* that, as the bill did not disclose what the evidence was, it did not present for review rulings based thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2933-2935; Dec. Dig. § 701.*]

Appeal from Circuit Court, Bibb County; B. M. Miller, Judge.

Assumpsit by the Hunnicutt Lumber Company against the Mobile & Ohio Railroad Company. Judgment for defendant and plaintiff appeals. Affirmed.

The action is on the common count. Plea 4 is as follows: "The defendant, for further answer to said complaint, saith that the amount upon which this suit is brought is made up of a series of separate and distinct invoices for lumber sold by plaintiff to defendant, and that each of said invoices was, before the commencement of this suit, paid by the defendant and accepted by the plaintiff in full settlement for said invoices, and the defendant pleads said fact as an accord and satisfaction of said debt." The demurrer to the plea was that it does not appear that the plaintiff accepted said alleged amount in full settlement or the satisfaction of said debt sued on. The charges referred to are as follows: "I charge you that, though you may believe from the evidence that the plaintiff has received all the principal of his debt, yet, if you believe from the evidence that he did not receive the same in full satisfaction, then your verdict must be for the plaintiff." The other charges were that the title to the account here sued on is in the plaintiff, the Hunnicutt Lumber Company.

Fuller & White and Logan & Logan, for appellant. Oliver, Verner & Rice, for appellee.

WALKER, P. J. [1] Plea 4 set up, as an accord and satisfaction, that the demand sued on was made up of a series of separate and distinct invoices for lumber sold by the plaintiff to the defendant, and that each of said invoices was, before the commencement of the suit, paid by the defendant, and accepted by the plaintiff in full settlement for said invoice. As the complaint claimed the amounts alleged in the several common counts to be due, "with interest thereon," the purport of the plea was to set up the payment and acceptance of the principal of the account as an accord and satisfaction. The facts alleged constituted a valid executed agreement in accord and satisfaction. The demurrer to the plea was properly overruled.

Wescott v. Waller, Guardian, 47 Ala. 492; Smith v. Gayle, 62 Ala. 446; 1 Ency. of Pl. & Pr. 77, 80. The ruling in the case of City Council of Montgomery v. Shirley, 159 Ala. 239, 48 South. 679, does not stand in the way of the conclusion just stated. The plea in that case, which was held subject to demurrer, merely set up the making of an executory agreement, not averred to have been accepted as a satisfaction or discharge of the demand sued on.

[2] The claim of the plaintiff in this case was based upon a series of shipments of lumber to the defendant, under an arrangement or agreement which provided for payments of the prices of the lumber within 60 days from the dates of the several shipments. Invoices covering the several shipments, showing the items of lumber and the amounts due therefor, were sent to the defendant. The amounts called for by each of these invoices were paid by the defendant, the payments being evidenced by the plaintiff's signature to "pay vouchers," which set out the items embraced in the several invoices, and each of which embodied a receipt of the amount stated in the corresponding invoice "in full of the above account"; but such payments were not made within 60 days from the dates of the several shipments. The contract between the parties contained no provision for interest. The main claim of the plaintiff was that it was entitled to interest on the several amounts after the lapse of 60 days from the dates of the shipment, and that this claim of interest was not barred by the payments and receipts above mentioned.

When interest is not stipulated for by the contract between the parties, and is recoverable merely as, or in lieu of, damages in the event of default in the payment of a liquidated demand when due, being in such case, not the basis of a separate right of action, but merely an incident to the recovery of the principal debt, the payment and acceptance of the principal as such extinguishes the right to recover interest thereon, in the absence of any agreement or understanding that the right to claim interest is reserved. Wescott v. Waller, Guardian, 47 Ala. 492; Stewart v. Barnes, 153 U. S. 456, 14 Sup. Ct. 849, 38 L. Ed. 781, note; Fuller v. Kemp, 20 L. R. A. 785, 789, note; 22 Cyc. 1572. It is plain that a receipt, signed by the creditor with a full knowledge of all the facts, for the amount shown to be due by an itemized statement of account, expressed to be "in full of the above account," imports a full discharge of the debt, principal, and interest. It expresses that meaning, and it "must have effect according to the intention of the parties." Code 1907, § 3973; Eufaula National Bank v. Passmore, 102 Ala. 370, 14 South. 683; Stegall v. Wright, 143 Ala. 204, 38 South. 844.

[3] It is true that such a receipt is open to explanation or contradiction by parol evidence. But the testimony of the person who

signed such paper, merely to the effect that the matter of interest was not mentioned, and denying that the execution of the receipt had the effect which the law imputes to it, by no means contradicts it, or tends to show that there was any agreement on the subject, other than that expressed in the writing.

An application of the principles above stated to the facts of this case leads to the conclusion that the plaintiff was not entitled to recover interest on the amount of the account, the principal of which had been paid under the circumstances above mentioned, and that there was no error in the refusal to give the general affirmative charge requested by the plaintiff, on the theory that the evidence did not show a payment of its entire claim or an accord and satisfaction thereof.

[4] For the same reason, the plaintiff was not entitled to require the court to give the charge set out in its third assignment of error, unless the undisputed evidence in the case showed that, as a result of an error, part of the principal of the account had not been paid, and so was withdrawn from the operation of the alleged accord and satisfaction. The appellant insists that the undisputed evidence was to that effect. This claim is based upon the part of the testimony of the witness Hunnicutt, referring to an alleged error of \$34.66 in one of the pay vouchers. It is insisted that there was no evidence tending to contradict his testimony in that connection to the effect that, as the result of such error, that amount of the principal due on one of the invoices remained unpaid. This insistence is not supported by the bill of exceptions. The witness stated that he discovered the alleged error by examining the account books. So it appears that his statement was based upon what he understood the books to disclose. Subsequently the defendant offered in evidence the account books themselves. The accounts as shown by the books are not copied into the bill of exceptions; but it recites that they showed—not merely tended to show—upon their face that the defendant had overpaid its account to the plaintiff, as shown by the latter's book account. The witness Berry testified that he checked all the vouchers made covering the invoices for lumber bought from the plaintiff, and found them correct. In the light of such evidence, the claim cannot be sustained that the evidence showed, without dispute, that part of the principal of the account sued on, as a result of an error in the statement rendered, had not been paid. The most that can be said in behalf of the plaintiff in this connection is that it was a question for the jury whether or not, as the result of an error, part of the principal of the account sued on remained due and unsettled. This being true, there was no error in the refusal of the charges set out in the third and fifth assignments of error.

[5] The proposition embodied in the charge

set out in the fourth assignment of error was fully covered by a written charge given at the request of the plaintiff. He cannot complain of the refusal of the court to repeat the proposition.

[6] The bill of exceptions shows that, by a written charge requested, the plaintiff referred to a written agreement, signed by persons named, as in evidence in the case, and invoked a ruling of the court as to its legal effect. The request for that charge shows that it was a controverted question in the trial whether that instrument affected the right or title of the plaintiff to the account sued on, and amounted to a statement or admission by the plaintiff that such a paper was in evidence; but the bill of exceptions does not set out or otherwise refer to it, and contains a statement that the evidence set out was all the evidence in the case. This latter statement is repugnant to the showing made by the bill of exceptions that such an instrument was in evidence. In other words, one part of the appellant's bill of exceptions indicates that such a paper was in evidence, and another part of it asserts that it was not. The question, then, is as to the construction to be placed upon a bill of exceptions containing such repugnant or contradictory statements as to the evidence in the case. A bill of exceptions is construed most strongly against the party excepting, and when it admits of two constructions, one favorable to the lower court, and the other unfavorable, that construction will be adopted which will sustain, rather than that which will reverse, the judgment. *Milliken v. Maund*, 110 Ala. 332, 20 South. 310; *Massey v. Smith*, 73 Ala. 173. The statement in the plaintiff's bill of exceptions in this case, indicating that the paper referred to was in evidence, is entitled to as much weight as the statement that the bill of exceptions, which omitted such paper, contained all the evidence. Other written charges requested by the plaintiff also indicated that it was a controverted question in the case whether it owned the claim sued on, though the evidence as detailed in the bill of exceptions does not indicate how such a question arose.

Construing the bill of exceptions as showing that a paper was admitted in evidence which was claimed to have a bearing upon the question of the plaintiff's ownership of the demand sued on, it is a result of the failure of the bill of exceptions to set out that paper, or to state its import, that this court has not before it the evidence in reference to which the trial court made its rulings on that phase of the case, and is in no position to affirm that there was or was not error in those rulings. The conclusion is that, as the bill of exceptions affords ground for a reasonable inference that evidence was introduced which was claimed by the defendant to

have a bearing upon the question of the plaintiff's ownership of the claim sued on, but fails to disclose what that evidence was, it does not properly present for review on appeal the rulings on that question; the result being that assignments of error based on those rulings cannot be sustained.

The record does not show that the trial court was in error.

Affirmed.

COUCH v. HUTCHINSON et al.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. CONTRACTS (§ 108*)—INVALIDITY—"PUBLIC POLICY."

The public policy the court is concerned with in determining whether a contract is void is that evidenced by the Constitution, the statutes, or definite principles of customary law, developed by the course of judicial decision, and the court should not declare a contract void on such a ground, except in a case free from doubt (quoting 6 Words & Phrases, p. 5813).

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 498; Dec. Dig. § 108.*]

2. CONTRACTS (§ 141*)—VALIDITY—PUBLIC POLICY—BURDEN OF PROOF.

The burden of establishing the invalidity of a contract because contrary to public policy is on the party asserting the same.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 461, 1760; Dec. Dig. § 141.*]

3. CONTRACTS (§ 108*)—AGENCY CONTRACT—PUBLIC POLICY.

A contract for the sale of an agency contract whereby a party acquires, subject to conditions, the privilege of selling patent churns, made under designated letters patent, and the power to sell on commission to others similar privileges, and designated classes of agencies under the patent in territory not previously appropriated, is not invalid as contrary to public policy in the absence of any suggestion that the patented article is without merit.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 108.*]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Action by M. P. Couch against J. D. Hutchinson and others upon the bond executed by the defendants to A. J. Mason of a certain date, and due and payable on the 10th of December, 1908. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

The complaint alleges the facts set out above, and also that the note was made payable to Mason, who transferred and indorsed said note to plaintiff, and waived presentment for payment, protest, and notice of nonpayment. It also claims attorney's fees. Plea 3 is as follows: "Defendant says that the only consideration for the execution of notes sued on was the execution and delivery to the defendant of a written contract, a copy of which is hereto attached, marked 'Exhibit A,' and prayed to be taken as a part thereof. And defendant says that the execution of said contract was in pur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

suance of a scheme, and constituted part of a scheme, to defraud the public, in that the natural and inevitable result of said contract was to cause each person who purchased a fourth agency, a half agency, a whole agency, a special agency, or a patentee agency to sell like agencies to such persons as he might induce to purchase the same, and so on down in an endless chain, whereby in the end the great bulk of the people would be defrauded, and would receive nothing for cash paid, or the notes executed by them; and said contract was entered into and constituted a part of an illegal and unlawful conspiracy to induce the public to purchase, one after another, in an endless chain, similar contracts which conveyed to the purchasers no substantial or valuable right or property, and to encourage each purchaser to involve another in order to extricate himself."

Street & Isbell, for appellant. Goodhue, Brindley & White, for appellees.

WALKER, P. J. To the complaint in this case counting on a bond or promissory note executed by the defendants (the appellees here) a special plea, numbered 3, was filed, which set up that the only consideration for the note sued on was the execution and delivery to the defendants of a written contract purporting to confer on them certain patent rights, a copy of which was made an exhibit to the plea, which questioned the validity of that consideration on a ground stated. As the plea does not aver the existence of any fact collateral to the execution of the contract mentioned which was claimed to affect its validity, and does not aver as a fact that there was an absence of value in the consideration referred to, it is understood that the expressed conclusions of the pleader, that "the execution of that contract was in pursuance of a scheme and constituted a part of a scheme to defraud the public," and "constituted a part of an unlawful conspiracy to induce the public to purchase, one after another, in an endless chain, similar contracts which conveyed to the purchasers no substantial or valuable right or property, and to encourage each purchaser to involve another in order to extricate himself," have for their only support the deduction of the pleader from the terms of the contract itself "that the natural and inevitable result of said contract was to cause each person who purchased a fourth agency, a half agency, a whole agency, a special agency, or a patentee agency to sell like agencies to such persons as he might induce to purchase the same, and so on down in an endless chain, whereby in the end the great bulk of the people would be defrauded and would receive nothing for cash paid or the notes executed by them." In other words, that plea attacked the patent right contract which constituted

the consideration of the instrument sued on on the ground that on its face it is legally invalid; and the action of the trial court in overruling the demurrer interposed to that plea is sought to be sustained here on the ground that the contract is void as being against public policy and directly tending to defraud the public generally.

[1] When the validity of a contract is attacked on the ground that it is violative of public policy, or that it is against the public interest to enforce it, the court may well bear in mind that it is wholly outside of its function to be influenced by some considerations of policy which might properly have weight with the Legislature if it had occasion to deal with the question of permitting or prohibiting such a contract, or with a business man who was called on to pass upon the question of the wisdom or folly of entering into such an engagement; that the public policy with which it is concerned is that evidenced by the Constitution, the statutes, or definite principles of customary law which have been recognized and developed by the course of judicial decisions; and that it may well look with suspicion upon an invitation to pronounce a questioned transaction invalid as being against public policy when there is a failure to make it plain how its recognition or enforcement would contravene any established rule of law. It behooves a court to move with caution when it takes up a line of inquiry by which it may unwittingly be led beyond the domain of established law within which judicial investigations should be confined, and find itself dealing with questions of policy which the law has not seen fit to make the subjects of inquiry by the courts. A plain-speaking English judge went so far as to say: "I for one protest, as my lord has done, against arguing too strongly on public policy. It is a very unruly horse, and when once you get astride of it, you never know where it will carry you. It may lead you from sound law. It is never argued at all but when other points fail." Sir James Burrough in *Richardson v. Mellish*, 2 Bing. 229. Without adopting that expression as a statement of the law on the subject, it is safe to say that courts should regard themselves bound by rules of extreme caution when invoked to declare a transaction void on grounds of public policy, and that contracts should not be declared void on such grounds except in cases free from doubt. *Smith v. Du Bose*, 78 Ga. 413, 3 S. E. 309, 6 Am. St. Rep. 260; *Barrett v. Carden*, 65 Vt. 431, 26 Atl. 530, 36 Am. St. Rep. 876; *Smith v. San Francisco, etc., Ry. Co.*, 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119; *Equitable Loan, etc., Co. v. Waring*, 117 Ga. 599, 44 S. E. 320, 62 L. R. A. 93, 97 Am. St. Rep. 177; 6 Words & Phrases, 5813; 1 Page on Contracts, § 326. And in dealing with the question of public policy as affecting the validity of a contract

it is well to recall what was said by an eminent judge: "If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice." Sir George Jessel in *Printing, etc., Co. v. Sampson*, L. R. 19 Eq. 465.

[2] It is also to be remembered, in entering upon such an inquiry, that the burden is on the party who seeks to put a restraint upon the freedom of contracts to make it plainly and obviously clear that the contract is against public policy. *Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul R. Co.*, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193.

We are of opinion that this burden has not been sustained by the party making the attack upon the contract brought into question in this case. The authorities principally, if not solely, relied on by the counsel for the appellees to sustain the ruling on the demurrer to the plea above mentioned are the decisions of the courts of several states in reference to the notorious "Bohemian Oats" contracts, which were the means adopted for carrying out a swindling scheme which for a while seems to have had quite a successful career. The state of facts presented in one of the cases cited by the counsel—*Schmueckle v. Waters*, 125 Ind. 265, 25 N. E. 281—is typical of a group of cases which found their way into the courts as the result of the operations of that scheme. The transaction in which the note sued on in that case was given was simply this: Ten bushels of oats of the actual value of 30 or 40 cents a bushel were delivered by one party to the other upon an agreement that the party receiving the oats should execute his note for \$100, the party furnishing the oats agreeing in turn to sell, before the maturity of the note, twenty bushels of the same kind of oats to be delivered by the maker of the note at the price of \$10 per bushel, both parties presumably having knowledge of the actual value of the oats. The court held that the contract was a mere speculative or wagering contract, and it seems that it was on that ground that a right to recover on the note was denied, though the court also characterized the transaction as prejudicial to public welfare and against public policy. In another case cited by the counsel for the appellees which presented a similar state of facts—*Merrill v. Packer*, 80 Iowa, 542, 45 N. W. 1076—the Iowa court held that the contract was not a gambling transaction, but that the note could not be recovered on because the scheme of which it was a part was one to cheat and defraud. In 1 Page on Contracts, § 402, is found a collection of cases which grew out of the operations of that scheme.

In reference to these cases it is there said: "Bohemian Oats" contracts were agreements whereby A. sold B. oats at an inflated price, took B.'s note therefor, and gave B. a bond to sell for him during the following year twice as many bushels of such oats as B. had purchased, at the same price. In some jurisdictions these contracts were held wagers; in others, not. Some courts hold that such contracts are illegal, as they cannot be performed without defrauding a third party." It is on this last-mentioned ground that the transaction disclosed in this case is claimed to be illegal and unenforceable, and some of the "Bohemian Oats" cases are referred to as rulings on analogous states of fact.

[3] An analysis of the contract a copy of which is made an exhibit to the plea above referred to does not verify the conclusions in reference to its nature and necessary operation which are expressed by the pleader. That was a patent right contract by which the appellees acquired, subject to conditions stated, the privilege of selling certain patent churns, made under designated letters patent of the United States, and also a power of attorney to sell on commission to others similar privileges, and also other designated classes of agencies under the patent. By provisions in the contract the rights to vend the patented article and to grant territorial rights under the patent were restricted to counties not already appropriated, in a manner provided for, by another person holding a similar contract. The contract was termed a "one-fourth agency contract," and was filled out on a form supplied by the patentee or his selling agent. The scope of the other classes of agencies authorized to be disposed of is not disclosed by the provisions of this contract, but reference is made to printed matter to be furnished by the patentee for use in making the authorized sales. The plea does not hint at the existence of any defect in the patent, or suggest that the patented article was without merit or even that it was worth less than the price at which the contract authorized its sale, and no provision of the contract is pointed out which could be construed to be an invitation or inducement to do anything prohibited by law. The sum and substance of the matter is that the plea shows that the consideration of the note sued on was a contract by which the maker of the note acquired the right to vend a patented article and to make disposition of territorial rights under a patent "for improvements in churns." The contract does not even obligate him to do either the one or the other. It does not show on its face that it is a part of a scheme to defraud the public or any part of it or to do anything else in contravention of an established rule of law. To declare that contract invalid on the ground suggested it would be necessary to find some rule of law against stimulating

or encouraging the selling of patent churns or of rights under a patent on that subject. In view of the age of the industry, of the methods sometimes employed by its promoters, and of the zeal with which many of the controversies that have marked its history have been waged, it may be supposed that if there was such a rule of law it would have been brought to light in some former patent churn lawsuit; and that it would not be necessary to refer the court to the "Bohemian Oats" cases for evidence of its existence.

Enough has been said to indicate the grounds of the court's conclusion that the demurrer to plea 3 should have been sustained.

Reversed and remanded.

KELLY v. STATE.

(Court of Appeals of Alabama. Dec. 21, 1911.)
WITNESSES (§ 372*)—CROSS-EXAMINATION TO SHOW BIAS.

In a prosecution for assault, it was proper, on cross-examination of the prosecuting witness, to bring out the facts that, previous to the alleged assault, the witness was the leader in getting up a petition to the superintendent of the mine in which the witness and defendant were employed to have the latter discharged, and that the witness himself had been discharged by the superintendent because of his trying to run the defendant away from the place where he resided, as the questions were calculated to elicit testimony showing bias or ill will of the witness towards accused.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.*]

Appeal from Criminal Court, Jefferson County; M. Frank Cahalan, Judge.

Charles Kelly was convicted of assault, and appeals. Reversed and remanded.

Bush & Bush, for appellant. R. C. Brickell, Atty. Gen., for the State.

WALKER, P. J. John Smith, the person charged to have been assaulted, was examined as a witness for the state. On his cross-examination, the counsel for the defendant asked him questions which sought to bring out the facts that, previous to the alleged assault, the witness was the leader in getting up a petition to the superintendent of the mine in which the witness and the defendant were employed to have the latter discharged, and that the witness himself had been discharged by the superintendent because of his trying to run the defendant away from Indio, where he resided. The defendant duly excepted to the action of the court in sustaining the objections of the solicitor to these questions. The court was in error in these rulings. It was competent to bring out on the cross-examination of the witness that he had a bias or ill will against

the accused, and the questions were calculated to elicit testimony tending to show that such was the fact. *Ott v. State*, 160 Ala. 29, 49 South. 810; *Salm v. State*, 89 Ala. 56, 8 South. 68.

Reversed and remanded.

KENDRICK & MCGOUGH v. CHAFIN.

(Court of Appeals of Alabama. Dec. 21, 1911.)

1. SALES (§ 359*)—ACTIONS FOR PRICE—EVIDENCE.

Where the evidence admitted warranted an inference that the goods delivered by plaintiff to defendant were worth more than the amount which defendant had paid on account, but did not show the amount of the balance due, the evidence supported a verdict for plaintiff for at least a nominal amount.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 359.*]

2. APPEAL AND ERROR (§ 1171*)—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

Where the evidence offered by plaintiff is such as to support a verdict for an amount which would carry costs, the error in excluding all the evidence is prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4546-4554; Dec. Dig. § 1171.*]

Appeal from Circuit Court, Walker County; J. J. Curtis, Judge.

Action by Kendrick & McGough against W. H. Chafin. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

W. T. McElroy and R. A. Cooner, for appellants. James J. Ray, for appellee.

WALKER, P. J. [1] Though much of the evidence offered by the plaintiffs (appellants here) was excluded under rulings of the court which are not assigned as errors, yet there was enough in the remaining evidence to warrant an inference that the amount of lumber delivered by the plaintiffs to the defendant was worth considerably more than \$15, which evidence tended to show had been paid by the defendant on the account. In this situation, though the evidence left in the case by the rulings of the court did not show the amount of the balance owing by the defendant, yet it was such as to support a verdict in favor of the plaintiffs for at least a nominal amount. In an action in contract, the successful party is entitled to full costs. Code 1907, § 3662; *Stevens v. Standard Oil Co.*, 156 Ala. 581, 47 South. 140.

[2] It is error to exclude all the evidence offered by the plaintiff, as was done in this case, where it is such as to support a verdict in his favor; and this error involves injury when the result of it is to deprive the plaintiff of a judgment in his favor carrying the costs of the suit. 13 Cyc. 21.

Reversed and remanded.

HALFLING v. WILLIAMSON.

(Court of Appeals of Alabama. Dec. 19, 1911.)

APPEAL AND ERROR (§ 78*)—DECISIONS REVIEWABLE—FINAL JUDGMENT.

A judgment sustaining a demurrer to the complaint, without any further step, is not final judgment, and so no appeal will lie from it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 464-483; Dec. Dig. § 78.*]

Appeal from Circuit Court, Lauderdale County; C. P. Almon, Judge.

Action by E. B. Halfling against H. C. Williamson. From an order sustaining a demurrer to the complaint, plaintiff appeals. Appeal dismissed.

Paul Hodges, for appellant. George P. Jones, for appellee.

WALKER, P. J. The record in this case does not show that a final judgment has been rendered which would support an appeal. The court did not follow up its action in sustaining the demurrer to the complaint by making final disposition of the case. No final judgment in favor of either party having been rendered, the appeal must be dismissed. *Eslava v. Jones*, 79 Ala. 287.

Appeal dismissed.

DAVIS v. CLAUSEN.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. BROKERS (§ 14*)—EMPLOYMENT TO SELL REAL ESTATE—AUTHORITY.

A real estate agent has only authority to find a purchaser and report him to the owner; and, in the absence of a special agreement to that effect, he has no power to conclude a sale.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 14.*]

2. BROKERS (§ 56*)—COMMISSIONS—WHEN EARNED.

A broker employed to sell land for a commission is entitled to compensation when a sale is made by his principal to a purchaser procured by the broker, though all the negotiations were conducted by the principal with the purchaser, provided the broker is the efficient cause of bringing the minds of the principal and purchaser together.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 85-89; Dec. Dig. § 56.*]

3. BROKERS (§ 57*)—COMMISSIONS—WHEN EARNED.

Where a broker employed to procure a purchaser of real estate handed to a third person a description of the property with the statement that it could be bought for a specified sum, and his act was the procuring cause of a subsequent sale made by the owner to the third person for a less sum, the broker was entitled to reasonable compensation for the services rendered.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.*]

4. BROKERS (§ 85*)—ACTIONS—EVIDENCE—ADMISSIBILITY.

Where, in an action by a broker for compensation for procuring a purchaser, the evidence showed that the owner conducted the ne-

gotiations with the purchaser, and the purchaser testified that the broker called his attention to the property before the purchase, but stated that he could not remember whether the broker was the first person who called his attention to the property, the testimony of third persons that they called the purchaser's attention to the property, and that, after the purchase, the purchaser told them that he had them to thank for the purchase, was admissible to aid in determining the question of the procuring cause of the sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 106-115; Dec. Dig. § 85.*]

5. WITNESSES (§ 388*)—CROSS-EXAMINATION—EXTENT.

Great latitude is allowed on the cross-examination of a witness to lay a predicate for proof of contradictory statements.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1242; Dec. Dig. § 388.*]

6. APPEAL AND ERROR (§ 901*)—PRESUMPTIONS—RECORD.

The record on appeal must affirmatively show error of the trial court to authorize a reversal for all presumptions are in favor of the correctness of the rulings of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3870; Dec. Dig. § 901.*]

7. APPEAL AND ERROR (§ 501*)—QUESTIONS REVIEWABLE—INSTRUCTIONS—EXCEPTIONS.

Where the bill of exceptions does not affirmatively show the reservation of an exception to the charge pending the trial and before the jury retired, the court on appeal will not review the charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2300-2306; Dec. Dig. § 501.*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by George J. Clausen against Charles N. Davis. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Boyles & Kohn, for appellant. Gordon & Eddington, for appellee.

DE GRAFFENRIED, J. [1] In the absence of a special agreement, the general authority of a real estate agent is only to find a purchaser, and to report him to the owner. He has, in the absence of special authority, no power to conclude a sale. His business generally is only to find a purchaser who is willing to buy the land on the terms fixed by the owner. *Minto v. Moore*, 1 Ala. App. 556, 55 South. 542.

[2] A broker employed to sell land becomes entitled to his compensation as a general rule, whenever a sale of the land is made by his principal to a purchaser introduced by him to his principal. When a broker employed to sell land interests a prospective buyer in the land which he has been employed to sell, and the owner of the land is thereby enabled to make, and does make, a sale of such land to such prospective purchaser, the broker is entitled, as a general rule, to his compensation, although the seller personally conducts all of the negotiations and

sells the land for a less sum than the amount for which he authorized the broker to offer the land for sale. In such case the seller is "liable at least for a reasonable commission, and the contract may be introduced as a guide for the jury in arriving at what is reasonable." *Smith v. Sharpe et al.*, 162 Ala. 438, 50 South. 381, 136 Am. St. Rep. 52. Of course, the mere fact that land which a real estate agent is authorized to sell is sold by the owner does not alone authorize the broker to recover compensation. The efforts of the broker to sell the land must be the procuring cause of the sale in order that he may be entitled to compensation. 19 Cyc. 257. The office of a real estate broker who is employed to negotiate sales of property is that he should find a purchaser able and willing to buy, and that he should be the efficient cause of bringing the minds of the proposed purchaser and would-be vendor together. *Birmingham Land & Loan Co. v. Thompson*, 86 Ala. 149, 5 South. 473.

[3] 1. It is evident from the above that for the appellee to be entitled to recover any sum of the appellant in this case he must show, by evidence, to the reasonable satisfaction of the jury that there was, in fact, a contract made by him with the appellant, whereby he became authorized, as appellant's agent, to sell the property, and, having offered such evidence, then that he was the procuring cause of the sale which appellant made of the land to Duval. Was there, in fact, a meeting of the minds of Clausen and Davis? If so, what was, in fact, their agreement? Did Clausen understand that Davis would sell for \$8,000, and only \$8,000? Was it the understanding of the parties, to be gathered from all that was said between them, that if Davis sold to Duval Clausen was to receive commissions only in the event a sale was made at \$8,000? If there was a contract between the parties, was Clausen the procuring cause of the sale made by appellant to Duval? Clausen seems to have handed Duval a description of the land, and informed him that the land could be bought for \$8,000. Duval seems to have refused to negotiate with Clausen with reference to the purchase of the property, and the negotiations were all conducted by Duval with Davis direct. Did the fact that Clausen handed Duval the description of the property with the statement that it could be bought for \$8,000 operate as the procuring cause of the sale? If so, the appellee, under the decisions of the Supreme Court of Alabama, if he was Davis's agent, was entitled at least to reasonable compensation for the services rendered by him. *Smith v. Sharpe et al.*, 162 Ala. 438, 50 South. 381, 136 Am. St. Rep. 52; *B. L. & L. Co. v. Thompson*, 86 Ala. 149, 5 South. 473; *Henderson v. Vincent*, 84 Ala. 100, 4 South. 180; *Bailey, McConnell & Howard v. Smith*, 103 Ala. 643, 15 South. 900.

[4] 2. It appears from the evidence that, before Clausen claims to have mentioned the subject of this sale to Duval, Duval had spent some time in the residence with Mr. and Mrs. Phygmyer, who were at that time in possession of the house as tenants of Davis. It further appears from the evidence of Mr. and Mrs. Phygmyer, which, after it was given to the jury, the court excluded on the motion of appellee on the ground that it was irrelevant, that, while Duval was with them as their guest in the house, he expressed himself as greatly pleased with it, made some examination of it, and was informed that it belonged to appellant, Davis. It further appeared from that excluded evidence that Phygmyer told Duval that it could be bought for \$8,000, but later, in the same conversation, told him that he had no authority to sell it or to place a price upon it. After the sale, Duval, so Phygmyer claims, stated to him that he had "him and Mrs. Phygmyer to thank for the purchase by him of his beautiful home." Mr. Duval, according to the evidence, is a man of good character, but his own evidence, as shown in the bill of exceptions, shows either that he is a man of large affairs, or that his memory is defective. This is plainly shown by the following, which is taken from the first part of his evidence, given on direct examination: "My name is Joseph E. Duval. I know Mr. Davis. During the month of February I bought a piece of property on Monterey and Hamilton streets from Mr. Davis. I don't remember what I paid for the property. I will have to refresh my memory by looking back for the sale. [It was here admitted by counsel that \$6,750 was the price the property was sold for.] I know George J. Clausen, the plaintiff in this case. He saw me regarding this property before I bought it. Mr. Clausen gave me this property as being for sale, and caused me to go out and look at it. I did not remember at the time whether he was the first man who told me until Mr. Clausen called my attention to it and I told him, 'Yes; I remember now you did.'" We have copied the above excerpt from Mr. Duval's testimony for the purpose of emphasizing our conclusion that the excluded testimony of Mr. and Mrs. Phygmyer was both relevant and material. All of the negotiations which culminated in the sale of the land were conducted personally by Duval and Davis, and unless there was a contract between Davis and Clausen, and unless Clausen was the procuring cause of the sale, then he was entitled to no recovery. Duval's testimony was introduced by appellee for the purpose of showing that he was the procuring cause of the sale, and for that purpose only, and the testimony of Mr. and Mrs. Phygmyer tended to show the contrary. If Duval already knew the property when appellee alleges that he gave him the description of the property, we think

that, under the evidence in this case, this should have gone to the jury for the purpose of aiding them in determining the question as to what was, in truth, the procuring cause of the sale. If, after the sale was made, Duval told Phygmyer that he had "him and Mrs. Phygmyer to thank for the purchase by him of his beautiful home," that testimony was relevant as a contradiction of Duval's testimony, and on a material point in his testimony.

[5] Great latitude is allowed on the cross-examination of a witness for the purpose of laying a predicate for proof of contradictory statements. *Tanner v. L. & N. R. R. Co.*, 60 Ala. 621.

[6, 7] 3. The bill of exceptions fails to show that the appellant reserved his exceptions to the parts of the oral charge to which he took exceptions pending the trial and before the jury retired. When an appeal is taken from the judgment of a trial court to an appellate court for review, all the presumptions are that the trial court committed no error. The record, to authorize a reversal, must affirmatively show that the trial court was guilty of error. While we think it probable that the appellant reserved his exceptions to the parts of the oral charge to which he reserved exceptions, pending the trial and before the jury retired, the bill of exceptions does not affirmatively show that he did so. We are therefore precluded from considering the questions which the appellant desires us to consider with reference to the correctness of parts of the court's oral charge. *Donahoo & Matthews v. Tarrant*, 1 Ala. App. 446, 35 South. 270.

4. There are certain other matters presented for our consideration, but, as we have undertaken, in the above opinion, to give expression to our views as to the controlling legal questions presented by the facts of this case, we do not deem it necessary to discuss them.

For the error pointed out, this cause is reversed and remanded.

Reversed and remanded.

TEMPLETON v. STATE.

(Court of Appeals of Alabama. Dec. 19, 1911.)
CRIMINAL LAW (§ 1116*)—APPEAL—RECORD.

Error in overruling a demurrer to the indictment cannot be reviewed, where the demurrer is not set out in the transcript on appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2924; Dec. Dig. § 1116.*]

Appeal from Criminal Court, Jefferson County; Samuel Weaver, Judge.

Albert Henry Templeton was convicted of an offense, and he appeals. Affirmed.

Robert C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. This is an appeal on the record alone. The defendant demurred to the indictment, and the demurrer was overruled. The demurrer is not set out in the transcript, and the record, therefore, fails to inform us as to the ground of the demurrer. No error is therefore shown by the record. *Wade v. State* (Ala. Sup.) 54 South. 171; *Blake v. State* (Ala. Sup.) 54 South. 496.

The judgment of the court below is affirmed.

Affirmed.

CARBON HILL & LOST CREEK COAL CO. v. W. P. COOPER & SON.

(Court of Appeals of Alabama. Nov. 28, 1911.)

1. TRIAL (§ 91*)—EVIDENCE—OBJECTIONS.

A responsive answer to a question asked a witness should not be stricken on motion, if no objection was made to the question.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 242-244; Dec. Dig. § 91.*]

2. APPEAL AND ERROR (§ 1078*)—WAIVER OF ERROR—INSUFFICIENT EVIDENCE.

Assignments of error are waived by failure to present them, beyond mere mention in the appellant's brief, with a general statement that the rulings complained of were erroneous.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Action by W. P. Cooper & Son against the Carbon Hill & Lost Creek Coal Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Zac P. Shepherd and D. A. McGregor, for appellant. Norman Gunn, for appellees.

WALKER, P. J. [1] For anything that appears in the bill of exceptions, the statement of the witness A. B. Ray in reference to paying Jim Lee for checks issued by Mr. Bynon may have been in response to a question or questions calling for a statement on that subject, to which no objection was interposed by the defendant. If so, the defendant was not entitled to have the responsive answer of the witness excluded on motion. It could not, by failing to object to the question, speculate on the answer the witness would make, and then be entitled to have the answer excluded.

[2] The other assignments of error must be regarded as having been waived, as the counsel for the appellant in his brief merely mentions them, and asserts in general terms that the rulings complained of were erroneous. An appellate court is not in this way to have the burden cast upon it of undertaking an unassisted search for errors in the record. *Fitts v. Phoenix Auction Co.*, 153 Ala. 635, 45 South. 150; *Pearson v.*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Adams, 129 Ala. 157, 29 South. 977; Harper v. Ralsain Fertilizer Co., 148 Ala. 360, 42 South. 550; Hodge et al. v. Rambo, 155 Ala. 175, 45 South. 678.

Affirmed.

**HENDERSON-MIZELL MERCANTILE CO.
v. C. D. CHAPMAN & CO.**

(Court of Appeals of Alabama. Nov. 30, 1911.)

**1. CORPORATIONS (§ 492*)—ACTS OF AGENTS—
TORTS—RESPONDEAT SUPERIOR.**

The liability of a corporation for the torts of its agents under the doctrine of respondeat superior is no greater than that of a natural person, and while liable for any tort committed by the agent in doing the business which he was employed to transact, though the particular act may have been committed without the knowledge of the principal and in violation of express directions, it is not responsible for an act of the agent while in no way engaged in that business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1903; Dec. Dig. § 492.*]

**2. CORPORATIONS (§ 492*)—TORTS OF AGENT—
ACTS IN THE SCOPE OF EMPLOYMENT.**

While a person was in a store with his mules and wagon outside, another person attempted to drive off with such property. In response to his call for assistance to prevent the taking, the clerk with whom he was dealing and the manager of the store ran out and assisted in the recovery of the wagon and mules. The attempted taking was by a servant of and was authorized by a mortgagee of the property, and while on communication of this to the manager of the store he replied that they also had a debt against the owner, neither he nor the clerk assumed possession or control of the wagon or attempted to assert any claim thereto. The mortgagee sued the owner of the store, for a conversion. *Held* the purpose of the employés of the defendant in assisting in the recovery of the wagon and mules was wholly foreign to the business of the defendant, and as the remark of the manager cannot be held to have been an assumption of possession for his employer, the acts were so disconnected from the service of the principal that no liability therefor would attach to it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1903; Dec. Dig. § 492.*]

3. EVIDENCE (§ 244*)—HEARSAY—DECLARATIONS OF AGENT.

In an action for conversion, declarations of an agent of the defendant corporation made after the occurrence charged to have been a conversion, and not shown to have been made in connection with any transaction at that time by or on behalf of the defendant with the property in question, were inadmissible as without the scope of the agent's authority to bind the principal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.*]

Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge.

Action by C. D. Chapman & Co. against the Henderson-Mizell Mercantile Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. O. Mulkey, for appellant. C. D. Carmichael, for appellee.

WALKER, P. J. This is an action for the conversion of a wagon and two mules which had been mortgaged to the plaintiff (the appellee here). The transaction on which is based the charge that the defendant (appellant) corporation converted the mortgaged property was as follows: The mortgagor, Campbell, who lived in Florida, came in the wagon, accompanied by his young son, to the town of Samson in this state, stopped in the street near the storehouse of the defendant, unhitched the mules and tied them to the hind wheels of the wagon, and went into the defendant's store. While he was in the store making a settlement for a bale of cotton with J. S. Pinckard, one of the defendant's clerks, his son called attention to the fact that some one had hitched the mules to the wagon and was about to drive off. Campbell said, "Don't let him take my mules," and he and the clerk with whom he was dealing went out into the street, and the clerk prevented the man, one Sykes, who had hitched the mules to the wagon, from driving off with them. The manager of the defendant's store also came out and assisted in getting Sykes to surrender possession of the wagon and team, having threatened to have him arrested if he did not do so. After this occurrence Campbell took charge of his wagon and team and returned with them to his home in Florida, one of the clerks in the defendant's store going with him at his request and with the permission of the manager of the store. The circumstance principally relied on in argument for the appellee as tending to show a connection of the defendant corporation with the transaction is this statement by Sykes in the course of his examination as a witness for the plaintiff: "Me and Mr. Clark just loosed them and hitched them to the wagon, and got in and drove off, when Mr. Pinckard ran up and grabbed hold of the bridle, and says, 'What does this mean?' and I said it was to satisfy a debt Campbell owed Chapman, and that Mr. Chapman had authorized me to take them. He said, 'We have one, too, and you are not going to take the team away from him.'" The testimony tended to show that when demand was made on Sykes to show his authority to take possession of Campbell's property he did not exhibit or make known the authority under which he was acting. However, Chapman had authorized Sykes to take possession of the wagon and team under the mortgages to him. No one on behalf of the defendant at any time assumed possession or control of the wagon or team, or asserted any claim to it. The claim of the appellee is that on the evidence tending to prove the state of facts above summarized it was a question for the jury whether the appellant was liable for a conversion of the wagon and team.

[1] The liability of a corporation for a

tort committed by its agent is but an application of the doctrine of respondeat superior, long recognized as a part of the law of agency; and in respect of such liability private corporations stand before the law on the same footing as natural persons. A state of facts which would not render a natural person liable for an act of one who was at the time his agent would not render a corporation liable if it is the principal or employer sought to be charged. *Jordan v. Alabama Great Southern R. Co.*, 74 Ala. 85, 49 Am. Rep. 800; 10 Cyc. 1204. "It is a general rule of the law of agency, that a principal is liable for any tort committed by his agent in the performance of the business which he was employed to transact, even though the particular act constituting the tort may have been done without the knowledge of the principal, and in violation of his express directions; but a principal is not responsible for an act performed by his agent while in no manner engaged in performing the business of the principal." 2 Morawetz on Private Corporations (2d Ed.) § 730. The principal is liable when the wrong was committed by the agent while acting within the general scope of his employment; and he is not liable when the agent, in committing the wrong, steps outside of the line or scope of his employment to accomplish some purpose of his own having no relation to the business of the corporation in which he is employed. The doctrine of respondeat superior has no application where the employé, for the time being, abandons the business he was employed to transact, and commits an independent wrong while engaged in a transaction having no connection with that business. *Johnson v. Alabama Fuel & Iron Co.*, 166 Ala. 534, 52 South. 312; *Goodloe v. Memphis & Charleston R. Co.*, 107 Ala. 238, 18 South. 166, 29 L. R. A. 729, 54 Am. St. Rep. 67; *Daniels v. Carney*, 148 Ala. 81, 42 South. 452, 7 L. R. A. (N. S.) 920, 121 Am. St. Rep. 34; 10 Cyc. 1206. These rules are familiar, and are not questioned. The dispute here, as is generally the case, turns on the inquiry as to whether the act complained of was done while the agent was acting within or outside of the general scope of his employment.

[2] In the case at bar there is nothing in the evidence to support an inference that the employés of the defendant were any longer engaged in any way in transacting its business when they responded to the appeal of Campbell for assistance in preventing Sykes, a stranger not known to have any kind of claim of right to accomplish what he was trying to do, from getting away with his wagon and team. They simply dropped the business of the store, and lent their aid to Campbell in protecting his property. Their purpose in this was wholly foreign to the business of the defendant. Nor was

there any evidence of a change of plan or purpose when Sykes made it known that what he was doing was in an effort to collect a debt due to Chapman. The remark of Pinckard testified to by Sykes does not indicate that the former claimed the property for the defendant, or undertook to do anything for or on behalf of the defendant in reference to it. At no time did any one have or claim possession for or on behalf of the defendant. All that was done or attempted was to thwart the attempt of Sykes to get away with the wagon and team, and to restore them to Campbell, who at once resumed the possession and control which Sykes had attempted to interrupt. It is the merest unsupported conjecture to claim that at any stage of the occurrence above detailed either of the defendant's employés who figured in it was engaged in the business of the defendant which he was employed to transact. What they did was in no way incident to their employment. During the progress of the occurrence these employés ceased to execute their agency for the defendant. While they were rendering this service to Campbell they were in no wise acting in the line of their engagement to their employer. It is an instance of an act of an agent being so disconnected and apart from the service for which he was employed as not to subject his principal to any liability on account of it. If what was done amounted to a conversion, it was a conversion for which, under the evidence, the defendant corporation is not chargeable.

[3] The trial court was in error in admitting, over the objection of the defendant, evidence of a declaration or statement made by an agent of the defendant in reference to the occurrence after it had happened, and not shown to have been made in connection with any transaction or dealing at that time by or on behalf of the defendant with the property in question. It was beyond the scope of the agent's authority to bind his principal by such admissions or declarations having reference to a bygone transaction. *Western Newspaper Union v. Judson*, 55 South. 1026; *Tennessee River Transportation Co. v. Kavanaugh Bros.*, 93 Ala. 324, 9 South. 395. With this evidence excluded, as it should have been, the defendant was entitled to the general affirmative charge requested in its behalf.

Reversed and remanded.

WESTERN UNION TELEGRAPH CO. v. REED.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. DAMAGES (§ 23*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

The damages recoverable for breach of contract are such as are the natural and proximate result of the breach which reasonably

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

may have been anticipated by the parties at the time of the making of the contract, and such damages as may not reasonably have been expected to result from a breach are not recoverable, unless the particular facts giving rise to such damages in the case of a breach were known at the time of the making of the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 58, 62; Dec. Dig. § 23.*]

**2. TELEGRAPHS AND TELEPHONES (§ 67*)—
CONTRACTS FOR TRANSMISSION OF MESSAGES
—BREACH—MEASURE OF DAMAGES.**

The damages recoverable for breach by a telegraph company of a contract to transmit and deliver a message, are such as naturally and proximately result from the breach according to the usual course of things, whether actually contemplated by the parties or not, but damages suffered by reason of special circumstances are not recoverable unless known at the time of the making of the contract.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 64-68; Dec. Dig. § 67.*]

**3. TELEGRAPHS AND TELEPHONES (§ 67*)—
CONTRACTS FOR TRANSMISSION OF MESSAGES
—BREACH—MEASURE OF DAMAGES.**

Where as the direct result of the negligence of a telegraph company in transmitting a message, the sendee or some one for whose traveling expenses he was responsible, made a trip, which had it not been for the company's breach of duty it would not have been necessary to make, the company was liable for the necessary expenses of the trip; the company learning by the message itself or the facts, that a failure to properly transmit the message might probably result in the making of a trip which otherwise would not be taken.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 64-68; Dec. Dig. § 67.*]

**4. TELEGRAPHS AND TELEPHONES (§ 67*)—
CONTRACTS FOR TRANSMISSION OF MESSAGES
—BREACH—MEASURE OF DAMAGES.**

A sender of a telegram recommended the purchase of "Atlanta City bonds." The telegram was changed in transmission by substituting the word "Atlantic" for the word "Atlanta," and the sendee took a trip to Atlanta for a personal conference. The company had no information except as disclosed by the telegram as to the matter referred to therein. *Held*, that it was not liable for the traveling expenses incurred by the sendee, but was only liable for the payment for the transmission of the telegram.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 64-68; Dec. Dig. § 67.*]

Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge.

Action by Prentiss B. Reed against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

George F. Fearons, Ray Rushton, and H. F. Crenshaw, for appellant. John S. Tilley, for appellee.

WALKER, P. J. On July 19, 1910, the appellant (the defendant below) received from the appellee's agent at Montgomery, Ala., for transmission, a telegram in the following words, addressed to the appellee at Dade-

ville, Alabama: "I recommend Atlanta City bonds, nine thousand, paying four twenty-five net. Balance Savings Association, all nontaxable. If satisfactory, where shall I mail certificate for your signature. H. C. Stockdell." The message was changed in its transmission by the substitution of the word "Atlantic" for the word "Atlanta," as it appeared in the message delivered for transmission, making that part of the message, as it was delivered to the appellee on the same day, read, "I recommend Atlantic City bonds," instead of "Atlanta City bonds." The cost of the message, 61 cents, was by the appellant charged to the appellee, and was paid by him. The complaint claimed damages for the defendant's violation of its contract in failing to transmit the message correctly. As it was amended, it contained two counts, one of which claimed as special damages the cost of a trip to Atlanta made by the plaintiff upon the receipt of the message, and the value of the time lost from his business by making that trip—that count averring that at and before the sending of the message the plaintiff and H. C. Stockdell were cotrustees of a certain fund, amounting to a large sum, which they desired to invest; that the plaintiff "was acquainted with an issue of bonds known as Atlanta City bonds, and that he would, on the receipt of the message as delivered to the defendant at Montgomery, have been able, without further inquiry or investigation, to determine and inform his cotrustee of the advisability of investing in such bonds. But plaintiff avers that he had no acquaintance with the bonds described in said message as received as Atlantic City bonds, and was not informed as to their value or desirability; that, upon receipt of said message and, in consequence of said change in said message, plaintiff went to the city of Atlanta, where said Stockdell then lived, for the sole purpose of conferring with his said cotrustee as to the value of such bonds, and as to the advisability of investing said funds in said Atlantic City bonds." The court, having overruled a motion of the defendant to strike the parts of the complaint above set out which constituted the basis for the claim of the special damages mentioned, on the trial of the case without the intervention of a jury, issue having been joined on the plea of the general issue, on evidence showing the payment by the plaintiff of the cost of the message and substantially sustaining the averments of the complaint as to special damages claimed, rendered judgment in favor of the plaintiff, awarding him the amount shown by the evidence to have been expended in the trip to Atlanta and the value of his time lost in making that trip. The plaintiff testified in effect that he did not have confidence in Mr. Stockdell, his cotrustee, and that, upon re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ceiving the message, altered so as to recommend the purchase of Atlantic City bonds, he thought it better to go to Atlanta and have a personal conference with Stockdell, rather than attempt to communicate with him by telephone or telegraph. So far as the evidence showed, the defendant had no notice or information in reference to the matter referred to in the message, or as to the places of residence, situation, or relations of the parties, except such as was afforded by the message itself as it was delivered for transmission.

[1] The rule is familiar that for the breach of a contract only such damages are recoverable as are the natural and proximate result of its breach which reasonably might have been anticipated by the parties at the time the contract was entered into as a probable consequence of the breach, naturally to arise in the usual course of things, in the event of such breach; and that special damages, or such as could not reasonably have been expected to result from the breach of the contract complained of but for the existence of a particular state of facts or exceptional circumstances attending the making of the contract are not recoverable unless the special state of facts which might give rise to them in the event of the breach was, at the time the contract was entered into, in some way brought to the knowledge or notice of the party sought to be charged. *Dickerson v. Finley*, 158 Ala. 149, 48 South. 548; *Pilcher v. Central of Georgia Railway Co.*, 155 Ala. 316, 46 South. 765.

[2] The application of these rules to cases involving a breach by a telegraph company of the obligation assumed by it properly to transmit and deliver a message accepted by it for transmission has been illustrated in several decisions in this state. *Daughtery v. American Union Telegraph Co.*, 75 Ala. 168, 51 Am. Rep. 435; *American Union Telegraph Co. v. Daughtery*, 89 Ala. 196, 7 South. 660; *Western Union Telegraph Co. v. Way*, 83 Ala. 542, 557, 4 South. 844, 849. In the opinion rendered in the case last cited it was said: "That special circumstances which take the contract out of the usual course of things must be communicated, in order to become an element of the duty in reference to which the parties are to be presumed to contract, and if unknown, damages suffered by reason of the existence of such special circumstances are not recoverable; but that, in all cases, the damages which would naturally, generally, and proximately result from a breach of the contract 'according to the usual course of things,' are recoverable; whether or not actually contemplated by the parties, the law conclusively presumes them to have been in their contemplation."

This case presents the questions, whether the expenses of the plaintiff's trip to Atlanta and the loss of time incident to the making of that trip can be regarded as natural and proximate results which the defendant, at

the time it accepted the message for transmission, reasonably might have anticipated would follow in the usual course of things from the breach of obligation of which it was guilty; and, if not, whether, by the message itself, or in any other way, the defendant, at that time, had knowledge or notice of the existence of such a special state of facts as would render it reasonably probable that the plaintiff might incur such outlay and loss of time as a consequence of the error that was made in the transmission of the message.

[3] The question last stated will first be considered, as it is apparent from what has been said that an affirmative answer to it would dispense with any necessity of discussing the other question. It is not to be doubted that "where as the direct result of the negligence of the telegraph company plaintiff, or some one for whose traveling expenses he is responsible, makes a trip which, had it not been for the company's breach of duty, it would not have been necessary to make, the telegraph company is liable for the necessary and reasonable expenses of the trip." 37 Cyc. 1767. The telegram itself, standing alone or considered in connection with another telegram to which it is an answer, may be of such a nature as to suggest that a failure to transmit it, or its incorrect transmission, might probably result in the sender or the person to whom it was addressed making, or having another for him to make, a trip for which otherwise there would have been no occasion. That was the nature of the message under consideration in the case of *Duncan v. Telegraph Co.*, 93 Miss. 500, 47 South. 552, which is relied on by the counsel for the appellee as an authority supporting his contention. The facts in that case were that a telegram which, as it was received for transmission, read, "Son very well," was so changed in its transmission as to read, "Son very ill," came as the answer to a telegram from the plaintiff to the superintendent of a school at which his son was a pupil, inquiring if the latter was sick, stating that the sender had not heard from his son for some time, and asking for a prompt answer. The court was of opinion that the receipt by a father of such a reply to such an inquiry was well calculated to lead the father to leave at once for his son's bedside, and that the telegraph company was chargeable with the expenses of the trip so occasioned by its mistake. In the case of *Western Union Telegraph Co. v. Henley*, 157 Ind. 90, 60 N. E. 682, also relied upon by the counsel for the appellee, it was held that a telegram sent by the plaintiff from Bloomington, Ind., to a person at South Bend, Ind., in the words, "Is stone work on building finished? Wire answer today. Henley Stone Company," sufficiently informed the telegraph company of the nature of the information desired to sustain a judgment against the company, upon its

failure to deliver the telegram, for the expense of sending a messenger to obtain the information requested by the telegram, as it informed the company that the sender was engaged in the stone business, that it was interested in the progress of the stone work on a building in South Bend, and desired immediate information on the state of the work. There are other cases in the books in which the expenses of a trip taken in consequence of a failure to deliver a telegram, or of the delivery of a telegram materially different from the one sent, were allowed where the words of the message itself were such as to suggest that the breach of its obligation of which the telegraph company was guilty might probably lead to that result. *Western Union Telegraph Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; 37 Cyc. 1768.

[4] Can it be said that the words of the message now under consideration gave such notice or information? There was nothing in the words of that message as it was accepted for transmission to indicate whether the person to whom it was addressed was then informed or ignorant of the merits or demerits of the Atlanta City bonds which were recommended. This being true, it could not with much plausibility be claimed that a recommendation of Atlanta City bonds would have been even less likely to suggest to the person to whom the message was addressed the advisability of making a trip to Atlanta for the purpose of making an investigation than would have been a recommendation of the bonds of some other city. The terms of the message as it was prepared by the sender were as well calculated to suggest to one ignorant of the matter to which it referred or of the relations between the sender and the person addressed that it was in response to a request of the latter for such a recommendation, and that its receipt by him would end or settle an inquiry or investigation on his part, as that it might be the occasion of his starting an investigation as to the securities recommended. Indeed, it would be the merest guesswork to infer from the reading of such a telegraphic recommendation of certain securities that it is calculated to settle or to start an investigation of them by the person addressed, or to cause him to make a trip to a certain place, or any trip at all, for that purpose. Even if it could be said that it is a reasonable inference from such a message that it would lead the person addressed to make an investigation of the securities mentioned, it would be pure surmise to say that he would probably take a trip for that purpose, rather than seek information by letter, telegram or telephone, or by resort to a banker, or other person near at hand, who might be supposed to be in touch with sources of information on such a subject. In conclusion, as to this feature of the inquiry, we think that it may with confidence be said that the message itself which is in question in this case was

not such that its receipt by the telegraph company gave to it notice or information of the existence of a particular state of facts which rendered it reasonably probable that such a mistake as was made in its transmission would lead the person addressed to incur the outlay for a trip and the consequent loss of time for which he claims to be compensated in damages.

In the absence of any evidence tending to show that the appellant had any knowledge, information, or notice as to the matter referred to in the message except such as the words of the message itself afforded, it is plain that it is not liable for special damages which the plaintiff may have sustained, possibly as the natural result of his receipt of such a message as was delivered to him, in view of his actual relations with the subject-matter and the sender of the message, which were known to him, but were unknown to the appellant. In some of the cases referred to by the counsel for the appellee—for instance, the case of *Sprague v. Western Union Telegraph Co.*, 6 Daly (N. Y.) 200—special damages were allowed because of information imparted by the sender of the message to the employé of the company who accepted it, at the time of its acceptance, of the existence of the particular situation which would naturally give rise to such special damages in the event of the breach of obligation of which the telegraph company was guilty. Such rulings are not applicable to the state of facts here presented, because of the absence of such knowledge or information on the part of the appellant.

The reasoning which led to the rulings made in the cases of *Southern Railway Co. v. Webb*, 143 Ala. 304, 315, 39 South. 262, 111 Am. St. Rep. 45, and *Southern Railway Co. v. Coleman*, 153 Ala. 266, 44 South. 837, on states of facts bearing some analogy to the state of facts presented in this case, leads to the conclusion that the damages claimed by the appellee because of the expenses incurred by him in his trip to Atlanta, and his loss of time consequent upon the making of that trip, cannot be considered as natural or proximate results which might reasonably have been anticipated by the appellant, at the time it received the message, in ignorance of the special circumstances which occasioned the sending of it, as likely to ensue, in the usual course of things, from the breach of obligation of which it was guilty; but are to be regarded as special damages, or such as would not naturally have been expected to result, ordinarily and in the usual course of things, from that breach of duty but for the existence of the particular state of facts, collateral to the contract, and not suggested or disclosed by it, and which are not recoverable, because of the appellant's lack of knowledge, information or notice of such exceptional circumstances. *Guliford & Deal v. Western Union Telegraph Co.*, 163 Ala. 1, 4, 50 South. 112.

Under the allegations of the third count of the complaint, and the general claim of damages therein made, supported by the proof of the payment by the appellee of the charge made for a message which was not delivered as it was sent, the appellee is entitled to recover 61 cents, the amount paid by him on that account, with interest thereon. *Western Union Telegraph Co. v. Crumpton*, 138 Ala. 632, 36 South. 517. The judgment of the court below is reversed, and a judgment will here be rendered in favor of the appellee for that amount, the costs of the appeal to this court to be taxed against him.

Reversed and rendered.

WESTERN UNION TELEGRAPH CO. v. BENNETT.

(Court of Appeals of Alabama. Nov. 29, 1911.)

1. TELEGRAPHS AND TELEPHONES (§ 68*)— NEGLECTED DELIVERY OF MESSAGES—LIABILITY—MENTAL ANGUISH.

A husband who suffers mental anguish from the failure of his father-in-law to attend the burial of his wife in consequence of the negligence of a telegraph company in transmitting a death message to the father-in-law advising him of the time of the burial, may recover therefor.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

2. TELEGRAPHS AND TELEPHONES (§ 73*)— NEGLECTED DELIVERY OF MESSAGES—LIABILITY—MENTAL ANGUISH.

Whether a husband suffered mental anguish because of the failure of his father-in-law to attend the funeral of his wife in consequence of the negligence of a telegraph company in transmitting a death message to the father-in-law, *held* for the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.*]

3. TELEGRAPHS AND TELEPHONES (§ 39*)— TELEGRAM—NOTICE OF RELATIONSHIP.

A message sent by a husband announcing the death of his wife and the time of her burial is notice to the telegraph company of the relationship between the husband and the sendee.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 39.*]

4. TELEGRAPHS AND TELEPHONES (§ 66*)— NEGLECTED DELIVERY OF MESSAGES—NEGLECT—EVIDENCE.

Proof that the telegram delivered by a telegraph company to the sendee was not a copy of the telegram which the sender delivered to it for transmission is *prima facie* proof of the negligence of the company.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Action by R. E. Bennett against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

George H. Fearons, Campbell & Johnston, and W. C. Davis, for appellant. A. F. Fite, for appellee.

DE GRAFFENRIED, J. This was a special action of trespass on the case which was brought by appellee against appellant for the alleged negligence of appellant in the transmission of a telegram, and by reason of which negligence it is alleged in the complaint the appellee was damaged. The appellee resides in Columbus, Miss., and on July 5, 1907, his family consisted of himself, his wife, and three or four children of tender age, the youngest child being then only three or four months old. H. K. Caddell was the father of appellee's wife, and on July 5, 1907, he resided at Winfield, Ala. On said day the wife of appellee, who had been seriously sick for about six weeks, died. Her father and one of her sisters visited her during her illness, but they left Columbus and returned to Winfield, Ala., about 10 days before her death. When Mr. Caddell left Columbus, he requested appellee to keep him informed as to his daughter's condition, and to wire him in the event of her death. Neither appellee nor his wife had any relations living in Columbus, Miss., except their children, and when the wife was buried none of their relatives were present with appellee at the funeral.

When his wife died, appellee, wishing her father to know about her death, and also desiring his presence at the funeral, requested R. E. Cheatam to wire his said father-in-law at Winfield, Ala., that his wife was dead and also the time when she would be buried. Acting under said instructions, Cheatam delivered to appellant a telegram for transmission to Caddell at Winfield, which, when he delivered it to appellant, read as follows: "July 5, 1907. To H. K. Caddell, Winfield, Alabama. Mrs. R. E. Bennett just died. Will be buried to-morrow eve. R. E. Cheatam for R. E. Bennett."

Appellant undertook to transmit and deliver the telegram to Caddell at Winfield, and appellee paid to appellant 25 cents, its customary charges, for so doing. The telegram was transmitted to Winfield and there delivered to the said Caddell at 5 o'clock on the afternoon of July 5th, in ample time for him to have reached Columbus the next morning, but too late for him to reach there on that day. When the telegram was delivered to Mr. Caddell it read as follows: "July 5, 1907. To H. K. Caddell, Winfield, Alabama. Mrs. R. E. Bennett just died. Will be buried to-day eve. R. E. Cheatam for R. E. Bennett."

A mistake was made by the servants of appellant in transmitting the message, in that the words "to-morrow eve" were changed to the words "to-day eve," and as the telegram was received too late for Caddell to reach

Columbus on the 5th, and as he naturally presumed that his daughter would be buried on that day, he did not attempt to go to Columbus or to attend the funeral. The evidence tends to show that but for the above mistake made by the servants of appellant in the transmission of the telegram, Caddell would have been present at his daughter's funeral. *Western Union Telegraph Co. v. Snell*, 56 South. 854.

[1] 1. When a man's wife dies, if he is a normal man, his thoughts turn, naturally, to her people, for it is her people, next to himself, who are most afflicted by her death. The wife's mother appears to have been dead, and this telegram was sent to her father, who, next to her husband and her children, stood most closely to her, and who, by reason of his own grief, would have been the most natural person in the world to give sympathy and comfort to the husband in his sorrow. He was the father-in-law of the husband, the grandfather of his children, and, if the husband was a normal man, he entertained for Caddell an affection and veneration second only to that in which he held his own parents. The relationship of the parties was such as to warrant the recovery of damages for mental suffering if, by reason of appellant's negligence, the father-in-law failed to attend the funeral, and the appellee was thereby denied the comfort of his presence. *Western Union Telegraph Co. v. Crocker*, 135 Ala. 496, 33 South. 45, 59 L. R. A. 398; *Western Union Telegraph Co. v. Saunders*, 164 Ala. 234, 51 South. 177, 137 Am. St. Rep. 35.

[2] It was, under the facts of this case, for the jury to say whether the appellee suffered mental pain because of the absence of his father-in-law at the time of the funeral. *Western Union Telegraph Co. v. McMorris*, 158 Ala. 573, 48 South. 349, 132 Am. St. Rep. 46.

[3] 2. The appellant contends that, as the evidence fails to show that appellee when he delivered the telegram to appellant for transmission disclosed to it that the sendee was his father-in-law, appellee is not entitled to recover for his mental suffering caused by its error in transmitting the telegram and the absence of the father-in-law occasioned thereby.

We do not regard the question which the appellant thus seeks to present as an open one in Alabama. We think that the decisions of our Supreme Court are clearly to the effect that when a telegram is sent announcing serious illness or death, and the relationship, by blood or marriage, between the sender and the sendee is such as to warrant the recovery of damages for mental suffering, on account of such relationship, caused by negligence in the transmission or delivery of such telegram, the sender may recover for mental suffering occasioned by

reason of such negligence, whether the relationship is disclosed or not. *Western Union Telegraph Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46.

It seems that in those jurisdictions where the rule above announced does not obtain, the sendee may always recover for mental pain or suffering occasioned by neglect in the transmission or delivery of such a telegram sent him by his agent. In all the states, it is held that the telegram shows its importance, and the fact that it is addressed to the sendee is sufficient evidence to the telegraph company of the near relationship of the sendee to the sick or dead person to notify it that mental pain or suffering will probably result to the sendee by reason of neglect in transmitting or delivering such a telegram. Under the facts in this case, we are inclined to the opinion that in those jurisdictions in which the rule invoked by appellant obtains, the appellee in this case would be held to be entitled to recover. The telegram announced the death of a woman and fixed the time of her funeral. The appellant was, under the decisions of all the states, charged with knowledge of the fact that Caddell was her near relative. The telegram shows on its face that its sender was the husband of the dead woman and as appellant therefore knew that the telegram was sent by the husband of the deceased to one of her near relatives, we are of the opinion that there was sufficient evidence in possession of appellant at the time the telegram was delivered to it for transmission, to have put it on inquiry as to the real relationship between the sender and the sendee of the telegram. *Western Union Telegraph Co. v. Benson*, 159 Ala. 254, 48 South. 712.

[4] 4. A prima facie case was made out by appellee, so far as the negligence vel non of appellant was concerned, when his evidence disclosed the fact that the telegram delivered to Caddell was not a copy of the telegram which appellee delivered to it at Columbus to be transmitted to Caddell. 4 Mayfield's Dig. p. 935.

We have above discussed all of the assignments of error in this case which appear to us to possess merit, and we find no error in the record.

The judgment of the court below is affirmed.

Affirmed.

BARKER v. STATE.

(Court of Appeals of Alabama. Dec. 21, 1911.)

CRIMINAL LAW (§ 834*)—INSTRUCTIONS—COMMENT ON INSTRUCTIONS GIVEN.

Under Code 1907, § 5364, which provides that charges must be given or refused in the terms in which they are written, the giving of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a charge on reasonable doubt in a murder case, with the remark: "This is a fool charge, but I will give it to you, gentlemen of the jury, as the Supreme Court has said it was good law; but in my opinion it is misleading"—is a modification or a criticism of the charge, constituting reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2013, 2014; Dec. Dig. § 834.*]

Appeal from Circuit Court, Elmore County; W. W. Pearson, Judge.

Dawes Barker was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Lancaster & Smoot and J. M. Holley, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. The defendant requested the court to give this written charge: "A reasonable doubt is not the same as the probability of his innocence. A reasonable doubt of the defendant's guilt may exist, when the evidence fails to convince the jury that there is a probability of defendant's innocence." In reference to the action of the court in this connection, the bill of exceptions states: "The court gave this charge at the request of the defendant, but at that time and in the presence of the jury made the following remarks in reference to said charge, to wit: 'This is a fool charge, but I will give it to you, gentlemen of the jury, as the Supreme Court has said it was good law; but in my opinion it is misleading.' To this remark of the court the defendant then and there duly excepted."

The statute provides that "charges moved for by either party must be in writing, and must be given or refused in the terms in which they are written." Code, § 5364. In giving effect to this statute, it has been held that the court may explain to the jury a written charge given at the instance of a party, but is not permitted to qualify or modify it (*Callaway & Truitt v. Gay*, 143 Ala. 524, 39 South. 277), and that even when a given written charge asserts a proposition which is legally incorrect, or which for any reason the court might properly have refused to assert, the statute has the effect of making the addition to it by the court of any qualification of it a reversible error (*Eiland v. State*, 52 Ala. 322; *Edgar v. State*, 43 Ala. 45). It cannot well be claimed that by the act of the court in accompanying the giving of an instruction requested with a statement that it is a fool charge, which, in the opinion of the court, is misleading, the instruction as given is not so modified, and its weight with the jury as a guide for their deliberations so impaired, as probably to lead them to consider it, if they consider it at all, mainly with the view of not being misled by it, rather than to regard it with

that respect which should be accorded to the instructions of the court as to the law applicable to the issues of fact to be passed on.

Without regard to whether or not there was merit in the court's criticism of the charge, it was improper for it to indulge in disparaging remarks to the jury in reference to a proposition embodied in a charge given to them as a part of the law by which they should be governed in the discharge of the duty imposed upon them. The jury should not, by any act or statement of the court, be left under the impression that any part of the instructions to them is by the court itself regarded as unworthy of approval as a statement of what the law really is, or that it is perfunctorily or unwillingly given to them in charge as a part of the law of the case, though the court withholds from it its assent or approval. It is idle to expect a jury to give respectful consideration to a charge, when the court makes known that it regards the proposition embodied in it, not as law, but as mere foolishness.

Other questions presented by the record need not be passed on, as they may not arise on another trial.

Reversed and remanded.

SILLS v. STATE.

(Court of Appeals of Alabama. Nov. 30, 1911.)

1. CRIMINAL LAW (§ 1169*)—TRIAL—CURING ERROR.

Any error, consisting of cross-examination of a witness as to whether he and another witness for the state were drunk on the night before the difficulty with reference to which they testified, was cured by the subsequent admission of uncontradicted evidence of the fact sought to be elicited.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

2. WITNESSES (§ 330*)—CROSS-EXAMINATION—RELEVANCY.

In a prosecution for homicide, questions asked of a witness on cross-examination as to the race or color of another witness for the state, and as to witness' improper relations with her, were properly disallowed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106-1108; Dec. Dig. § 330.*]

3. WITNESSES (§ 414*)—CORROBORATION—DECLARATIONS.

Evidence as to statements made by witness in conformity with the testimony given by him was inadmissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1287, 1288; Dec. Dig. § 414.*]

4. WITNESSES (§ 388*)—CONTRADICTION—FOUNDATION.

A witness may not be contradicted by proof of inconsistent statements, unless a proper foundation therefor has been laid.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1246; Dec. Dig. § 388.*]

5. HOMICIDE (§ 112*)—SELF-DEFENSE—PROVOKING DIFFICULTY.

A defendant, who provoked or brought on the difficulty which resulted in the homicide

with which he is charged, cannot set up self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 145-150; Dec. Dig. § 112.*]

6. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS—REQUEST TO CHARGE.

It is not error to refuse a request to charge, substantially covered by instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from City Court of Mobile; O. J. Semmes, Judge.

Lee Sills was convicted of murder in the second degree, and he appeals. Affirmed.

The bill of exceptions shows that Weinacker was called by the defendant, and the defendant offered to show by him that John Jackson made a statement conforming to his testimony in court before he saw either Dudley or Crozier. The testimony offered by Baker was in the shape of a written showing that he would swear that Mary Vigo told him she was drunk at the time of the difficulty between Ray and Sills, and did not know anything about it.

Charge 8, given for the state, is as follows: "If the jury believe beyond all reasonable doubt, from the evidence, that the difficulty was caused and commenced by reason of an opprobrious epithet by the defendant, then he would not be entitled to set up self-defense."

Webb & McAlpine, for appellant. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

WALKER, P. J. [1] If there was any prejudicial error in the rulings of the court on the questions asked John R. Stogsdale, a witness for the state, on his cross-examination, as to whether he and another witness for the state were drunk on the night before the occurrence of the difficulty in reference to which they testified, that error was cured by the subsequent action of the court in admitting uncontradicted evidence of the fact sought to be elicited by those questions.

[2] The questions asked the same witness on his cross-examination as to the color or race of Mary Vigo, another witness for the state, and as to his illicit sexual relations with her, called for matters which were irrelevant to any issue in the case, and there was no error in sustaining objections to those questions. *Fonville v. State*, 91 Ala. 39, 8 South. 688; *Crawford v. State*, 112 Ala. 1, 21 South. 214.

[3] Under the rule, prevailing in this state, that proof of declarations, verbal or written, made by a witness out of court, is inadmissible in corroboration of his testimony (*Jones v. State*, 107 Ala. 93, 18 South. 237; *Nichols v. Stewart*, 20 Ala. 358), the court properly sustained the objection to the

testimony sought to be elicited by the defendant from the witness Weinacker as to statements made by John Jackson, another witness for the defendant, in conformity with the testimony given by him.

[4] The testimony of Walter Baker as to a statement made to him by the witness Mary Vigo which was inconsistent with her testimony was properly excluded, because of the failure to lay the proper predicate for the introduction of evidence of such contradictory statement.

[5] The court was not in error in giving charge 8, requested by the counsel for the state. It asserted the familiar proposition that a defendant, who provoked or brought on the difficulty which resulted in the homicide with which he is charged, cannot set up self-defense. *Storey v. State*, 71 Ala. 329; *Hendricks v. State*, 122 Ala. 42, 28 South. 242.

[6] The proposition embodied in the written charge, refused to the defendant, as to the presumption of innocence to be indulged in his favor, was substantially covered by another written charge given at his instance, and the court is not chargeable with reversible error because of its refusal to repeat the proposition, when stated in slightly varying terms.

The counsel for the appellant do not undertake to point out a fault in any other ruling of the court in giving or refusing instructions, and we discover no prejudicial error in any of those rulings.

Affirmed.

HUDSON v. WRIGHT.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. LANDLORD AND TENANT (§ 248*)—CLAIM FOR RENT—PRIORITY.

Under Code 1907, §§ 4734, 4743, giving a landlord a paramount lien on the crops for the rent, and providing that, where the relation of hirer and hiring exists, the laborer has a lien on the crop for the value of his portion, a landlord's lien is superior to the lien of a hiringling, raising a crop under an agreement with the tenant by furnishing the labor for one-half of the crop.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1003-1017; Dec. Dig. § 248.*]

2. APPEAL AND ERROR (§ 843*)—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

Where appellee indicates a purpose to abandon any claim based on specified counts of his complaint, the overruling of demurrers to such counts will not be considered on appeal; the court indicating its views of the principles applicable to the controversy.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 843.*]

Appeal from City Court of Gadsden; John H. Disque, Judge.

Action by Harvey Wright against F. N.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Hudson. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

See, also, 1 Ala. App. 433, 56 South. 258.

Amos E. Goodhue and E. O. McCord, for appellant. George D. Motley, for appellee.

WALKER, P. J. By the ruling made on the former appeal in this case (*Hudson v. Wright*, 164 Ala. 298, 51 South. 389, 137 Am. St. Rep. 55), it was determined that the plaintiff, shown by the pleadings in the case as they stood at that time to have been a subtenant of J. T. Wright, was not bound by the result of the attachment suit brought by the defendant against J. T. Wright, with which the plaintiff was not in any way connected.

[1] On one aspect of the evidence developed on the trial of the case which is under review on this appeal, the appellee was not a subtenant of J. T. Wright, but made the crops in reference to which this suit was instituted under an agreement between him and J. T. Wright, by the terms of which the latter furnished the land, teams, etc., and the plaintiff furnished the labor, and was to receive one-half of the crops raised. On this aspect of the evidence, the plaintiff was a hireling of J. T. Wright, and had no property or interest in the crop, save that he had a lien on the crop for "the value of the portion of the crop to which he was entitled," which lien was subordinate to the lien of the landlord "on the crop grown on the rented lands for the rent of the current year, and for advances made in money or other thing of value," etc. Code 1907, §§ 4734, 4743; *Hudson v. Wright*, 1 Ala. App. 433, 56 South. 258. That, as against a plaintiff, having such a relation to the subject of controversy as is indicated by the aspect of the evidence above mentioned, evidence was admissible to show that the entire crop grown on the rented land and levied on in the attachment suit instituted by the defendant as the landlord was not sufficient to satisfy the amount due him as landlord, was ruled in the case last cited. And that the court was in error in assuming, as it did in its oral charge, that, under that aspect of the evidence, the plaintiff was entitled to recover, is made manifest by what was said in the opinion rendered in that case on a similar state of facts.

[2] The counsel for the appellee asserts in his brief, as a reason for this court's declining to review the action of the trial court in overruling demurrers to the third and fourth counts, which were added to the complaint by amendment, that those counts were withdrawn. The record does not sustain this claim; the counts of the complaint which it shows were withdrawn by the plaintiff being counts A and B, which are not set out. But as the appellee's counsel indicates

a purpose to abandon any claim based on the third and fourth counts of the complaint, and as what has been said sufficiently indicates the views of the court as to the principles applicable to the controversy between the parties, the ruling on the demurrers to those counts need not be passed upon specifically.

Reversed and remanded.

MOSELEY v. SELMA NAT. BANK.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. SUNDAY (§§ 11, 15*)—NOTES—VALIDITY.

A note made and delivered on Sunday is void, and cannot be ratified.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. §§ 30, 46; Dec. Dig. §§ 11, 15.*]

2. BILLS AND NOTES (§ 375*)—BONA FIDE PURCHASER—SUNDAY CONTRACT.

Where a note and chattel mortgage securing it were executed on Sunday, but dated as of a secular day, and an innocent purchaser took them for value, without notice, before maturity, the maker was estopped to defeat an action thereon by the purchaser.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 974; Dec. Dig. § 375.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where, in detinue by the holder, as collateral security, of a note and mortgage for the personality covered by the mortgage, there was no controversy over the execution of the note and mortgage and hypothecation agreement, the mode of proving the signatures, though erroneous, was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

4. CHATTEL MORTGAGES (§ 209*)—TRANSFERS—TITLE OF TRANSFERREE.

Where a note and chattel mortgage securing it were transferred by the payee as collateral security by indorsing the note in blank and delivering it and the mortgage to the transferee, the legal title to the chattels covered by the mortgage passed to the transferee.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 456, 457; Dec. Dig. § 209.*]

5. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where a transferee of a chattel mortgage, who obtained by the transfer the legal title to the chattels, brought an action against the mortgagor in detinue for the chattels, the error, if any, in admitting in evidence the hypothecation agreement involved in the transfer was not prejudicial to the mortgagor; the right to recover not resting on the agreement.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

Appeal from Circuit Court, Dallas County: B. M. Miller, Judge.

Action by the Selma National Bank against L. H. Moseley. From a judgment for plaintiff, defendant appeals. Affirmed.

Arthur M. Pitts, for appellant. Pettus, Jeffries, Pettus & Fuller, for appellee.

PELHAM, J. The rulings on the pleadings in the trial court raise the question on this appeal as to whether or not the maker of a negotiable note that is void because of having been made and delivered on Sunday, but which is dated by the maker on a secular day, is estopped from pleading the illegality of the note in bar of recovery in a suit brought by an indorsee who acquired the note before maturity, and for a valuable consideration, without notice of its illegality.

The appellee brought an action of detinue against the appellant based on a mortgage given by the appellant to the Schwarz Commission Company on personal property sought to be recovered in this suit. The commission company, a firm doing an advancing business, transferred the mortgage, and note secured by it, to the appellee bank as collateral security, along with other notes and mortgages to secure a loan made by the bank to the commission company. The note was indorsed to the bank in blank by the payee at the time of its hypothecation, together with the mortgage, and both note and mortgage were delivered to the bank before maturity, for a valuable consideration, under a hypothecation agreement, together with other collateral securities, not connected with this suit. The note and mortgage were executed and delivered on Sunday, January 2, 1910, but were dated by the maker, or payee, with the maker's knowledge and consent, on a secular day, to wit, the following Monday, January 3, 1910. The mortgage was recorded several days after its execution, and, after being recorded and before maturity, was transferred to the appellee in the due course of business. The complaint is in the code form for the recovery of specific property. The defendant filed pleas of the general issue, made a suggestion, under the statute, that the suit was based on a mortgage, with request to ascertain the amount due on the mortgage, and also filed a plea of payment and three special pleas, setting up the fact that the mortgage and note were executed and delivered on Sunday, and therefore were void. To these special pleas, the plaintiff filed replications, averring, in substance and effect, that plaintiff purchased the note and mortgage in the due course of business from the original payee for a valuable consideration, before maturity, and without notice or knowledge of any defense existing between the original maker and payee, and that the defendant was estopped from pleading that the note was executed and delivered on Sunday and void, for the reason that it had been falsely dated by defendant on a secular day, for the purpose of holding it out as a valid transaction to induce persons to deal with it as such, and that plaintiff had so dealt and purchased it in good faith, believing it to have been executed and delivered on a secular day, as on the face of the paper purported to be the fact. Demurrers to these replications were overruled,

and the court's action in overruling the demurrers is assigned as error.

[1] It has been the settled law in this state for many years that a note made and delivered on Sunday cannot be enforced; nor will a subsequent ratification validate it, as it was originally void. *Shippey v. Eastwood*, 9 Ala. 198. Chief Justice Collier, however, in referring to such contracts in rendering the opinion of the court, in *Saltmarsh v. Tuthill*, 13 Ala. 390, 406, says: "It has been repeatedly determined that a penalty inflicted by statute upon the doing of an act is equivalent to a prohibition, and a contract relating to it is void. See *Shippey and Another v. Eastwood*, 9 Ala. 198, 200. Under the influence of this rule, it has been decided that a contract made on a Sunday is void, and a security founded on it is not recoverable at the suit of a party to the illegal consideration. But, as the act does not declare that both the contract and security are void, the authorities clearly indicate that a bona fide indorsee of negotiable paper, founded upon such a contract, who acquires it before maturity, without notice of the illegality, for value, may enforce its payment."

[2] The case of *Saltmarsh v. Tuthill* is cited by the court in rendering its opinion in the case of *Cranston v. Goss*, 107 Mass. 439, 9 Am. Rep. 45, in support of this proposition, declared by that case to be the law: "But it is also agreed that the note bears date of a secular day; and that the plaintiff is a bona fide holder of the note, for a valuable consideration, and took it before it came due, without notice of any defect, illegality, or other infirmity in the same. The plaintiff, therefore, not having participated in any violation of law, and having taken the note before its maturity, for good consideration, and without notice of any illegality in its inception, may maintain an action thereon against the maker. To hold otherwise would be to allow that party, who alone had been guilty of a breach of the law, to set up his own illegal act as a defense to the suit of an innocent party. This view is supported by the judgments of all the courts, English and American, that have considered the question."

The opinion in the case of *Saltmarsh v. Tuthill* is criticized in *Burns v. Moore*, 76 Ala. 339, 52 Am. Rep. 332, and *Anderson v. Bellinger*, 87 Ala. 334, 338, 6 South. 82, 4 L. R. A. 680, 13 Am. St. Rep. 46, and the statute in force at the time of the prior decision pronounced less "sweeping and violating in its effect"; but the distinction drawn in the latter case is placed on the adjudication in the first case having been related to a negotiable instrument, which "depended for the result reached on the general principle which frees commercial paper from infirmities of which subsequent holders have no notice." *Anderson v. Bellinger*, supra.

On the proposition of estoppel as applied to the holder of commercial paper, it is said by the justice rendering the opinion of the

court in *Knox v. Clifford*, 38 Wis. 651, 20 Am. Rep. 28: "We hold this rule: That, when a party makes and puts in circulation a negotiable note purporting to be made and bearing date on some secular day, he is estopped, as against an innocent holder, from showing that it was actually executed and delivered on Sunday. We cannot well conceive of a stronger case for the application of the doctrine of estoppel than such a case presents."

We find the following holding in *Johns v. Bailey*, 45 Iowa, 241: "In the case before us, the plaintiff caused the contract to be dated as though it had been executed on a secular day. By this act, the defendants may have been misled and induced to believe that the defense now made to the contract did not in fact exist. While giving all the appearance of legality to his contract, plaintiff cannot set up its illegality to protect himself against the instrument, when in the hands of a good-faith holder, without notice. He is estopped to deny the validity of the instrument, when he, by his own act, has given it such character." The last-mentioned case is cited approvingly in *Leightman v. Kadetska*, 58 Iowa, 676, 12 N. W. 736, 43 Am. Rep. 129, where the court, in passing on a case involving the same principle, uses this expression: "It is only against a person in equal fault that a defendant can be allowed to allege his own turpitude."

In the case of *Vinton v. Peck*, 14 Mich. 287, the court says: "This note bore upon its face a legal date, which was placed upon it for the express purpose of obtaining credit for it as a lawful instrument; and it would certainly be valid in the hands of a bona fide holder." And, referring to the rule protecting a bona fide holder, the court further says: "And, apart from this rule, where steps are taken to induce a belief that a note was not made on Sunday, we should not be prepared to hold that a party could assert his own fraud in his defense."

In *Love v. Wells*, 25 Ind. 503, 87 Am. Dec. 375, the court held that, assuming that a deed was delivered on Sunday, and void, the party who executed it and gave it a secular date could not set up the invalidity of the deed against a subsequent vendee, who purchased the land for a valuable consideration, in good faith, without notice of the transaction having been had on Sunday. To allow the defendant such a defense would "be permitting him, by his own unlawful act, to perpetrate a gross fraud upon innocent purchasers. To such an act the law will not lend its aid, or give its sanction." *Love v. Wells*, supra.

Many authorities support the proposition that, notwithstanding promissory notes and other instruments executed on Sunday are void, yet, if they are falsely dated as of another day, and an innocent person takes them for value and without notice, the maker is estopped from setting up that defense in a

suit by an innocent purchaser without notice. See *Ball v. Powers*, 62 Ga. 757; *Harrison v. Powers*, 76 Ga. 218; *Bank v. Mayberry*, 48 Me. 198; *Bank v. Thompson*, 42 N. H. 369; *Trieber v. St. Louis Bank*, 31 Ark. 128; *Clinton v. Graves*, 48 Iowa, 228; *Gray Tie Co. v. Bank*, 109 Ky. 694, 60 S. W. 537; *Bank v. Furman*, 4 Pa. Super. Ct. 415; *Heise v. Bumpass*, 40 Ark. 545; *Greathhead v. Walton*, 40 Conn. 226; *Bank v. Butler*, 157 Mass. 548, 32 N. E. 909; *Gordon v. Levine*, 197 Mass. 268, 83 N. E. 861, 15 L. R. A. (N. S.) 243, 125 Am. St. Rep. 361.

The great weight of authorities seem to hold that one who gives to an instrument a legal date, thereby authorizing innocent parties to deal with it as such, cannot be heard to deny the legality of date in a suit against him by an innocent holder, who came into possession as a bona fide purchaser for value, without notice. It would seem that this rule, as applicable to commercial paper, is essentially just, and based on sound reason. By intentionally giving a negotiable note a false date, so as to make it appear valid on its face, the maker holds it out and represents it to be a valid instrument, and invites all parties to deal with and treat it as his legal act and binding obligation. Giving the note a false date for this purpose, if not an express representation of its validity that would estop the maker from denying its legality of date as against an innocent holder, is a representation necessarily implied from the circumstance, and there is no real difference between the express and implied representation. As said by Mr. Story (*Story's Eq. Jur.* § 384): "There can be no real difference between an express representation and one that is naturally or necessarily implied from the circumstances." The representation or assertion, to create an estoppel, need not be express, but may be implied. *Bigelow on Estoppel*, vol. 1, § 6. If the false representation, either express or implied, induced the one who becomes the innocent holder to be deceived and part with a valuable consideration for what he honestly believes to be the legal obligation of another, then it is to protect such a one that the law of estoppel operates to close the mouth of the other party against setting up his own fraudulent act to defeat the right of the one who has innocently acted on the false representation and put himself in a position of disadvantage. It is this principle that distinguishes the cases cited by appellant from the case under consideration. In the case of *Burns & Co. v. Moore & McGee*, 76 Ala. 339, 52 Am. Rep. 332, the suit was between the original parties to the transaction, and there was, and could be in that case, no question of estoppel, as the parties were in *pari delicto* and the maxim applied: "*In pari delicto potior est conditio defendentis et possidentis.*"

The cases of *Hanover National Bank v. Johnson*, 90 Ala. 552, 8 South. 42, and *B. T. & S. Co. v. Curry*, 160 Ala. 370, 49 South.

319, 135 Am. St. Rep. 102, each hold that a note resting on a contract declared void by statute cannot be enforced, even by a bona fide purchaser for value, without notice and before maturity. But the question of false representation by the maker to induce a purchase of the notes did not arise in either; and therefore the doctrine of estoppel was not applied or taken into consideration in the opinions of the court. The former case involved the collection of a note given for commercial fertilizer, and the contract for the sale and delivery was void, under the statute, for noncompliance with the tax tag provisions. Had the maker of the note accompanied the payee to the bank and represented that the note was given for a horse, or for some other legal consideration, or had he stated such fact in the face of the note, and had the bank acted on the assertion and purchased the note in good faith, for value, could the maker afterwards be heard to allege his own turpitude in defense of an action by the bank on the note? We do not think so.

The latter case was a suit on a note founded on a gambling contract, and the consideration was in itself illegal and void, and a different rule might well apply; but, should the maker of a note founded on a gambling consideration induce an innocent person, by an assurance that the obligation was valid, to invest his money in a purchase of the note, could the maker set up his own wrong to defeat a recovery at the hands of the innocent holder? Or would not the maker, having by false representation induced the purchase, be estopped from pleading his own wrong against him whom he had deceived into parting with a valuable consideration? See *Manning v. Manning*, 8 Ala. 138; *Finn & Dulaney v. Barclay et al.*, 15 Ala. 626, 629. We state this, however, only as a query, without passing on the question, as it is unnecessary to a decision of the instant case. For the consideration in that case is void, whereas in the case before us the consideration is not void, and it is only the act of the parties that makes the transaction void; or, as the distinction is expressed by some of the law writers, "is void applied to the contract and not to the parties."

The case of *Anderson v. Bellinger & Ralls*, 87 Ala. 334, 6 South. 82, 4 L. R. A. 680, 13 Am. St. Rep. 46, is not in point, and does not touch the question of estoppel here presented. That was an action on a statutory claim bond, and it is said in that case that the statute against Sunday contracts then in force (Code 1886, § 1749) "is more sweeping and vitiating in its effect" (quoting from *Burns v. Moore*, supra) than the statute in force (Act 1808) at the time of the decision in *Saltmarsh v. Tuthill*, supra. It is held that transactions in violation of the Sunday statute are void, and that the statute inures to the benefit of third parties, including public officers; but the question of estoppel, as

invoked by the appellee in the case at bar, is not passed on or considered, as that proposition was not before the court.

The other cases cited by appellant to sustain his contention (*Ala. Nat. Bank v. Parker*, 146 Ala. 518, 40 South. 987, and *Boyett v. St. Ch. & Oil Co.*, 146 Ala. 554, 41 South. 756) were suits for the collection of notes given for commercial fertilizers that had not been tagged as required by law. In the first case (*Bank v. Parker*, supra), the court holds that, as the note rests for a consideration on a void contract, it cannot be collected in the hands of a bona fide purchaser for value, without notice, and cites the case of *Bank v. Johnson*, supra, in support of the holding. The question of estoppel did not enter the case. In the latter case (*Boyett v. Oil Co.*), the court, in the opinion delivered, considers the question of estoppel only in so far as it applied to the defendant waiving his right to plead the illegality of a void contract because of his subsequent inconsistent acts after having entered into the contract. The facts before the court in that case on which a waiver or estoppel was claimed related to the defendant's right to set up the invalidity of the notes, because he had gone to trial on an issue made under his pleas to the common counts setting up payment of the demand sued on by executing notes for the claim. Under these conditions, the plaintiff in that suit contended that he was entitled to the general charge on the counts based on the notes, because the defendant was estopped by his pleas of payment and going to trial on that issue on the common counts from denying the validity of the notes. The court held that interposing the pleas of payment constituted no estoppel or waiver as to the counts declaring on the notes.

The question presented in this case is not one of waiver or estoppel growing out of some subsequent action of the defendant, whereby the plaintiff is not induced to change his position, and is put at no disadvantage as in that case, but is a question of estoppel arising from the original representations made by one of the parties to a transaction, on which the other party relies in parting with a valuable consideration; the innocent party to the transaction being led by the false representations of the other party into a position of disadvantage. In such a case, the doctrine of estoppel has uniformly been held to operate and prevent the wrongdoer from asserting his own wrong against the claims of an innocent party, who has been led to change his position to one of disadvantage by the false representations of the other party to the transaction. "Whenever a man has made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden, as against them, to deny the assertion." Estoppel and Res Judicata, Herman, vol. 1, § 6.

We think it safe to hold, as stated by Mr. Herman (*Estoppel and Res Judicata*, vol. 2, § 1027), that it is "a general rule of law" that all notes executed and delivered on Sunday are void between the parties; yet, if falsely dated as of another day, and such an instrument comes to the hands of an innocent holder, who takes it for value, before maturity, without notice, the maker is estopped, in an action on such instrument by the innocent holder, from setting up that it is not truly dated, and is a Sunday contract, and therefore void. To hold otherwise would be to invite fraudulent collusion between makers and payees of negotiable instruments, who at their will could give a false date to a negotiable note and invite its use in the commercial world, and then defeat its enforcement in the hands of an innocent purchaser for value, before maturity, by pleading their own perfidy.

From what we have said, it will be seen that the court's rulings on the defendant's demurrers to the plaintiff's replications were free from error, and that there was no error committed by the court in its oral charge, or in refusing the special charges requested by the defendant. All the matters raised by these various assignments are related to the principal controversy fully discussed above. The other assignments are without merit.

[3] There was no real controversy over the execution of the note, mortgage, and hypothecation agreement, and the mode of proving the signatures, if irregular or even erroneous, was without injury. The defendant admitted execution of the note and mortgage, and the evidence was without conflict that the note was indorsed in blank by the payee, and the note and mortgage delivered to the appellee, before maturity, for a valuable consideration.

[4, 5] The legal title to the property described in the mortgage was in the appellee after the transfer, and an admission of the hypothecation agreement in evidence was not prejudicial to the interests of appellant, and, if error, was without injury, as appellee's right of recovery did not rest on the agreement. The rulings on the evidence assigned as error either go to matters not prejudicial to appellant on the issues before the court, or are not available because of the evidence sought to be elicited and excluded having been subsequently admitted. The note and mortgage having been dated on a secular day, which was testified by appellant (the maker) to be false, and, the appellee having been shown to have acquired the papers in the usual course of a banking business for a valuable consideration, without notice, before maturity, there was sufficient evidence to support the verdict under the pleadings, and there was no error in refusing the general charge requested by appellant. The assign-

ments of error fail to show reversible error in the ruling of the trial court, and the case will be affirmed.

Affirmed.

MADDOX v. STATE

(Court of Appeals of Alabama. Nov. 30, 1911.)

PERJURY (§ 19*)—INDICTMENT—REQUISITES—COMPLIANCE WITH STATUTE.

Code 1907, § 7542, provides that an indictment for perjury shall state the substance of the proceedings with which the alleged false oath was connected, and is qualified, in so far as it relates to a charge of perjury in a civil case, by Code, § 7161, form 82, which prescribes the form in which such an indictment must be drawn, as follows: "A. B., on an application for a continuance in a civil action in the _____ court of _____ county, in which one C. D. was plaintiff and the said A. B., defendant," etc. Code, § 7182, provides that the manner of stating the acts constituting the offense in an indictment shall be as similar to the forms provided as the nature of the case will permit. An indictment for perjury in a civil case, which charged "that before the finding of this indictment J. M., in a cause pending in the chancery court of C. county, Ala., in which the said J. M. was plaintiff, or complainant, and T. M. respondent, or defendant," was attacked by a demurrer for the sufficiency of its description of the proceedings in which the perjury charged was alleged to have occurred. *Held*, that the indictment states the substance of the proceedings substantially in the mode provided by the Code, and is sufficient.

[Ed. Note.—For other cases, see *Perjury*, Cent. Dig. §§ 65, 66, 70; Dec. Dig. § 19.*]

Appeal from Circuit Court, Chilton County; W. W. Pearson, Judge.

James M. Maddox was convicted of perjury, and appeals. Affirmed.

Thomas A. Curry, for appellant; R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. The demurrer to the indictment in this case raised the question of the sufficiency of its description of the proceedings in which the false swearing charged against the defendant was alleged to have occurred. The requirement of section 7542 of the Code of 1907 that an indictment for perjury, or subornation of perjury, shall "state the substance of the proceedings" with which the alleged false oath was connected, so far as that requirement concerns a charge of perjury in a civil case, is to be read in the light of the construction placed upon it by the Legislature itself in prescribing a form of indictment for perjury in civil cases or in other proceedings not criminal in their nature. Code, § 7161, form 82. The only description given in that form of the proceeding in which the perjury is charged to have been committed is embodied in the following words, constituting its first clause: "A. B., on an application for a con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tinuance in a civil action in the ——— court of ——— county, in which one C. D. was plaintiff and the said A. B. defendant," etc. The indictment in this case charges "that before the finding of this indictment James M. Maddox, in a cause pending in the chancery court of Chilton county, Alabama, in which the said James M. Maddox was plaintiff, or complainant, and Tabitha M. Maddox was respondent, or defendant, the said James M. Maddox, being duly sworn by Hugh M. Simpson, register in chancery of said court, acting as commissioner in said cause, who had authority to administer such oath, falsely swore," etc.; the indictment proceeding to set out the matter charged to have been falsely sworn to, that it was material, and that the oath of the defendant in relation to such matter was willfully and corruptly false.

The similarity between this indictment and the Code form in the feature of the description of the proceedings in which perjury is charged to have been committed is such that this indictment could not well be declared insufficient in that respect without ignoring the statutory authority for the use of forms of indictment analogous to those prescribed in the Code or as near similar as the nature of the case will permit, where there is no special statutory rule governing the mode of averring the matter that is brought into question. Code, §§ 7132, 7161. Indeed, this indictment may be said to "state the substance of the proceedings" in which perjury is charged to have been committed substantially in the mode adopted in the Code form of indictment for perjury in a civil case. *Barnett v. State*, 89 Ala. 165, 7 South. 414; *McClerkin v. State*, 105 Ala. 107, 17 South. 123; *Smith v. State*, 103 Ala. 57, 15 South. 866. The ruling in the case of *Jacobs v. State*, 61 Ala. 448, does not stand in the way of the conclusion that this indictment is not insufficient in the respect in which it is brought into question by the demurrer to it. The indictment under consideration in that case was held to be insufficient because of its failure to show that the affidavit there charged to have been falsely made constituted a part of any legal proceeding in which there was authority of law for taking the affiant's oath to it. Certainly that objection is not tenable as to the indictment here assailed by demurrer.

Affirmed.

LAWLEY v. STATE.

(Court of Appeals of Alabama. Dec. 19, 1911.)

Appeal from Circuit Court, Chilton County; W. W. Pearson, Judge.

"Not to be officially reported."

W. J. Lawley was convicted of perjury, and appeals. Affirmed.

Thomas A. Curry, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PER OURIAM. This case is affirmed, on the authority of the case of *James M. Maddox v. State*, 57 South. 95. It seems to be a companion case, and all the propositions involved are decided in the case cited.

Affirmed.

MILFORD v. STATE.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. HOMICIDE (§ 179*)—ASSAULT WITH INTENT TO MURDER—EVIDENCE—ADMISSIBILITY.

In a trial for assault with intent to murder accused's wife, it was proper to exclude testimony offered by accused as tending to show that his mind was unbalanced by her conduct, where there had been no previous testimony tending to show insanity.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 179.*]

2. CRIMINAL LAW (§ 681*)—EVIDENCE—ADMISSION.

Exclusion of evidence which is prima facie incompetent is not error, where the party offering it does not, by statement to the court, show that he will subsequently introduce such evidence as will render the particular evidence relevant and material.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1611, 1612; Dec. Dig. § 681.*]

3. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTIONS.

Leading questions asked a witness in a criminal trial are properly excluded.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 795, 837-845; Dec. Dig. § 240.*]

4. CRIMINAL LAW (§ 417*)—EVIDENCE—DECLARATIONS AS TO INSANITY.

Though one accused of assault with intent to murder pleaded insanity, it was not error to exclude a question asked a witness if she did not observe accused, a short time before the occurrence, strolling about a field picking up sticks, and if she did not remark to her husband that accused acted like a crazy man.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 417.*]

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

Will E. Milford was convicted of assault with intent to murder, and he appeals. Affirmed.

J. T. Roach, for appellant. R. C. Brickell, Atty. Gen., and William L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. The defendant was indicted for assault with intent to murder, was convicted by a jury, and under the judgment of the court, rendered on the verdict, was sentenced to the penitentiary for 20 years. From this judgment the defendant appeals.

The party upon whom the assault was made was the wife of the defendant. The details of the crime, as shown by the evidence, were brutal in the extreme, and if the

defendant was guilty the punishment inflicted by the court was not too severe.

It appears from the evidence that the relations existing between the defendant and his wife at the time of the commission of the alleged offense were extremely unhappy, and that this unhappy situation was due largely to the misconduct of the wife. In fact, the parties had separated more than once, and the wife, according to the testimony, was a woman of bad character. On the other hand, except certain statements made by the wife while she was on the stand as a witness testifying against the defendant, the evidence all tends to show that the defendant was, up to the time of the commission of the offense, a man of good character. On the night of the alleged offense, the defendant and the wife slept in different rooms, and about 3 o'clock in the morning the defendant went into her room, and while she slept struck her several blows on the head, fracturing the skull in three places and inflicting several dangerous wounds. The bill of exceptions tends to show that the wife did not know of her injuries until several days after the occurrence, as the first blow seems to have rendered her unconscious. Immediately after the occurrence, the defendant left, and was not seen for more than two weeks.

The case was tried upon the pleas of not guilty and not guilty by reason of insanity at the time of the commission of the offense.

[1] 1. While the trial was in progress, and before the defendant testified, and before any evidence had been offered tending to show that the defendant was insane at the time of the commission of the alleged offense, and while the defendant's wife was testifying as a witness, counsel for defendant asked her the following question: "Is it not a fact that some time last summer, before the alleged assault, you were in company with men of questionable habits and character on the corner of Twentieth street and First avenue, in the city of Birmingham, and that you held their hands and slapped them on the back?" The state objected to the above question, on the ground that it called for incompetent, irrelevant, and immaterial testimony. Thereupon the attorney for the defendant called the court's attention to the fact that the defendant had interposed a plea of "not guilty by reason of insanity," and that he proposed to show that the conduct on the part of the wife was brought home to the defendant, and argued to the court that under the plea of insanity it was relevant, material, and competent to show any act or fact which, when brought to the knowledge of the defendant, would have a tendency to unbalance his mind. The court sustained the objection, and refused to allow the witness to answer the question, and the defendant then and there duly excepted to this action of the court.

In making the above statement to the court, counsel for defendant did not state

that he intended, by subsequent evidence to be introduced by him, to show that the information called for by the above question, when communicated to defendant, had so weighed upon his mind that he became insane, and that at a time of mental irresponsibility, caused by such insanity, he committed the act.

A jury have no right to infer the existence of insanity from the existence of a cause which may have some tendency to produce it, unless there is some evidence before them that insanity actually followed as a result of the possible cause. As was said by the Supreme Court of Indiana: "If it were a case where a given effect *must* follow the cause, there would be force in the argument, because proof of the cause would be proof of the effect. But we know that the various causes that may tend to produce insanity very frequently fail to produce any such effect; and it seems to us that it is not competent to prove the existence of such exciting cause, unaccompanied with some proof that the effect followed the cause. Indeed, a jury would not be authorized to find a man to be insane without proof on the subject, other than the fact that a cause existed that tended to prove insanity." *Sawyer v. State*, 35 Ind. 80.

[2] Our understanding is that when evidence is offered during a trial, and when, at the time it is offered, it is *prima facie* incompetent, and the party against whom it is sought to be introduced objects to its introduction, the party so offering the evidence cannot put the trial court in error for its refusal to allow such evidence, unless he, by a statement to the court, shows that he will subsequently introduce such evidence as will render the proposed evidence relevant and material, and subsequently introduces such evidence. The defendant, while the state was offering its evidence, asked similar questions of other witnesses, which, if answered affirmatively, would have tended to show that defendant's wife was a lewd woman, and that her acts had been such as would naturally have given him much mental concern; but as that evidence was, at the time it was offered, *prima facie* irrelevant, and counsel for the defendant did not sufficiently inform the court as to *how* and *by what other evidence* he would subsequently render it material, the court cannot be put in error for refusing, on the objection of the solicitor, to allow the evidence to go to the jury. *Smith v. Gaffard*, 33 Ala. 168; *First Nat. Bank v. Chaffin*, 118 Ala. 246, 24 South. 80.

Evidence that a man's wife was a lewd woman, and that he was informed of her misconduct, in no way palliates his crime, if he murders her. If her lewdness rendered him insane, and he killed her while insane, he must offer evidence of his insanity at the time of the act, before the evidence of her lewdness becomes admissible. *Sawyer v. State*, *supra*.

[3] 2. For the above reasons, the action of the trial court as to all of the questions propounded to the witnesses Vandy Lewis, J. F. Weir, and Mrs. Charley Graham, which the court, on the objection of the solicitor, refused to allow the witnesses to answer, must be sustained. These witnesses were placed upon the stand by the defendant, and many of these questions were plainly leading, and the action of the trial court in refusing to allow them to be answered can be also sustained on that ground.

[4] 3. It is also evident that the court, on objection of the solicitor, properly refused to allow Mrs. Charley Graham to answer the following question: "Is it not a fact that you observed the defendant, a short while before this trouble, strolling about the field picking up sticks, and that you remarked to your husband that Mr. Milford acted like a crazy man?" *Braham v. State*, 143 Ala. 28, 38 South. 919.

4. The action of the trial court in its other rulings on the evidence was in accordance with the views expressed by us in sections 1 and 2 of this opinion, and such rulings of the court were therefore without error.

While there may have been some evidence tending to show that the defendant was insane at the time of the commission of the alleged offense, the record discloses that he was convicted by a jury after a fair and legal trial, and as there is no error in the record the judgment of the court below is affirmed.

Affirmed.

HUGHES v. ALBERTVILLE MERCANTILE CO.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. PARTIES (§ 65*)—COMPLAINT—AMENDMENTS TO CONFORM TO PROOF.

Where the complaint alleged a joint contract by defendants, and the evidence showed that a defendant did not make a contract jointly with his codefendant, but that he had a separate transaction with plaintiff, the complaint could be amended under Code 1907, § 5367, by striking out the name of defendant, and the allowance of the amendment was not a ground for a discontinuance of the action on the motion of said codefendant.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 100-107; Dec. Dig. § 65.*]

2. TRIAL (§ 207*)—INSTRUCTIONS—COMMENT ON TESTIMONY.

Under Code 1907, § 5362, prohibiting the court from charging on the effect of testimony, unless requested so to do by one of the parties, a charge on the effect of the testimony, given without any request therefor, is ground for reversal.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 498-501; Dec. Dig. § 207.*]

Appeal from Circuit Court, Marshall County; A. H. Alston, Judge.

Action by the Albertville Mercantile Company against J. W. Hughes and another.

From a judgment for plaintiff, defendant named appeals. Reversed and remanded.

See, also, 56 South. 120.

A. E. Hawkins and John A. Lusk, for appellant. Street & Isbell, for appellee.

WALKER, P. J. [1] The complaint counts upon a joint cause of action against all of the defendants named in it. On the trial there was evidence tending to show that the account sued on was not jointly made by the two defendants, but that whatever liability the defendant Hughes (the appellant here) had incurred in reference to that account was the result of separate dealings or transactions between him and the plaintiff in regard to it. "Though the suit may be against several defendants, and the complaint allege a joint contract, if, from the evidence, it appears that one of the defendants did not in fact make the contract jointly with the others, the complaint may be amended by striking out the name of the person so improperly joined. In such case, the amendment is regarded as a correction of a misdescription of the cause of action." *Jones v. Engelhardt*, 78 Ala. 505. Under the aspect of the evidence above mentioned, there was a fatal variance between the allegations and the proof, which was curable by an amendment of the complaint striking out one of the parties defendant; and the allowance of such an amendment did not constitute a ground for discontinuing the action on the motion of the remaining defendant. Code, § 5367; *Jones v. Engelhardt*, supra; *Cobb v. Keith*, 110 Ala. 614, 18 South. 325; *Jackson v. Bush*, 82 Ala. 396, 1 South. 175.

[2] The trial court charged the jury upon the effect of the testimony, without being required to do so by one of the parties. This is forbidden by the statute, and constitutes a ground of reversal. Code, § 5362; *Mayer v. Thompson-Hutchinson Building Co.*, 116 Ala. 634, 22 South. 859.

Reversed and remanded.

JEFFERSON FERTILIZER CO. v. HOUSTON.

(Court of Appeals of Alabama. Nov. 28, 1911.)

1. EVIDENCE (§ 123*)—CONVERSATIONS—RES GESTÆ.

In an action for the death of a heifer which fell into an unguarded pit maintained by defendant, a conversation between the son of the owner of the heifer and the manager of defendant on the day after the accident was not a part of the res gestæ.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 351-368; Dec. Dig. § 123.*]

2. EVIDENCE (§ 243*)—ADMISSIONS—DECLARATIONS OF AGENT.

Where a heifer was killed by falling into an open unguarded pit maintained by defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

ant, declarations of the manager of defendant, made the day after the accident, did not bind it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 908-915; Dec. Dig. § 243.*]

3. NEGLIGENCE (§ 125*)—ACTIONS—EVIDENCE—ADMISSIBILITY.

Where a heifer was killed by falling into an unguarded pit maintained by a fertilizer company, evidence that the maintenance of the pit was necessary to its business, and that such pits were maintained in the same way by other well-regulated fertilizer companies, was admissible upon the issue whether the pit had been negligently maintained.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 239-244; Dec. Dig. § 125.*]

4. TRIAL (§ 251*)—ACTIONS—INSTRUCTIONS.

Where plaintiff claimed that his heifer had fallen into an unguarded pit maintained by a fertilizer company, and by reason of the lead or acid therein had received injuries causing her death, and defendant claimed that her death was the result of other causes, a charge, that if the death of plaintiff's cow was caused by some disease, or any other cause than the contents of the white lead pit, then the verdict should be for defendant, was not abstract, and should have been given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

5. TRIAL (§ 139*)—PROVINCE OF JURY—WEIGHT AND SUFFICIENCY OF EVIDENCE.

The weight and sufficiency of evidence is for the jury and not for the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Action by W. D. Houston against the Jefferson Fertilizer Company for damages for the death of a heifer. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The following charge was refused to defendant: "(11) The court charges the jury that, if you are reasonably satisfied from the evidence that the death of plaintiff's cow was caused by reason of some disease, or any other cause than the contents of the white lead pit she walked into, then your verdict must be for the defendant."

Estes, Jones & Welch, for appellant. William Hugh McEniry, for appellee.

PELHAM, J. The heifer that was the subject of the litigation resulting in this appeal was the property of the appellee, who brought suit against the appellant, alleging that a ditch, excavation, or trench negligently maintained upon its property, and used in connection with the manufacturing business carried on by appellant, caused the animal's death. The appellant was engaged in manufacturing fertilizers and by-products at its plant near Bessemer, in precinct No. 33, Jefferson county, where there was no law to prohibit domestic animals from running at large. The premises where the business was carried on were not inclosed, and the appellant had excavated a pit, ditch, or

trench in the ground near one of its buildings, into which was run white lead to be dried by the sun before shipment. This white lead had more or less sulphuric acid mixed with it, and was washed by a flow of water from the building through troughs into the ditch to dry. There was no guard or other protection around the ditch or pit to keep out stock running at large, except the embankments made by the dirt thrown out in excavating the trench. The white lead and other substances run into the pit had no qualities to attract cattle, but around another place in the plant a saline matter, known as "kainit," had been kept, which had attracted cattle; but it was not shown that this kainit had been kept on the premises where it would attract animals for some time prior to the injuries complained of. Grass and weeds, however, were growing on the premises in August, at the time of the occurrence in question.

The appellee, the owner of the heifer, who lived near appellant's plant, alleged in his complaint that the ditch was negligently maintained; that there was no fence or other guard to prevent cattle going into it; that the salty matter (kainit) kept upon the premises, or the grazing afforded, attracted his heifer to go there; and that she walked or fell into the excavation made for drying the white lead, and by reason of the lead or acid contained therein received injuries resulting in her death.

Suit was originally brought in a justice court and tried there, and appealed to the city court of Bessemer, where it was again tried and a judgment rendered, from which this appeal is prosecuted. There are no less than 49 assignments of error, a great many more than are necessary to present for review all the questions that could be properly raised upon the record.

[1, 2] On the trial of the case in the city court, the appellant objected to the question asked the witness Joe Houston, appellee's son. "What did you say to Mr. Southerland with reference to the heifer when you were there?" The court overruled the objection, and allowed the witness to answer. The conversation was the next day after the animal had been in the pit, and the question clearly sought to elicit illegal testimony, in that it called for a mere narrative of a past event or declaration, and the objection should have been sustained. *M. & C. R. R. Co. v. Womack*, Adm'r, 84 Ala. 149, 4 South. 618; *So. Ry. Co. v. Reeder*, 152 Ala. 227, 44 South. 699, 126 Am. St. Rep. 23, and authorities cited; *L. & N. R. Co. v. Pearson*, Adm'r, 97 Ala. 211, 12 South. 176. The conversation was no part of the res gestae; it related to a past transaction, and the fact that Southerland was appellant's superintendent did not make either the statements of Houston or Southerland competent evidence. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

company would not be bound by statements of Southerland made in reference to past transactions. Ala. Gt. So. Ry. Co. v. Hawk, 72 Ala. 112, 47 Am. Rep. 403; L. & N. R. R. Co. v. Carl, 91 Ala. 271, 9 South. 334. This witness, Joe Houston, was allowed, against appellant's objection, to testify to what he said and what Southerland said in this conversation. The court was in error in overruling each of the several objections to the questions eliciting the conversation, and in overruling the motion to exclude the answer.

[3] The appellant should have been allowed to prove that the pit as excavated and maintained was necessary to the operation of its business, and was excavated and maintained in a similar manner and the usual and customary way such pits are excavated and maintained by all well-regulated fertilizer plants engaged in like business under similar conditions; and evidence tending to prove these facts was improperly excluded. These facts, if true, the appellant had a right for the jury to consider in arriving at a conclusion as to whether or not it had negligently maintained the pit as alleged by appellee. Holland v. T. C. I. & R. Co., 91 Ala. 445, 8 South. 524, 12 L. R. A. 232; Wilson v. L. & N. R. Co., 85 Ala. 269, 4 South. 701.

There was no other reversible error shown in the various rulings of the court in passing on the testimony upon which any assignment of error is based.

[4, 5] Charge 11, requested by the appellant, is not abstract, as insisted by appellee, and it should have been given. It was the appellee's contention that the heifer fell or walked into the ditch (plaintiff's witness, who saw her go in, said she walked in), and that by reason of the lead or acid in the ditch she received injuries resulting in her death. The animal died the next day after getting in the ditch, and there was evidence from which the jury could conclude that her death was to be attributed to the substance she got upon her while in the ditch; and there was also evidence offered by appellant tending to show the animal's death was due to other and entirely different causes having no connection with the ditch. It was a question for the jury, under the evidence, whether the death was due to the lead or acid in the pit, alleged to have been negligently maintained by appellant, or to the other causes, for which it would not be responsible. The weight and sufficiency of the evidence were questions, not for the court, but for the jury. Central of Ga. Ry. Co. v. Dothan Mule Co., 159 Ala. 225, 49 South. 243; Way v. State, 155 Ala. 52, 46 South. 273.

Rulings on the other charges are free from reversible error. Some of them belong to that class which a court may or may not give, in its discretion, without being put in

error. The general charge on each of the counts was properly refused. The evidence made appellant's liability under each count of the complaint a question of disputed fact under the pleading, and it was correctly submitted to the determination of the jury.

There was no error committed in the rulings on the pleading. The rules laid down in Hurd v. Lacy, 93 Ala. 427, 9 South. 378, 30 Am. St. Rep. 61, are sound, and correctly state the law applicable to the right of a party, where the injury is occasioned by the negligence of the landowner, to recover damages for injuries to stock received on another's lands in a district where animals are permitted to run at large.

For the errors designated, the case must be reversed.

Reversed and remanded.

CHILTON WAREHOUSE & MFG. CO. v. LEWIS.

(Court of Appeals of Alabama. Dec. 21, 1911.)

1. BILLS AND NOTES (§ 516*)—ACTIONS—PRIMA FACIE CASE.

Plaintiff's introduction in evidence of a negotiable promissory note executed by defendant entitled plaintiff prima facie to recover the face value of the note, with interest and the reasonable value of attorney's fees stipulated therein.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1800-1806; Dec. Dig. § 516.*]

2. AGRICULTURE (§ 7*)—FERTILIZER—FERTILIZER NOTES—DEFENSES.

Code 1907, § 37, provides that when the deficiency in fertilizer amounts to more than 5 per cent. of the guaranteed commercial value thereof any note given in payment of the fertilizer shall be collectible only for one-half of the note. The Agricultural Department, pursuant to Code 1907, § 43, had two lots of the brand of fertilizer purchased by defendant analyzed. One lot from samples taken from sacks in plaintiff's warehouse showed 11 per cent. below guaranteed value, while the other lot from sacks sold a consumer showed 2½ per cent. below guaranteed commercial value. Held, that the deficiency in the fertilizer sold defendant could not be ascertained by averaging the result of the two tests.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 13, 14; Dec. Dig. § 7.*]

Appeal from Circuit Court, Elmore County; W. W. Pearson, Judge.

Action by the Chilton Warehouse & Manufacturing Company against J. C. Lewis. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Frank W. Lull, for appellant. J. M. Holley, for appellee.

DE GRAFFENRIED, J. This suit was brought by the appellant against the appellee on a certain promissory note made by the appellee to appellant for certain commercial fertilizers sold by appellant to appellee.

[1, 2] When the appellant introduced the defendant's note in evidence, it made out a prima facie right to recover the face of the note, interest, and, upon proof of their value, its attorney's fees, for the payment of which by the appellee the note provided. If there existed any good and sufficient reason why the appellant should not so recover, the law cast the duty upon the defendant to show such reason by legal evidence. The appellee claimed that he should not be required to pay the price he had agreed to pay for the fertilizer, but should be required to pay only one-half of that amount, because, according to his contention, the fertilizer sold him was deficient in some of its ingredients, as guaranteed or branded on the sacks, and that, by reason of such deficiency, the commercial value of the fertilizer sold him fell more than 5 per cent. below the guaranteed total commercial value of the fertilizer so sold to him. Section 37 of the Code of 1907 provides that when such deficiency occurs and amounts to more than 5 per cent. of the guaranteed commercial value of such fertilizer any note or obligation given in payment therefor shall be collectible by law only for one-half of the amount of such note or obligation.

Section 44 of the Code provides the method whereby any purchaser of fertilizer or fertilizer material may obtain, through the officials of the state, and at the state's expense, a complete analysis of the particular lot of fertilizer obtained by him; and it is provided in this section that "such official analysis shall be admissible as evidence in any of the courts of the state on the trial of any issue involving the merits of the particular lot of fertilizer or fertilizer material so sampled and analyzed."

While the analysis provided for in the above section 44, when introduced in evidence on the trial of a cause involving the merits of the particular lot of fertilizer so analyzed, is not made conclusive evidence of its correctness, nevertheless, as the analysis is made by trained and impartial officials of the state, such evidence, when introduced on the trial of a cause, would naturally carry with it much probative force. The appellee did not take advantage of section 44 and have his fertilizer analyzed; and he undertook to show that the fertilizer sold to him by appellant fell more than 5 per cent. below its commercial value, as shown by the brands on the sacks containing it, in the following manner: He introduced the record of the official analysis made of the fertilizer manufactured by appellant, as provided in section 43 of the Code. This record shows that the Agricultural Department caused two lots of the brand of fertilizer bought by appellee from appellant to be analyzed under the requirements of and in accordance with the provisions of said section 43. The analysis of one lot, made from samples taken from sacks in the warehouse of appellant, showed

a commercial value of \$17.00, which was 11 per cent. below the guaranteed commercial value of the fertilizer, and the other analysis, made from samples taken from sacks in the hands of a farmer or consumer, showed a commercial value of \$18.78, which was 2½ per cent. below the guaranteed value. In other words, the official analysis, as shown by the records of the Department of Agriculture, showed that one lot of the brand of fertilizer which the appellee bought from appellant fell below the 5 per cent. standard, and that the other lot went above the 5 per cent. standard. The two lots were analyzed in the early part of the year, and as each analysis was made by the Department of Agriculture, under the provisions of section 43 of the Code, both possessed equal dignity, and both possessed equal probative force. As the burden was on the defendant to show that the fertilizer that he bought from appellant was more than 5 per cent. below its guaranteed commercial value, it is evident that the above evidence was insufficient to meet the requirements of such a defense. To meet this situation, the appellee was permitted, against the objection of appellant, to ask a witness the following question: "What would be the average of the two tests in the matter of percentage and in the difference between test No. 231e and test No. 298h; that is, the average between 2½ per cent. and 11 per cent.?" The witness was permitted to answer, "Something over 6 per cent."

The fact that the appellant had fertilizer which was 11 per cent. below its guaranteed analysis and other fertilizer which fell 2½ per cent. below the same guaranteed analysis was no evidence that it ever had a sack of fertilizer which fell 6¾ per cent. — "something over 6 per cent.," to use the language of the witness—below the guaranteed analysis. If a wine merchant had sold a customer some wine, representing it to be 10 years old, would it be held proper, in a suit involving the age of the wine, because the evidence showed that the wine merchant had two sorts of wine, one sort 10 years old and the other 4 years old, to permit a witness to swear that the "average" between 10 years and 4 years is 7 years? Would the jury be authorized to infer, in the absence of all proof as to the true age of the wine in controversy, that the two wines had been mixed together, and that the wine in controversy was 7 years old? Under the case supposed, would a court permit such a special finding of a jury to stand?

"A verdict is not a true verdict, the result of any arbitrary rule, or order, whether imposed by themselves, or by the court or officer in charge." *Southern Railway Co. v. Williams*, 113 Ala. 620, 21 South. 328.

There was no evidence in this case tending, in the remotest degree, to show that the lot of fertilizer from which analysis described in the above question "test No. 231e" and

the lot from which analysis described as "test No. 298h" were ever mixed together, and, if so mixed, in what proportions, and the court was clearly in error in permitting the question to be asked the witness, and also in permitting the witness to answer the same.

It follows from what we have above said that this cause, for the error pointed out, must be reversed and remanded. It also follows that, in our opinion, under the evidence as it exists in the bill of exceptions, the appellee failed to sustain his plea of tender.

Reversed and remanded.

ZAVELO v. J. GOLDSTEIN & CO.

(Court of Appeals of Alabama. Dec. 21, 1911.)

1. APPEAL AND ERROR (§ 518*)—RECORD—FILING OF PAPERS AS PART OF RECORD—COMPLAINT.

The papers transmitted by a justice to the circuit court included a complaint, but, on the case being certified by the circuit court to the Court of Appeals, it did not appear that the complaint was ever marked or indorsed as filed by the clerk of the circuit court. *Held*, that the record sufficiently showed that the judgment appealed from was supported by an appropriate complaint, since, in the absence of a statute prescribing what constitutes the filing of a paper, it is said to be filed whenever it is delivered to and received by a proper officer, with the intention of filing it, although the fact and date of the filing are not then indorsed upon it.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 518.*]

2. APPEAL AND ERROR (§ 916*)—REVIEW—PRESUMPTION—WAIVER OF COMPLAINT.

Where the record certified from the circuit court shows that defendant filed pleas to the complaint, but that he did not undertake to sustain them on the hearing, it may be presumed, to sustain the judgment entered by the trial court without objection having been made thereon on account of a failure to file a complaint, that the defendant waived a filing of such pleading.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 916.*]

3. NEW TRIAL (§ 123*)—NOTICE OF APPLICATION.

Where defendant filed a petition for a rehearing on grounds authorized by Code 1907, § 5372, and obtained a supersedeas of the execution issued on the judgment, but made no attempt to comply with the requirement as to notice prescribed by Code 1907, § 5373, he was not entitled to prosecute a proceeding for rehearing, and his application was properly dismissed.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 276-281; Dec. Dig. § 123.*]

4. APPEAL AND ERROR (§ 1194*)—MANDATE—VACATION OF MOTION TO DISMISS.

Where appellants submitted a motion, entered after the appeal was sued out, for the issuance of a writ of mandamus to the judges of the court below commanding them to vacate and set aside their order dismissing appellants' application for a rehearing, and the court holds that the application was properly dismissed, the motion for a writ of mandamus will also be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1194.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action between B. Zavelo and J. Goldstein & Co. From the judgment, Zavelo appeals. *Affirmed*.

See, also, 55 South. 1068.

C. B. Powell, for appellant. George Hudleston, for appellee.

WALKER, P. J. [1] This suit was instituted before a justice of the peace, and from the judgment in favor of the plaintiff rendered by the justice the defendant appealed to the circuit court. The assignment of error that that court erred in rendering its judgment against the defendant is sought to be sustained by the suggestion that the record fails to show that the plaintiff filed a statement of his cause of action or a complaint. Among the papers transmitted by the justice to the clerk of the circuit court on the appeal to that court was a complaint in due form on a verified account, and the record contains also an amended complaint under the title of the case in the circuit court, but it does not show that that paper was marked or indorsed as filed by the clerk of that court. That paper, however, is set out as a part of the record and proceedings in the cause as certified by the clerk on the appeal to this court. "In the absence of a statute prescribing what constitutes the filing of a paper, it is said to be filed whenever it is delivered to and received by the proper officer, * * * with the intention of filing it, although the fact and date of the filing are not then indorsed upon it." *Owensboro Wagon Co. v. Bliss et al.*, 132 Ala. 253, 31 South. 81, 90 Am. St. Rep. 907; *Ex parte State*, 51 Ala. 69; 8 Ency. of Pleading & Pr. 923. The record sufficiently shows that the judgment appealed from was supported by an appropriate complaint.

[2] Besides, as the record shows that the defendant filed pleas to the complaint, but that he did not on the hearing of the case undertake to sustain them, it might be presumed, to sustain the judgment entered without objection having been made in the trial court on account of a failure to file a complaint or statement of the cause of action, that the defendant waived a filing of such paper. *Heyman v. McBurney*, 66 Ala. 511; *Richmond & Danville R. Co. v. Jones*, 102 Ala. 212, 14 South. 786.

[3] In August, 1910, the defendant filed a petition for a rehearing under the statute (Code 1907, § 5372), authorizing the making of such an application on certain grounds within four months from the rendition of the judgment, and obtained from the presiding judge an order for the supersedeas of the execution issued on the judgment. The plaintiff filed a motion to dismiss that petition, on the grounds that "the petition did

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not give the plaintiff or his attorney notice of the filing of such petition or application, nor of the time when or the place where the application would be made, and did not cause a copy of said petition to be served on plaintiff before the application was made." In March, 1911, that motion was granted. That action of the court is assigned as error. The record does not indicate that there was any attempt on the part of the defendant in making his application for a rehearing to comply with the requirements as to notice prescribed by the statute in such a case. Code 1907, § 5373. This being true, the defendant had not entitled himself to prosecute the proceeding, and the court was not in error in dismissing his petition. The motion in effect suggested the failure of the petitioner to prosecute the proceeding in the manner prescribed by the statute, and the record certainly indicates that the suggestion was well founded in fact. Any proceeding is subject to dismissal because of the failure of the party by whom it was instituted duly to prosecute it.

[4] At the time of the submission on the appeal in this case there was also submitted a motion by the appellant, entered after the appeal was sued out and predicated upon the record brought into this court by that appeal, for the issuance of the writ of mandamus directed to the judges of the court below, commanding them or either of them to vacate and set aside the order of dismissal above mentioned. From the conclusion above announced that the objections urged against the propriety of that action of the court are not well taken it follows that the motion for the writ of mandamus could not be sustained, without regard to the question whether that action could be brought into question by a motion for the writ of mandamus entered after the case had been removed into this court by the appeal. *Hudson v. Bauer Grocery Co.*, 105 Ala. 200, 16 South. 693; *Supreme Lodge, etc., v. Thomas*, 130 Ala. 275, 30 South. 567. The judgment appealed from is affirmed, and the motion for the writ of mandamus is overruled.

ZAVELO v. J. GOLDSTEIN & CO.

(Court of Appeals of Alabama. Dec. 21, 1911.)

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action between B. Zavelo and J. Goldstein & Co. From the judgment, Zavelo appeals. Affirmed.

C. B. Powell, for appellant. George Huddleston, for appellee.

PER CURIAM. On the authority of *B. Zavelo v. J. Goldstein & Co.*, 57 South. 102, present term, MS., the motion in this case for a writ of mandamus is overruled, and the judgment of the court below is affirmed.

Affirmed.

BIRMINGHAM RY., LIGHT & POWER CO. v. ANDERSON.

(Court of Appeals of Alabama. Dec. 1, 1911.)

1. PLEADING (§ 8*)—MATTERS OF FACT OR CONCLUSIONS.

A statement of the pleader's conclusion in a complaint counting on the alleged negligence or wrong of another, cannot be accepted as a substitute for appropriate averments of the facts, out of which the duty is supposed to have arisen; it being for the court to draw the conclusion from the facts alleged in the complaint as to what, if any, duty it shows owing by defendant to the plaintiff.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 12-28½; Dec. Dig. § 8; **Negligence*, Cent. Dig. § 182.]

2. CARRIERS (§ 236*)—CARRIAGE OF PASSENGERS—DUTY TO RECEIVE AND TRANSPORT.

The public character of the business of a common carrier of passengers imposes on such carrier the duty of receiving and carrying without discrimination in vehicles, in use by it for public carriage, all persons fit to be carried, who may properly present themselves for transportation, so long as there are accommodations for passengers in such vehicle.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 968-972; Dec. Dig. § 236.*]

3. CARRIERS (§ 267*)—CARRIAGE OF PASSENGERS—RULES.

A common carrier of passengers may establish reasonable rules and regulations in regard to the times and places of receiving passengers.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 994-996; Dec. Dig. § 267.*]

4. CARRIERS (§ 236*)—CARRIAGE OF PASSENGERS—REFUSAL TO ACCEPT AS PASSENGER—PLEADING.

A complaint in an action against a common carrier of passengers for damages for refusal to accept plaintiff as such a passenger, alleging that plaintiff on a certain date applied to the servants or agent of the carrier in charge of one of its cars for transportation thereon, but such servant, acting within the scope of his employment, wrongfully and without legal excuse refused to permit plaintiff to become a passenger on the car or to be transported thereon, and that her intention and desire to become a passenger and be transported was known to the servant, is not sufficient to show such a relation between the plaintiff and the carrier as to put the latter under the duty of accepting plaintiff as a passenger.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 968-972; Dec. Dig. § 236.*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by Winnie Anderson against the Birmingham Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Tillman, Bradley & Morrow and Frank M. Dominick, for appellant. Allen & Bell, for appellee.

WALKER, P. J. The grounds of demurrer assigned to count 1 of the complaint as amended distinctly raised the question of the sufficiency of its averments to show the existence of a duty on the part of the defendant (the appellant here) to accept the plain-

tiff as a passenger, that being the only duty claimed to have been breached.

[1] It may be regarded as settled that it is for the court to pronounce the conclusion, from the facts or circumstances alleged in a complaint, as to what, if any, duty it shows was owing by the defendant to the plaintiff; and that as to this feature of a complaint counting on the alleged nonfeasance or misfeasance of another a statement of the pleader's conclusion on the subject cannot be accepted as a substitute for appropriate averments of the facts out of which a duty is supposed to have arisen. *Tennessee Coal, Iron & R. Co. v. Smith* (Sup.) 55 South. 170; *Republic Iron & Steel Co. v. Williams*, 168 Ala. 612, 53 South. 76; *Alabama Consolidated C. & I. Co. v. Hammond*, 156 Ala. 253, 47 South. 248; *Leach v. Bush*, 57 Ala. 145; *Ensley Railway Co. v. Chewing*, 98 Ala. 24, 9 South. 458.

[2, 3] The public character of the business of a common carrier of passengers imposes on one who undertakes it the duty of receiving and carrying without discrimination on a vehicle then in use by it for the purposes of public carriage all persons fit to be carried who may properly present themselves and seek transportation, so long as there are accommodations for passengers on such vehicle. The carrier may establish reasonable rules and regulations in regard to such matters as the times and places of receiving passengers. *Pullman Car Co. v. Krauss*, 145 Ala. 395, 40 South. 398, 4 L. R. A. (N. S.) 103; *North Birmingham Railway Co. v. Liddicoat*, 99 Ala. 545, 13 South. 18; *Illinois Central R. Co. v. Smith*, 85 Miss. 349, 37 South. 643, 70 L. R. A. 642, 107 Am. St. Rep. 293, 299; 4 *Elliott on Railroads*, §§ 1574, 1575, 1576; 2 *Hutchins on Carriers*, §§ 963, 966.

[4] Count 1 of the complaint in this case, as the same was amended, after alleging that the defendant was a common carrier of passengers for hire or reward, proceeds as follows: "Plaintiff alleges that on the date aforesaid she applied to the servant, agent, or employé of the defendant in charge of one of its said cars for transportation thereon, but that said servant, agent, or employé, acting within the line or scope of his employment, wrongfully and without legal excuse therefor, wholly failed or refused to permit plaintiff to become a passenger on said car, or to be transported thereon, as it was her intention or desire to become and to do. Said intention and desire then and there was well known to said servant, agent, or employé." The count contains no other averment of the facts or circumstances out of which the supposed duty to receive the plaintiff as a passenger arose. In considering these averments, the statement to the effect that the refusal to permit the plaintiff to become a passenger was wrongful and without legal excuse may be put out of view as expressive merely of the pleader's conclu-

sion, and also because it has reference, not to the existence of a duty, but to the breach of it. *North Birmingham Ry. Co. v. Liddicoat*, supra. The facts stated would be fully proved by evidence which showed that when plaintiff made known her desire to become a passenger she was at such a distance from the car as to require its detention for an unreasonable length of time to enable her to reach it; that the car on which she sought to become a passenger was then in motion and at a place at which it was against the reasonable rules or regulations of the defendant to take on passengers, and that it was not even a car which was then in use for the carriage of passengers. It hardly requires a resort to the rule of construing a pleading most strongly against the pleader to reach the conclusion that the facts stated fail to show the existence of such a relation between the plaintiff and the defendant as to put the latter under the duty of accepting the former as a passenger. *Birmingham Railway & Electric Co. v. Mason*, 187 Ala. 342, 34 South. 207; *North Birmingham Ry. Co. v. Liddicoat*, supra; *Smith v. Birmingham Ry., L. & P. Co.*, 41 South. 307.¹ Counsel for the appellee cite the case of *Birmingham Ry., L. & P. Co. v. Adams*, 146 Ala. 267, 40 South. 385, 119 Am. St. Rep. 27, as supporting her contention that the count in question was not subject to the grounds of demurrer assigned against it. The facts stated in the complaint in that case showed the existence of the relation of passenger and carrier between the plaintiff and the defendant. In other words, the existence of the duty there claimed to have been breached was disclosed by appropriate averments of the facts. This cannot properly be said of the count now under consideration. We are of opinion that the demurrer to that count should have been sustained.

Reversed and remanded.

ALEXANDER v. SMITH.

(Court of Appeals of Alabama. *Nov. 28, 1911.)

1. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—RULING ON DEMURRER.

Any error in sustaining demurrers to special pleas was harmless to defendant where defendant had the benefit of the facts alleged in such pleas under the general issue.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4089-4106; Dec. Dig. § 1040.*]

2. CONTRACTS (§ 296*)—PERFORMANCE—SUFFICIENCY.

Defendant owned land lying between plaintiff's land and a creek, and made a contract with plaintiff, by which the latter agreed to furnish labor to clear off a right of way and dig a ditch through a pond and clean out and open the old ditch on defendant's land, the contract requiring plaintiff to "dig this ditch

¹ Reported in full in the *Southern Reporter*; reported as a memorandum decision without opinion in 147 Ala. 702.

not less than six or eight feet wide and the proper depth necessary, not to exceed three feet in the new ditch." *Held*, that while the provision that the ditch should not exceed three feet in depth was not intended as a limitation upon plaintiff in digging it, if it was otherwise satisfactory, even if it was construed as a limitation upon plaintiff's right to dig beyond that depth, the fact that it was dug more than three feet deep would not prevent plaintiff from recovering one-half of the cost thereof, as agreed, if the excess depth did not interfere with the ditch as a drain.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1363-1371; Dec. Dig. § 296.*]

3. CONTRACTS (§ 169*)—CONSTRUCTION—INTENTION OF PARTIES.

To ascertain the intention of the parties to a contract as to what should be done, regard may be had to the nature of the instrument, the condition of the parties, and their purposes.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752; Dec. Dig. § 169.*]

4. CONTRACTS (§ 296*)—PERFORMANCE—SUBSTANTIAL PERFORMANCE.

If the work done substantially conforms to the contract, immaterial deviations will not prevent recovery of the contract price, less the amount required to indemnify for injuries sustained by such deviations.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1363-1371; Dec. Dig. § 296.*]

5. TRIAL (§ 191*)—INSTRUCTIONS—PROVINCE OF JURY—INVASION.

In an action for one-half the cost of digging a ditch, which plaintiff was to dig not exceeding three feet in depth, through his and defendant's land, where the evidence made it a jury question whether the excess over three feet was a material deviation from the contract requirement, and whether it caused any loss to defendant, a requested charge that the digging of the ditch more than three feet deep was a material deviation preventing recovery was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.*]

6. CONTRACTS (§ 198*)—CONSTRUCTION.

Defendant owned a tract lying between plaintiff's land and a certain creek, and the parties made a contract by which plaintiff agreed to furnish labor "to clean off right of way and dig ditch through C. pond and to clean out and open the old ditch" on defendant's land; plaintiff agreeing "to dig this ditch not less than six or eight feet wide and the proper depth necessary and not to exceed three feet in the new ditch." The contract further provided that defendant should allow plaintiff's water right of way through the ditch, through the pond to the creek, for the purpose of keeping the ditch clean and open. The new ditch referred to was to connect with the old ditch, which was to furnish the outlet to the creek; the purpose being to make one drainage ditch by digging the new ditch to meet the old. *Held* that, under the provision "to clean out and open the old ditch," plaintiff was required not merely to remove the rubbish therefrom, but to widen it, so as to make it an unobstructed outlet for the water; the word "open" meaning to form by cutting, cleaning, removing, or pushing aside whatever impedes or hinders.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 861-883; Dec. Dig. § 198.*]

For other definitions, see Words and Phrases, vol. 6, pp. 4983-4984.]

7. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSIONS.

In an action for one-half the cost of digging and enlarging a ditch through the prop-

erty of adjoining landowners pursuant to agreement between them, the witness for plaintiff testified that the place where the new ditch was more than three feet deep was where it started from the old ditch near the edge of a hillside, and that the new ditch was to meet the old ditch, and, as the water stood where they came together, it was necessary to make the new ditch deeper. Witness was further asked, "Was that ditch dug any deeper than was necessary in order to make it take off the water?" *Held*, the question was proper, not calling for a conclusion, but for a matter of observation as to whether the ditch was made any deeper than was required to flow the water into the old ditch.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge.

Action by McQueen Smith against J. L. Alexander. From a judgment for plaintiff, defendant appeals. *Affirmed*.

The substance of the contract appears in the opinion of the court. The following written charges were refused to the defendant: (2) "If the jury believe from the evidence that the new ditch was dug by plaintiff more than three feet deep, they must find for the defendant." (8) "I charge you, gentlemen of the jury, that if you believe from the evidence that the plaintiff dug the new ditch to a depth greater than three feet, that the plaintiff is not entitled to recover anything for the digging of the new ditch." (3) "If the jury believe the evidence in this case, they cannot find for the plaintiff for any services or labor in the widening of the old ditch." (4) "If the jury believe the evidence, they cannot find a verdict for the plaintiff for any work or labor done on the old ditch." (5) "Under the contract in this case there rested upon plaintiff no duty to widen the old ditch to a width greater than originally dug, but only to open and clean out the old ditch; and if you believe the evidence in this case the plaintiff is not entitled to recover for any services rendered in widening the old ditch." (6) "I charge you, gentlemen of the jury, that there is no evidence in this case that it was necessary to widen the old ditch in order for it to carry off the water."

Coleman, Dent & Weil and Peyton E. Alexander, for appellant. Ray Rushton, William M. Williams, and Ballard & Thomas, for appellee.

WALKER, P. J. One of the counts of the complaint embodies a copy of the contract between the parties, avers performance by the plaintiff of its stipulations on his part, and that the defendant has failed and refused to pay one-half of the actual cost of the work, as he agreed to do.

[1] Under his plea of the general issue, the defendant had the benefit in the trial of presenting the claims, which he sought to set up by special pleas; that the work done by

the plaintiff did not constitute a performance of the contract according to its terms. This being true, if there was error in sustaining the demurrers to those special pleas, it was error without injury to the defendant. *Selma Street & Suburban Ry. Co. v. Campbell*, 158 Ala. 438, 48 South. 378.

[2] The defendant owned a tract of land lying between the plaintiff's land and Cat creek. By the contract, the plaintiff undertook "to furnish labor to clear off right of way and dig ditch through Cypress pond, and to clean out and open the old ditch, all on lands owned by J. L. Alexander [the defendant], known as the Carew Place. McQueen Smith [the plaintiff] is to dig this ditch not less than six or eight feet wide and the proper depth necessary, not to exceed three feet in the new ditch." Each of the parties was to pay one-half of the actual cost. The contract concluded with the stipulation "that the said J. L. Alexander is to allow McQueen Smith water right of way through said ditch through Cypress pond to Cat creek, for purpose of keeping ditch clean and open." The defendant resisted the plaintiff's right to recover anything for the digging of this new ditch, on the ground that it was dug more than three feet deep, instead of not to exceed the depth mentioned in the contract. For support in this position he relies on the words in the contract, "not to exceed three feet in the new ditch."

[3] In construing a contract as a whole or any provision of it that is brought into question, the effort should be to ascertain the intention of the parties, "and, to ascertain their intention, regard may be had to the nature of the instrument itself, the condition of the parties executing it, and the objects they had in view." *Lewman & Co. et al. v. Ogden Bros. et al.*, 143 Ala. 351, 42 South. 102. The situation with which the parties dealt in making the contract in question was the possession by the defendant of an old ditch on his land which he was interested in having cleaned out and opened and rendered more useful for the draining of his land by the construction of a new ditch to connect with it; while the old and new ditches together would serve plaintiff's purpose by furnishing drainage for his adjoining land. The two landowners agreed to the scheme of improvement. One of them was to do the work, and each was to pay one-half of the actual cost. The object of each of them was to get his land drained. The obligation of the one who undertook to dig the ditch "the proper depth necessary" was limited and qualified by the words "not to exceed three feet in new ditch"; and, while the connection in which those words are found makes it plain that this was the primary purpose of their use, yet the clause also inured to the benefit of the other party to the contract, as it is a fair inference that he did not intend to bind himself to pay one-half of the cost of work done in excess

of the requirements of the contract. It being perfectly plain that the paramount object of both parties was to have a ditch that would serve as an effective drain into Cat creek, it is not to be supposed that it was any part of their purpose in inserting the clause in question to enable the defendant to claim that no liability was imposed on him by the digging of the new ditch in the event of its depth exceeding three feet, though the ditch as dug accomplished the purpose of affording an effective means of drainage, at a cost to the defendant within the limit indicated by the terms of the contract, and the additional digging done by the plaintiff involved no loss or damage to the defendant. Even if the clause in question could reasonably be construed as a limitation upon the right of the plaintiff to dig the new ditch beyond the depth specified, and not as a limitation of the amount of digging required of him by the contract, still the mere fact that the ditch as dug was more than three feet deep would not have the effect claimed by the defendant, unless the excess in the depth of the ditch constituted a material departure from the scheme of improvement contemplated by the parties. It is not every variation from specifications that entitles a party who has contracted for work to be done to claim that his obligation to pay has not been incurred because the work as done does not conform to the terms of the contract.

[4] If the work as done substantially conforms to the requirements of the contract, immaterial deviations from specifications do not constitute an obstacle in the way of a recovery of the contract price, less the amount, by way of damages, requisite to indemnify the party sought to be charged against whatever injury he may have sustained as the result of such a departure from the letter of the contract. *Singer Manufacturing Co. v. McLean*, 105 Ala. 316, 18 South. 912; *Pitcairn v. Philip Hiss Co.*, 113 Fed. 492, 51 C. C. A. 323; *City of Elizabeth v. Fitzgerald*, 114 Fed. 547, 52 C. C. A. 321; *Crouch v. Gutmann*, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. Rep. 608; 8 Page on Contracts, §§ 1385, 1386. The ditch here in question was to be six or eight feet wide, and it is not questioned that the plaintiff had the right to dig it "the proper depth necessary, not to exceed three feet in the new ditch."

[5] Under the evidence, it was a question for the jury whether as dug it was more than three feet deep, and, if so, whether its depth was so little in excess of what was contemplated as to constitute no material deviation from the requirement of the contract in this connection, and to entail no loss or injury upon the defendant. In this state of the evidence the defendant was not entitled to a ruling to the effect that digging the ditch more than three feet deep constituted a material departure from the provisions of the contract. The foregoing considerations disclose the incorrectness of the

propositions involved in the second and eighth written charges refused to the defendant. Under those instructions, the jury would have been required to treat any deviation by the plaintiff from the provision referred to, however trivial or unsubstantial, as vitally affecting the plaintiff's rights under the contract.

[6] Another claim set up by the defendant was that he was not chargeable with any part of the cost incurred by the plaintiff in widening the old ditch. This claim is based upon the contention that the stipulation on the part of the plaintiff "to clean out and open the old ditch" did not authorize him to incur any expense in widening that ditch. This clause of the contract also is to be construed in the light of the situation dealt with by the parties and of the object sought to be accomplished. The new ditch provided for was to be connected with the old ditch mentioned, and the latter was to furnish the outlet to Cat creek. The result in contemplation was in reality one drainage ditch, which was to be lengthened by the digging of what was called the "new ditch," the water from which was to go out through the old ditch. The language of the contract is to be read in the light of this state of fact. The plaintiff agreed to "dig ditch through Cypress pond, and to clean out and open the old ditch." Immediately following this provision is the stipulation that the plaintiff "is to dig this ditch not less than six or eight feet wide and the proper depth necessary, not to exceed three feet in new ditch." In view of the fact that the parties were providing for one continuous ditch, it seems probable that the words "this ditch" as used in the clause just quoted were intended to refer to the entire ditch provided for in the immediately preceding stipulation, and not merely to the new ditch; and this view is strengthened by the circumstance that in the provision in that clause intended to apply only to the new ditch it is mentioned specifically. As the new ditch was to be not less than six or eight feet wide, and as the evidence showed that in some places the old ditch was only about four feet wide, it cannot be said that to give the language last quoted the effect of authorizing a widening of the old ditch where that was necessary to make it conform in capacity to the ditch which was to connect with it would be in disregard of the intention of the parties as expressed in the contract. But, assume that this particular provision was intended to refer alone to the new ditch, and that the plaintiff's right to recover for work done on the old ditch is under the provision requiring him "to clean out and open the old ditch." The counsel for the appellant construe these words as requiring no more than a removal from the old ditch of the trash and deposit accumulated in it. This much would have been required of the plaintiff if he had un-

dertaken merely to clean out the old ditch. We are of opinion that this construction unduly narrows the import of the words used when considered in the connection in which they are found. Manifestly the purpose of providing for the cleaning out and opening of the old ditch was that it might be made an effective part of the drainage project undertaken to be carried out. It was to be the means of letting off water from the land. Through it was to be discharged an additional volume of water to be brought into it by a new ditch which was to be six or eight feet wide and about three feet deep. This being true, it is not improbable that the parties deemed it advisable so to open up the old ditch as to give it a corresponding width throughout, so that the passage of the volume of water which would flow into it would not be impeded as a result of its being too narrow in some places. And we are of opinion that the words used are to be construed as expressing this purpose. One of the accepted meanings of the word "open" is "to form by cutting, cleaving, removing or pushing aside whatever impedes or hinders." Century Dictionary. The connection and the subject-matter dealt with indicate that it was in some such sense that that word was used in the provision in question. The conclusion is that the requirement "to clean out and open the old ditch," under the circumstances surrounding the making of the contract under consideration, called for, not merely the removal of the rubbish which had accumulated in that ditch since it was dug, but for such a widening of it in narrow places as to make it throughout an unobstructed outlet for the water to be drained into it. Such a widening of that ditch where it was necessary to make it conform to the plan of the drainage project of which it was to be a part cannot fairly be said to have been beyond the requirements of the provision under consideration. It follows from this conclusion that the court was not in error in refusing to give written charges 3, 4, 5, and 6 requested by the defendant.

[7] In the course of his examination as a witness the plaintiff testified: "The place where the ditch is more than three feet deep is down near where it started from the old ditch, near the edge of a hillside. The swamp is right under the edge of a hillside. The new ditch was to meet the old ditch. We dug the new ditch first in the summer, and in the fall went back to deepen it. When we came up the new ditch and the water stood there where the new ditch and the old ditch came together, and the new ditch had to be made deeper. The water in the ditch was the only level we had." In this connection the witness was asked the question: "Was that ditch dug any deeper than was necessary in order to make it take off the water?" The court was not in error in overruling the defendant's objection to this

question. The question called, not for a mere conclusion of the witness, but for a mere matter of observation as to whether at that point, where there was an elevation of the surface, the ditch was made any deeper than was required to let the water flow from it into the old ditch with which it was to connect. Besides, the witness was shown to be qualified by knowledge and experience to give an opinion on the subject inquired about which was admissible as evidence.

Enough has already been said of the conflict in the evidence to indicate the conclusion that the defendant was not entitled to the general affirmative charge requested in his behalf.

Affirmed.

CHEEK v. STATE ex rel. METCALF.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. INTOXICATING LIQUORS (§ 248*)—SEARCHES AND SEIZURES—AFFIDAVIT—SUFFICIENCY.

In search and seizure proceeding under Act Aug. 25, 1909 (Gen. & Loc. Laws Sp. Sess. 1909, p. 74) § 22, motion to quash an affidavit was properly overruled, where the affidavit stated that defendant kept a place where spirituous, vinous, or malt liquors or beverages were kept for sale, or otherwise illegally disposed of, known as the Olympian Hotel, etc.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 368-375; Dec. Dig. § 248.*]

2. INTOXICATING LIQUORS (§ 250*)—SEARCHES AND SEIZURES—EVIDENCE—ADMISSIBILITY.

In a proceeding to search a hotel for liquors unlawfully kept for sale or other disposition, under Act Aug. 25, 1909 (Gen. & Loc. Laws Sp. Sess. 1909, p. 74) § 22, the state could show that liquors had recently been sold there; and hence it was proper to admit proof that the sheriff sent a negro with no whisky on his person into the hotel, and remained in front of and near the hotel until the negro returned with whisky, and that he gave the negro money, and directed him to go into the hotel and buy whisky and bring it to him.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 387; Dec. Dig. § 250.*]

3. INTOXICATING LIQUORS (§ 250*)—SEARCHES AND SEIZURES—EVIDENCE—ADMISSIBILITY.

In a search and seizure proceeding under Act Aug. 25, 1909 (Gen. & Loc. Laws Sp. Sess. 1909, p. 74) § 22, it was improper to permit the state to show that, before issuance of the search warrant, defendant had more than once been arrested for violation of the prohibition laws.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 387; Dec. Dig. § 250.*]

4. CRIMINAL LAW (§ 365*)—EVIDENCE—COLLATERAL MATTERS.

Where several crimes constitute in fact one criminal transaction, evidence of all may be given as part of the res gestae of the offense with which accused is charged, but collateral facts affording no inference as to the principal facts in issue should not be allowed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 365.*]

5. INTOXICATING LIQUORS (§ 250*)—SEARCHES AND SEIZURES—LEGALITY OF KEEPING—BURDEN OF PROOF.

Claimant of liquors seized under Act Aug. 25, 1909 (Gen. & Loc. Laws Sp. Sess. 1909, p. 74) § 22, and found in a building, not used exclusively as a dwelling or a drug store, had the burden to show that he did not keep them for illegal purposes.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 387; Dec. Dig. § 250.*]

6. INTOXICATING LIQUORS (§ 249*)—SEARCH AND SEIZURE—BUILDING SUBJECT TO SEARCH.

In a search and seizure proceeding under Act Aug. 25, 1909 (Gen. & Loc. Laws Sp. Sess. 1909, p. 74) § 22, under a warrant describing the place as being located at a specified street number, and as being known as a certain hotel, a building, not located at that number, even if connected with the hotel by planks and used in connection therewith, is not subject to search.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 376-385; Dec. Dig. § 249.*]

Appeal from Circuit Court, Jefferson County; E. C. Crowe, Judge.

Proceeding by the State of Alabama, on relation of W. L. Metcalf, against F. C. Cheek, under Act Aug. 25, 1909 (General & Local Laws Sp. Sess. 1909, p. 74) § 22. From the judgment, Cheek appeals. Reversed and remanded.

Burgin, Jenkins & Brown, for appellant. R. C. Brickell, Atty. Gen., and William L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. One Metcalf, on the 15th day of April, 1911, under the provisions of section 22 of an act of the Legislature approved August 25, 1909, and entitled "An act to further suppress the evils of intemperance," etc. (General and Local Acts Alabama, Special Session 1909, p. 74), made an affidavit before E. C. Crowe, judge of the circuit court of Jefferson county, charging that "Fred Cheek keeps a place where spirituous, vinous or malt liquors or beverages are kept for sale or otherwise disposed of contrary to law, known as the Olympian Hotel," etc. Thereupon a search warrant was issued by the said circuit judge of Jefferson county, and was placed in the hands of the sheriff of said county, authorizing him, in substance, to search the said Olympian Hotel for said liquors, and, if found therein, to seize and hold them, subject to the orders of the court. Thereupon the sheriff and his deputies searched the Olympian Hotel and a building near it, known as the Wilson building; there being a passageway by means of two planks between the two buildings. The sheriff found and seized in the two buildings 23 dozen bottles of beer, 100 one-half pints of whisky, 1 quart of whisky, and two pints of whisky. Thereupon the said F. C. Cheek, as provided in subdivision 9 of section 22 of said act, filed a verified claim to 96 half pints of

whisky and 20 dozen bottles of the beer so seized, and denied any claim to any of the balance of said liquors. He denied, in his said verified claim, that he kept a place where spirituous, vinous, or malt liquors or beverages were kept for sale, etc. On the issues made up under the direction of the court on the said verified claim of Cheek, this suit was tried.

[1] 1. In our opinion, the motion to quash the affidavit upon which the search warrant was issued was properly overruled. This question has been directly passed upon by the Supreme Court of Alabama. *Toole v. State* (Sup.) 54 South. 195.

[2] 2. As the affidavit upon which the writ of seizure issued alleged that appellant kept, at the Olympian Hotel, "a place where spirituous, vinous or malt liquors or beverages are kept for sale," it was competent for the state to show that such liquors had recently been sold there. The evidence, therefore, that the sheriff sent a negro with no whisky on his person into the hotel, and remained in front of and near the hotel until the negro returned with whisky, and that he gave the negro money, and directed him to go into the hotel and buy whisky and bring it to him, was relevant and competent as a circumstance to be considered by the jury, along with the other evidence in the case, in determining whether such liquors were in fact kept for sale in said hotel. *Allison v. State*, 1 Ala. App. 206, 55 South. 453.

[3, 4] 3. Upon what theory as to its competency or relevancy the court proceeded when it permitted the state, against the objection of the appellant, to offer evidence tending to show that, prior to the issuance of the search warrant, appellant had, more than once, been arrested for a violation of the prohibition laws, we are not able to understand. The appellant took the stand as a witness, and the state was thereby given an opportunity to impeach him. This the state did not attempt to do. As the question as to whether the Olympian Hotel was a place in which contraband liquors were kept for sale was before the jury, the state also had a right, by legal evidence, to show that such liquors were being sold or had recently been sold there; but the fact that the appellant had been arrested for violating the prohibition laws had no legal tendency whatever to show that said hotel was a place where such liquors were sold. A collateral crime may be evidence against a party, if it is connected with the crime under investigation, and forms a part of a general and composite transaction. Where several crimes constitute in fact one criminal transaction, evidence of all of such crimes may be given as part of the res gestæ of the offense with which the person being tried is charged. *Allison v. State*, supra. Collateral facts affording no inference as to the principal facts in issue should not be allowed, and we know of no rule in this state de-

claring that the fact that a man is arrested for an offense, without more, is to be received in a court of justice as substantive evidence of his guilt of any offense. Such evidence is immaterial; for even innocent persons are sometimes arrested, and are subject to indictment. *Underhill on Crim. Ev.* § 245.

[5] 4. The evidence in this case showed, without dispute, that the liquors claimed by appellant were certainly not in the main building of the Olympian Hotel, but in the Wilson building, with which the main building of the Olympian Hotel was connected by two planks, used as a passageway. The place which the sheriff, under the search warrant, was authorized to search is described as follows: "Said place being located at 206 No. 21 St., B'ham, Ala., known as the Olympian Hotel." If the Wilson building was in fact included in the above description, then the appellant is not entitled to recover, unless he is able to show by evidence that the liquors were not kept by him in said building in violation of law. The liquors were found in said building, and, as it was not a building used exclusively for a dwelling, and was not a drug store, the burden is upon appellant to reasonably satisfy the jury that he did not keep said liquors in said building for illegal purposes, provided the building was included in the above description, and was a part of the Olympian Hotel.

[6] On the other hand, if the Wilson building was not located at "206 No. 21 St., B'ham, Ala.," but at some other number, then, even if connected with the Olympian Hotel by planks, and used in connection with the Olympian Hotel as a part of the same, the sheriff had no right to search that building under the directions contained in his affidavit, and the appellant is entitled to recover, whether said liquors were kept there for illegal purposes or not. "The writ must not be general; it should not leave the place to be searched to the discretion of the officer executing it; it must confine the search to one place or building." *Toole v. State* (Sup.) 54 South. 195.

In the above case of *Toole v. State*, in the affidavit and warrant the premises to be searched were described as "a place at 14 Jefferson street in the city of Montgomery, to wit, a stable or storehouse in the rear of a residence at said 14 Jefferson street," and while the court held, in effect, that the sheriff, under that writ, had the right to search both "a stable and a storehouse," if both of such buildings were in the rear of a residence at 14 Jefferson street, nevertheless it held that the sheriff was confined to such named buildings at said "14 Jefferson street."

In the present case, the building to be searched was "206 No. 21 St., B'ham, Ala., known as the Olympian Hotel," and the sheriff was without authority to search any property not coming within that description,

or to seize any liquors situated in any other building. It follows, of course, that, if the Wilson building is included in the description "206 No. 21 St., B'ham, Ala.," but was not a part of the Olympian Hotel—if appellant was not its proprietor, and had no dominion over it—then he is entitled to recover, although he may have kept the liquors in said building for illegal purposes. The constitutional guaranty against unreasonable searches and seizures is to be observed. *Toole v. State* (Sup.) 54 South. 195.

The record presents many other questions for our consideration; some of them will probably not arise on the next trial, and the others may not do so. We will therefore not consider them.

The judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

JACKSON v. STATE

(Court of Appeals of Alabama. Dec. 21, 1911.)

1. SALES (§ 7*)—SALE DISTINGUISHED FROM AGENCY.

Accused entered into a contract with a fertilizing company, whereby the company was to ship him fertilizer and receive his notes therefor, which fertilizer accused might sell at his own price, and later to pay the company. Held that, although the contract provided that accused was the fertilizing company's agent, there was no agency, a person to whom goods are consigned to be sold and who is at liberty to sell them at any price on any terms he pleases, paying a fixed price to the owner, being not an agent, but a vendee.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 16, 17; Dec. Dig. § 7.*]

2. EMBEZZLEMENT (§ 11*)—BY AGENT.

Where accused purchased fertilizer upon credit, executing the notes in payment, and sold it upon credit, taking notes which he pledged as collateral for the payment of his own note, and the fertilizer company allowed him to retain these notes and collect them, he was the agent for the purpose of collection, and so might be guilty of embezzlement of the funds collected.

[Ed. Note.—For other cases, see Embezzlement, Dec. Dig. § 11.*]

3. EMBEZZLEMENT (§ 38*)—EVIDENCE—ADMISSIBILITY.

In a prosecution for the embezzlement of money, which accused collected as agent of a fertilizer company, evidence of a contract whereby the fertilizing company sold him goods, though not creating an agency, was admissible, an agency being in contemplation by the parties, for great latitude is allowed on the question where fraud is involved.

[Ed. Note.—For other cases, see Embezzlement, Dec. Dig. § 38.*]

4. CRIMINAL LAW (§ 695*)—TRIAL—OBJECTIONS.

Where accused objected to the introduction of the number of letters as a whole, his objection may be overruled if any part of them be admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1637; Dec. Dig. § 695.*]

5. CRIMINAL LAW (§ 730*)—TRIAL—ARGUMENT OF COUNSEL.

It being the duty of the court, even upon its own motion, to prevent improper argument to a jury, and to require counsel to confine their arguments within the range of legitimate discussion, the court properly excluded argument that the accused, if convicted, would suffer imprisonment in the penitentiary for not less than one, nor more than ten, years.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 730.*]

Appeal from Circuit Court, Clarke County; John T. Lackland, Judge.

Dudley Jackson was convicted of embezzlement, and appeals. Affirmed.

The contract referred to in the opinion is as follows: "Tennessee Valley Fertilizer Company, Florence, Ala., 12/7/1908. To D. B. Jackson, Fulton, Ala.—Dear Sir: I hereby offer to ship you, for Tennessee Valley Fertilizer Company, the following fertilizers on the terms and at the price hereinafter named: 30 tons, 10-2-2 at \$20.94 per ton, 30 tons 12-2, at \$16.94, per ton, or 30 tons, 14% at \$14.69 per ton. Upon delivery of the goods you are to give your note or notes for the purposes hereinafter named to cover the invoice price, payable to the order of the Tennessee Valley Fertilizer Company at Alabama Trust & Savings Bank, Florence, Ala., and to mature as follows: 1/3 Nov. 1, 1909; 1/3 Nov. 15, 1909; and 1/3 Dec. 1, 1909. Deliveries to be made by us in car lots as you may direct on cars or boats at Florence, Ala., not later than May 1, freight prepaid to Fulton, Ala. The goods are not to be shipped until so ordered by you; and our obligation to deliver may be canceled by the destruction of our works by fire or other providential causes, including accidents, labor strikes, or delays in transportation. This contract is nontransferable, except by the written consent of both parties hereto. You strictly agree not to sell or deliver our fertilizer to any person on a credit without first taking note on the form to be furnished by us. Notes or other obligations taken by you in settlement in part or whole for fertilizer shipped you under this contract shall not be pledged with any bank or other party without the written consent of this company. On May 1, or sooner, if possible, you agree to deliver to us, or our order, notes of the planters or other purchasers to whom you may have sold these goods for the gross amount of the sales of the same to be held by us as collateral security for the payment of your obligation to us. You are to give us a receipt for said collateral when same is returned to you for collection. All of said goods and all of customers' obligations therefor, as also all proceeds therefrom, are to be held in trust by you for us until your indebtedness to us is fully paid, and, further, all proceeds of said goods as collected must be first applied to the payment of

your notes or obligations to us, whether the same have matured or not, such payments, however, to draw the legal rate of interest from the time of payment to the maturity of note. In case you fail to carry out any or all of the provisions and agreements in this contract, then the debt arising under this contract becomes at once due and payable, whether the same shall be closed by note or otherwise, and any and all goods, money, notes, and accounts you have received shall be considered to have been received by you as our agent, and we can demand immediate settlement of all transactions between us under this contract, and as to the obligations herein contained you waive all right of exemption under the laws of Alabama, or any other state, and you agree to pay all cost of collection, including a reasonable attorney's fee. It is further agreed that any and all goods shipped you in excess of the quantity herein mentioned, whether same goods or not, you are to receive subject to all conditions of this contract, unless otherwise provided for in writing, and you agree to handle our goods exclusively this season. It is further expressly agreed and understood that each and every car or shipment under this contract is distinct and separate from every other shipment, and in the event of any misunderstanding arising about any shipment it shall apply only to shipments which are questioned, and each and every complaint, if any is made, shall be specific as to shipment and cause of complaint. We reserve the right to cancel this contract, or any part thereof, in case of any occurrence which we regard as unfavorable to your credit. No verbal understanding will be recognized by either party hereto. This contract expresses all the terms and conditions agreed upon, and becomes binding when approved by the home office. [Signed by both parties.] The letters referred to had reference to the signing of certain notes, the shipment of certain guano, and some have reference to the shortness of the crop and the fact that the defendant had not been able to make any collections. The argument of the counsel excluded was that the defendant would, if convicted, suffer imprisonment in the penitentiary for not less than one nor more than ten years. The other facts sufficiently appear in the opinion.

J. F. Aldridge and Jesse V. Boyles, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. The indictment charged that the defendant, "an agent of Tennessee Valley Fertilizer Company, a corporation, under the laws of the state of Alabama, embezzled, or fraudulently converted to his own use, money to about the amount of one hundred and seventy-five and no/100 dollars, which had come into his possession by virtue of his office or employment." He

was convicted by a jury, and under the judgment of the court following the verdict was sentenced to the penitentiary. The defendant appeals.

[1] 1. We desire to state, at the outset of this opinion, that the conclusions to which we have arrived in upholding the judgment of the court below are not based upon the theory that the contract dated "Florence, Ala., 12/7/1908," which the reporter will set out in the summary of the facts of this case, and the letters subsequently written by the defendant, which were introduced in evidence, taken in connection with the further fact that the defendant bought fertilizers from the Tennessee Valley Fertilizer Company as contemplated, were sufficient to make out a prima facie case of agency against the defendant. "There is no magic in the word 'agency.' It is often used in commercial matters when the real relationship is that of vendor and purchaser." Sir W. M. James, L. J., in *White v. Neville*, 6 L. R. Ch. Cases, 397. "Mr. Towle practically acknowledges in his cross-examination that the real bargain between them was this: That Neville was to pay Towle & Co. a fixed price at a fixed time, but he was not bound to sell to the customer at that price or at that time, but was left at liberty to make his own bargains. Both Towle & Co. and Mr. Neville may have thought that this did not prevent their relation being principal and agent; but in my opinion in point of law it certainly does." Sir G. Mellish, L. J., in *White v. Neville*, supra. "These were the defendant's own goods. What the act [against embezzlement] contemplated was the intrusting of goods to an *agent*, and I do not see how a vendee can be considered as an agent within the meaning of the act. I am pretty clear on this point. Has a vendee ever been held liable under this statute? The whole tenor of it points otherwise, and it seems to contemplate a direction coming from a vendor, or from the person who intrusts. The goods having been sold and the delivery orders given, the defendant became, *not an agent*, but the owner of the goods, and I therefore do not think the relations between the parties were at all such as were contemplated by the act." Ray v. Budin, Cox's Crim. Cases, vol. 15, p. 412. A person to whom goods are consigned to be sold, and who is at liberty to sell them at any price and on any terms he pleases, he paying a fixed price to the owner, is not an agent, but a vendee. *Gibney v. Curtis*, 61 Md. 192.

While the Supreme Court of the United States in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, were dealing with the question as to whether certain contracts were void as being in restraint of trade and not on the identical subject now before us, the following is quoted in the opinion in that case with ap-

proval, and it furnishes us with an apt illustration of our views upon the present question: "If a man," says Lord Coke, in Coke upon Littleton, § 360, 'be possessed of a horse or a chattel, real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath no possibility of reverter; and it is against trade and traffic and contracting between man and man.'" It would seem from the same reasoning that it is against "trade and traffic and contracting between man and man" that the vendee of property, acquiring the whole interest in the property, can by a contract make himself the agent of the vendor as to the proceeds of the property if he sees proper to sell it. Imprisonment for debt is inconsistent with the humane spirit of the present age, and it seems to us that by this instrument the vendor, being unwilling to make the purchaser an agent, but making, in fact, an absolute sale, has undertaken, in advance, to provide criminal punishment for the mere nonpayment of a debt, if the property, the subject of the sale, was in fact sold by the vendee before the payment of the debt. Adults should be allowed great freedom in making their contracts, but we doubt whether a vendor making an absolute sale of personal property on credit can by indirection provide a criminal remedy for the collection of the debt when due.

[2] 2. The defendant, it appears from the evidence, is a man of no property. He lives on land belonging to his wife, and conducts a mercantile business for his wife, or in his wife's name. It further appears that he bought two car loads of commercial fertilizer from the Tennessee Valley Fertilizer Company, and that the fertilizer was bought by him, and not his wife. It further appears that he sold some of the fertilizer for cash, but, we gather from the bill of exceptions, most of it was sold to farmers in the neighborhood who gave notes for it payable in the fall. These notes were made payable to the Tennessee Valley Fertilizer Company, but as the fertilizer belonged to the defendant, and not to the fertilizer company, we attach but little, if any, importance to that fact. The notes when taken by him were for his fertilizer, and the notes so given by the farmers were his notes, no matter to whom he made them payable. When the defendant bought the fertilizer, he did not pay in cash for it, but, after he had bought it and it had been delivered to him, and after he had sold it as above stated and taken notes from the purchasers, he executed on April 19th to the Tennessee Fertilizer Company his three notes for an aggregate sum of \$732.90, and in the notes provided that "as collateral security to secure this or any other debt I now or may owe said company I hereby pledge all notes taken for Tennessee Fertilizer Com-

pany fertilizers during the current season." Substantially all of the notes taken by the defendant from his customers for the fertilizer sold them had been taken when the above agreement was made, and the defendant subsequently collected the money due on said notes, and, instead of remitting the money to the fertilizer company, he converted the money to his own use. The notes above pledged as collateral were not delivered by the defendant to the fertilizer company when he executed his notes to the company, but the defendant was allowed to remain in possession of them, and it seems to us that the above evidence shows that it was certainly in effect agreed between the parties, when the defendant executed his notes to the company; that the money due by said notes transferred as collateral, when collected, was to be the money, and in fact was the money, of the fertilizer company, and that, when it was collected, the defendant was to remit the money to said company. If so, the defendant was the agent of the company for the purpose of collecting the money, and, when the money was collected, it was the company's money. The evidence of one of the witnesses for the state, if believed, clearly shows that this was the true situation. This witness says: "I met the defendant in the town of Dickson during that fall. He took out a roll of money from his inside pocket and said: 'This is \$150. This belongs to Tennessee Valley Fertilizer Company, but they damn sure won't get it, for I am going to keep it myself.'"

[3] 3. The contract which we have instructed the reporter to set out in his summary of the facts of this case tends to show that at the inception of the transaction between the defendant and the fertilizer company an agency was within the ultimate scope of the contemplation of the parties when the fertilizer was sold to the defendant, and this letter or contract was therefore not irrelevant. Great latitude is allowed in the range of evidence when the question of fraud is involved. It is indispensable to truth and to a proper administration of justice that it should be so. *Snodgrass v. Bank*, 25 Ala. 174, 60 Am. Dec. 505; *Reeves' Case*, 95 Ala. 32, 11 South. 158.

[4] 4. A number of letters written by the defendant to the fertilizer company were also offered in evidence. The defendant objected to their introduction as a whole. If part of an answer is admissible, an objection to the question as a whole may be overruled. 6 Mayfield's Dig. 371, § 701. For the reasons indicated in section 3 of this opinion, some of the letters written by the defendant and introduced in evidence were certainly admissible.

[5] 5. The court has the right *ex mero motu*, and it is, in fact, its duty, whenever counsel undertake to make an improper argument to a jury, to put an end to such argument, and to require counsel to confine their

arguments within the range of legitimate discussion. *Ridgell v. State*, 1 Ala. App. 94, 55 South. 327; *Du Bose v. Conner*, 1 Ala. App. 456, 55 South. 432. It is therefore evident that the court committed no error in refusing to allow the attorney for the defendant to transgress the bounds of legitimate argument.

There was, in our opinion, evidence in this case from which the jury were authorized to conclude that the defendant, an agent of said fertilizer company, embezzled or fraudulently converted to his own use money exceeding in amount the sum of \$25, which had come into his possession by virtue of his office or employment, and, as we find no error in the record, the judgment of the court below must be affirmed.

Affirmed.

BIRMINGHAM RY., LIGHT & POWER CO. v. MINDLER.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. CARRIERS (§ 343*)—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—PLEAS.

In an action for injuries to a passenger while alighting from one of defendant's cars, defendant pleaded that plaintiff was herself guilty of contributory negligence in that she negligently attempted to alight from the car while it was moving at a rate of speed, with her hands incumbered with bundles, and that she was injured in such attempt, and would not have been injured had she used one of her hands as any reasonably prudent person would have done, and also in that she negligently attempted to alight without using her hands as she might have done and thereby avoided the injury, and as any reasonably prudent person would have done, and in negligently attempting to alight from the car while it was moving. *Held*, that both of such pleas disclosed facts to which the law attached the conclusion that plaintiff was guilty of negligence proximately contributing to her injury, and were not demurrable.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1398; Dec. Dig. § 343.*]

2. DAMAGES (§ 215*)—WILLFULNESS—PLEADING AND PROOF.

Where a complaint charged a willful and wanton injury, an instruction that if the jury believe from the evidence that defendant recklessly and carelessly injured plaintiff, then they could take into consideration the wanton count of the complaint and give plaintiff punitive damages, was erroneous as authorizing the jury to award punitive damages on proof of simple negligence.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 543-547; Dec. Dig. § 215.*]

Appeal from Circuit Court, Jefferson County; E. C. Crow, Judge.

Action by Amelia Mindler against the Birmingham Railway, Light & Power Company for damages to her as a passenger, received while alighting from one of its cars. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The pleas referred to are as follows: (2) "For further answer to each count of plain-

tiff's complaint, separately and severally, defendant says that plaintiff was herself guilty of negligence which proximately contributed to her alleged injuries, which negligence consisted in this: The plaintiff negligently attempted to disembark from said car while same was moving at a rate of speed exceeding five miles per hour, with her hands incumbered with bundles, and without using her hands, as she might have done, and she was injured in said attempt, and would not have been injured, had she used one of her hands as any reasonably prudent person would have done under similar circumstances." (3) Same as 2, down to and including the words "consisted in this," where they first occur, and adding: "Plaintiff, without using her hands as she might have done, and thereby avoided the injury, and as any reasonably prudent person would have done under similar circumstances, negligently attempted to disembark from said car while the same was moving, and was injured in said attempt."

The oral charge of the court, excepted to, is as follows: "Now, if you believe that that was recklessly or carelessly done, then the wanton count can also be taken into consideration by you. You can then give her what the law calls punitive damages; that is, punish them for their recklessness and carelessness, for not recognizing the high duty the law imposes upon them for the safety of their passengers."

Tillman, Bradley & Morrow and John S. Stone, for appellant. Gaston & Pettus, for appellee.

WALKER, P. J. [1] The second and third pleas each detailed the conduct of the plaintiff in attempting to alight from the moving car which was relied on to sustain the conclusion therein averred that she was guilty of negligence which proximately contributed to the injury complained of. Looking to the averment of facts, and not alone to the conclusion of the pleader deduced therefrom, the court is of opinion that each of those pleas disclosed a state of facts to which the law attaches the conclusion, expressed by the pleader, that the plaintiff was guilty of negligence proximately contributing to her injury, and that neither of them was subject to demurrer on any of the grounds assigned. *Osborne, Adm'x, v. Alabama Steel & Wire Co.*, 135 Ala. 571, 33 South. 687. The averments of each of those pleas show that in the plaintiff's attempt to alight from a moving car there was an absence of such care, prudence or forethought on her part as, in the circumstances stated, such a venture reasonably called for, and that this failure of duty on the part of the plaintiff was a contributing cause of the result complained of. *Watkins v. Birmingham Railway & Electric Co.*, 120 Ala.

147, 24 South. 392, 43 L. R. A. 297; Hunter v. L. & N. R. R. Co., 150 Ala. 594, 43 South. 802; Nashville, C. & St. L. Ry. v. Casey, 56 South. 28. It may be remarked that the evidence on the trial—both that offered by the plaintiff and that offered by the defendant—did not indicate that the incident complained of occurred under such circumstances that the defenses set up in these two pleas would have been available to the defendant if the demurrers to them had been overruled. If the record disclosed no other ground for reversing the judgment, it might be a question whether the court could be justified, in such a situation, in treating the action of the court in sustaining the demurrers to the pleas as error without injury, or would have to indulge the presumption that the defendant might have produced other testimony which would have disclosed the occurrence under a very different aspect, if it had not, by the act of the court in sustaining the demurrers to the pleas, been denied the opportunity of attempting to sustain them by evidence. But the question suggested is not material, as the record discloses other error requiring a reversal of the judgment appealed from.

[2] In a part of its oral charge to which an exception was reserved the court instructed the jury in effect that if they believed from the evidence that the defendant recklessly or carelessly injured the plaintiff, then they could take into consideration the wanton count of the complaint, and give the plaintiff punitive damages. Under this instruction a count alleging wanton or willful misconduct could be sustained by evidence showing no more than mere carelessness—simple negligence, and punitive damages could be awarded for such negligence. Under the authorities it cannot be doubted that such an instruction was materially erroneous. *Kansas City, Memphis & Birmingham R. Co. v. Crocker*, 95 Ala. 412, 11 South. 262; *Southern Railway Co. v. Bush*, 122 Ala. 470, 26 South. 168; *Birmingham Ry. L. & P. Co. v. Wise*, 149 Ala. 492, 42 South. 821; *Montgomery Street Railway v. Rice*, 142 Ala. 674, 38 South. 857.

Other rulings assigned as errors need not be passed on, as the questions involved may not be presented on another trial.

Reversed and remanded.

NATIONAL CHEMICAL CO. et al. v. NATIONAL ANILINE & CHEMICAL CO.

(Court of Appeals of Alabama. Nov. 30, 1911.)

1. SALES (§ 201*)—CONTRACTS—DELIVERY.

Where a buyer orders goods from the seller f. o. b. cars at the seller's place of business, a delivery by the seller to a carrier for transportation and delivery to the buyer is a constructive delivery to the buyer, and the seller is not

liable to the buyer for damages to the goods during transportation or after their arrival at the point of destination.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 529-541; Dec. Dig. § 201.*]

2. SALES (§ 435*)—ACTIONS FOR PRICE—PLEADING.

A plea, in an action on the common counts for goods sold and delivered, which alleges a sale of goods under a guaranty of quality equal to goods previously sold, and which avers that the representations of the seller that the goods sold were of a certain quality were false, and sets forth the seller's knowledge of the purpose for which the goods were bought, and that they were unfit for such purpose, merely alleges conclusions of the pleader or sets up matters not constituting an answer to the action declared on, and is demurrable.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1239-1245; Dec. Dig. § 435.*]

3. APPEAL AND ERROR (§ 1040*)—REVIEW—HARMLESS ERROR—ERRONEOUS RULINGS ON PLEADINGS.

The error, if any, in sustaining demurrers to a special plea alleging matters available under other pleas, is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4093; Dec. Dig. § 1040.*]

4. SALES (§ 446*)—ACTIONS FOR PRICE—INSTRUCTIONS.

Where a seller did not show any damages under his plea of set-off, in an action for the price, a charge that the seller was not entitled to any damages was proper.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1309-1317; Dec. Dig. § 446.*]

5. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—NECESSITY.

A party, who believes that an instruction stating a correct proposition of law is misleading because not sufficiently specific, must request an explanatory charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

6. SALES (§ 446*)—ACTIONS FOR PRICE—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

Where, in an action for the price of goods sold, the evidence showed a constructive delivery to the buyer by the seller delivering the goods to a carrier for transportation and delivery to the buyer, a charge that, if the goods were inferior in quality, the seller could not recover, was misleading for failing to allege that the inferiority must have existed before or at the time of shipment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1309-1317; Dec. Dig. § 446.*]

7. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING EVIDENCE.

Where, in an action for the price of goods sold, there was evidence that the buyer retained the goods and promised to pay for them, a charge that, if the goods were inferior in quality, the seller could not recover, was properly refused because ignoring a part of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

8. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING EVIDENCE.

Where, in an action for the price of goods sold and delivered, the evidence was conflicting on the issue of the buyer's promise to pay after receiving the goods, and on the question of whether the goods retained by the buyer were worthless, so that no obligation rested on him to rescind the contract and return the goods, a charge authorizing a verdict for the buyer

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

without regard to such evidence was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

9. TRIAL (§ 194*)—INSTRUCTIONS—INVADING PROVINCE OF THE JURY.

An instruction in an action for the price of goods constructively delivered to the buyer by a delivery by the seller to a carrier for transportation and delivery to the buyer, that there was no evidence that the goods became defective between the time of the delivery to the carrier and the time of the delivery to the buyer, and that there was no evidence that the goods were damaged while being transported, was objectionable as invading the province of the jury and as a charge on the effect of evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 462; Dec. Dig. § 194.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by the National Aniline & Chemical Company against the National Chemical Company and others, a partnership. From a judgment for plaintiff, defendants appeal. **Affirmed.**

The action was on the common counts for goods sold and delivered. The pleas were the general issue, and certain special pleas, setting up that the defendants, prior to June 20, 1907, were engaged in the business of manufacturing medicine and various medical remedies, and have been engaged in manufacturing a medicine known as "Dr. Odell's Liver Medicine," and that senna was used by the defendants in the manufacture of said medicine, and they had theretofore purchased senna from said plaintiff, and had bought a lot which was shipped to defendants on or about April 11, 1907, which they aver they used in and about compounding said medicine, and that it was well adapted for that purpose. The plea then sets out a letter written by appellee to appellants on June 20, 1907, offering 1,000 pounds of similar senna, quality equal to a lot shipped April 11th. Plea then avers and sets out a letter in answer to same, ordering said senna shipped at once, if equal to the last lot shipped. Then follows an averment that in and by said letter appellee guaranteed to appellants or warranted the senna to be equal to that shipped on April 11th, and set up that said representations were false and fraudulent, and set forth the reasons why this was so. The plea also sets up plaintiff's knowledge of the purpose for which it was bought, and that it was wholly unfit and unsuited for such purpose. And they offer to set off their damages in \$100.

The following charges were given at the instance of the plaintiff: (C) "I charge you, gentlemen of the jury, that under the evidence in this case the defendants are not entitled to any damages on their plea of set-off." (A) "I charge you, gentlemen of the jury, that if you believe the evidence in this case you cannot assess the defendants any

damages on their plea of set-off." (2) "Gentlemen of the jury, I charge you that in this case, if you find from the evidence that the plaintiff was to deliver the goods in New York City, then I charge you that a delivery of the goods to the railroad company in New York City was constructive delivery to the defendants; and if you find from the evidence that the goods were in good condition at the time they were delivered to the railroad company, then I charge you that the plaintiff is entitled to recover." (3) "I further charge you, gentlemen of the jury, that when the goods were delivered by the transportation company in New York City in this case, this was constructive delivery to the defendant, and if the goods were damaged after they were delivered to the transportation company, the plaintiff is not responsible for such damages." (4) "I charge you, gentlemen of the jury, that from the evidence in this case it is understood that plaintiff was to deliver the goods to the transportation company in New York City; and if you find from the evidence that said goods were delivered to the transportation company, and that said goods so delivered were of the same quality as the goods of the prior shipment, then I charge you that the plaintiff would be entitled to recover, and, further, that if any damages occurred to the goods after they were placed in the office of the transportation company in New York City by the plaintiff, then the loss of such damage would fall upon the defendants, and not upon the plaintiff."

The following charges were refused the defendants: (2) "I charge you that, if you find from the evidence that the senna in question was inferior in quality to the senna invoiced and shipped by plaintiff to the defendants April 11, 1907, then the plaintiff would not be entitled to recover for the amount claimed in the complaint." (6) "Gentlemen of the jury, I charge you that, if you find from the evidence that the senna in question was worthless, then your verdict must be for the defendants, although you might further find from the evidence that the defendants promised to pay the plaintiff the amount claimed for the senna." (8) "I charge you that the defendants were not under any legal obligation to notify the plaintiff of the reception of the senna in question, nor of its condition." (9) "I charge you that the letters of the defendants introduced in evidence by the plaintiff in no way bind the defendants to the payment of the amount claimed by the plaintiff, nor any part thereof." (11) "I charge you that if the senna, the price of which forms the basis of this suit, was not of equal quality, when delivered by the plaintiff to the transportation company in New York, with the senna shipped to the defendant on April 11, 1907, then the plaintiff is not entitled to recover in this case." (12)

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

"I charge you that, if you are reasonably satisfied from the evidence in this case that the senna forming the basis of this suit had leaves in it when delivered by the plaintiff to the transportation company in New York, then the plaintiff is not entitled to recover."

(14) "I charge you that, if you are reasonably satisfied from the evidence that the senna in question was worthless when delivered to the defendants in Birmingham, then your verdict must be for the defendants." (15) "I charge you that, if the senna mentioned in the plaintiff's letter to the defendants of June 20, 1907, was of an inferior quality to that delivered on April 11, 1907, when it was delivered by plaintiff to the transportation company in New York, then I charge you that plaintiff was not entitled to recover the amount sued for in this action." (17) "I charge you that, if you are reasonably satisfied from the evidence that the senna in question was, when delivered to the defendants, of an inferior quality to that of shipment of April 11, 1907, then the plaintiff would not be entitled to recover for the amount sued for." (18) Same as 17, except that it requires a verdict in favor of the defendants. (20) "If you are reasonably satisfied from the evidence that the senna in question had either leaves, bugs, or worms in it when delivered by plaintiff to defendants, then your verdict must be for the defendants." (21) "If you are reasonably satisfied from the evidence that the senna in question was worthless when delivered to the defendants, then the defendants were under no obligation to notify the plaintiff of its condition, and your verdict must be for the defendants, although you might find from the evidence that the defendants promised to pay for the same." (25) "There is no evidence in this case showing that leaves got into the senna between the time it was delivered to the transportation company in New York and the time it was delivered to the defendants in Birmingham." (26) "I charge you that there is no evidence in this case that the senna in question was damaged while being transported from New York to Birmingham."

Arthur L. Brown, for appellants. Thompson & Thompson, for appellee.

PELHAM, J. The appellee wrote to the appellants on June 20, 1907, offering to sell them a quantity of ground senna, "quality equal to lot shipped and invoiced on April 11th, * * * f. o. b. New York." The letter was written from appellee's place of business in New York City to appellants in Birmingham, Ala., where they were engaged in putting up medicines. On June 27, 1907, appellants, by letter written from their office in Birmingham, replied to this offer to sell and ordered the goods, about 1,000 pounds of senna leaves, under the terms and conditions offered in appellee's letter of June 20th, "if equal to the last lot shipped us."

Appellee replied by letter, acknowledging the order and promising prompt shipment. The goods were promptly delivered for shipment to the carrier f. o. b. by the appellee in New York, marked to appellants in Birmingham, Ala.; the invoice being dated July 2, 1907. The correspondence introduced in evidence shows that the goods after their arrival in Birmingham were allowed to remain in the depot or warehouse of the carrier for about 30 days; appellants not taking them out until August 16, 1907.

[1] Whether the railroad or appellant was at fault for the goods being kept in the depot or warehouse of the carrier is not material to the issues involved, as appellants ordered the senna from appellee f. o. b. New York, and a delivery to the common carrier there by appellee was a constructive delivery to the appellants, and the appellee would not be liable to appellants for injuries or damage to the goods after their arrival in Birmingham. *Capehart v. Furman Co.*, 103 Ala. 671, 16 South. 627, 49 Am. St. Rep. 60.

The appellants, after receiving the goods, made no complaint and offered no objection to them, but, on the contrary, made several promises by letter to pay for them, and, not having done so, appellee brought suit in the court of a justice of the peace on January 3, 1908, and recovered judgment on October 18, from which an appeal was prosecuted by appellants to the circuit court of Jefferson county, where appellee recovered the judgment from which this appeal is prosecuted. The evidence in the trial court on the part of appellants was to the effect that the senna received was not of the quality ordered, and that "it was full of leaves, stems, and worms and bugs" and was worthless; that the lot previously shipped, to which this was to correspond, was of the best quality. The evidence on behalf of appellee was to the effect that the senna shipped and delivered by it to the carrier f. o. b. New York was taken from the same lot as previously shipped, imported at the same time from the same party, and was free from leaves, bugs, or worms, and was of the best grade and quality, and in every respect equal to the lot previously shipped. The evidence was without dispute that appellants had made repeated promises to pay and offered no objection of any kind to the goods until the appellee placed the claim in the hands of an attorney for collection. The appellants testified that when they received the senna they needed it to fill orders on hand and endeavored to use it by passing it through a sieve to eliminate the leaves, bugs, or worms, but afterwards found it worthless. No offer to return, or objection of any kind, was made to the goods by appellants after receiving them about the middle of August, 1907, until shortly before suit was brought in January, 1908, when the claim was in the hands of an attorney for collection. And it was during this period, on October 12, 1907, and

November 29, 1907, that appellants wrote the appellee asking an extension and offering to pay.

[2] The several assignments of error going to the rulings of the trial court on the pleadings are without merit. The pleas of appellant to which demurrers were sustained set up matters that were mere conclusions of the pleader (*McAllister v. Matthews*, 150 Ala. 167, 43 South. 747, and authorities there cited), or were not an answer to the action declared on.

[3] All the matters that the defendants were entitled to the benefit of as a defense to the action that were attempted to be set up in these pleas they had the full benefit of in other pleas, and the rule is well settled that, where a party gets all the benefits on the trial it would have received if the ruling on demurrer had been otherwise, the error, if any, is error without injury. *Marlowe v. Rogers*, 102 Ala. 510, 14 South. 790; *A. G. S. R. R. Co. v. Dobbs*, 101 Ala. 219, 12 South. 770; 3 *Mayfield's Dig.* p. 10, § 6, and list of authorities given there.

[4] The court was free from error in giving charges "C" and "A" requested in writing by appellee. No damages were shown under the defendants' pleas of set-off.

[5] Charge 2 given at the instance of the appellee states a correct proposition of law as applicable to the evidence. If the appellants deemed that it had a tendency to mislead, in that it failed to specifically instruct with reference to the goods being of the same quality as the April shipment, an explanatory charge should have been requested.

Charges 3 and 4 assert correctly the law applicable to the facts predicated, and were properly given.

[6, 7] There was no error committed in the refusal of charges requested by the appellants. Charge 2 requested by appellants and refused, viewed in the light of the evidence, was decidedly misleading in failing to allege the inferiority in quality to have existed before or at the time of shipment. For anything appearing in the charge to the contrary, the goods may not have been "inferior in quality" when delivered to the carrier in New York, but became so, without fault on the part of the shipper, while in transit or while lying in the depot in Birmingham, after they were in the actual or constructive possession of appellants. It also ignores the liability that might be occasioned by retaining the goods and promising to pay. The charge ignores a material part of the evidence, and was properly refused. *Elliott v. Howison*, 146 Ala. 568, 40 South. 1018.

Charge 6 was faulty for the same reasons pointed out as to charge 2. The senna, if the appellee's testimony be considered, may have been of the grade and quality ordered, and delivered in good condition f. o. b. New

York. The charge ignores this part of the appellee's evidence completely.

Charges 8 and 9 do not assert correct propositions of law applicable to the evidence.

[8] Charges 11 and 12 disregard the evidence of the appellants' promise to pay after receiving the goods, and also the question of whether or not the goods retained by appellants were worthless, and no obligation rested on them to rescind the contract and return the goods. These were all matters on which there was a conflict in the evidence, and the charges instructing the jury to return a verdict in favor of appellants without regard to the evidence on this phase of the case were properly refused.

Charge 14 was clearly erroneous. The contract was to deliver to the transportation company f. o. b. New York, and not in Birmingham.

Charge 15 had a tendency to mislead, and was also properly refused for the same reasons discussed in sustaining the rulings of the trial court as to charges 11 and 12.

Charges 17, 18, 20, and 21 are erroneous for the same reasons assigned in reference to charges 6 and 14.

[9] Charges 25 and 26 invade the province of the jury and charge on the effect and weight of the evidence.

The errors assigned fail to show any reversible error, and the case is affirmed.

Affirmed.

DUNGAN v. STATE.

(Court of Appeals of Alabama. Dec. 21, 1911.)

1. LIBEL AND SLANDER (§ 152*)—CRIMINAL SLANDER—SUFFICIENCY OF AFFIDAVIT.

An affidavit alleged that accused did falsely and maliciously speak of and concerning W., in the presence of others named, charging W. with having committed perjury in substance, as follows, to wit: That the oath of said W. had been impeached, and was worth nothing in the courts of the county. Code 1907, § 7840, provides that any person who falsely and maliciously imports the commission by another of a felony or other indictable offense involving moral turpitude must be punished as provided, and section 3747 provides that every accusation of false swearing presumptively imports a charge of perjury. *Held*, that the affidavit sufficiently informed accused of the offense charged.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 417-427; Dec. Dig. § 152.*]

2. CRIMINAL LAW (§ 766*)—INSTRUCTIONS—REQUESTS—SUBMITTING QUESTIONS OF LAW.

A requested charge in a prosecution for defamation in charging another with perjury that, unless the jury believed that the words imputed to accused charged such other with the commission of perjury, they must acquit, was properly refused as submitting a question of law to the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1794-1797; Dec. Dig. § 766.*]

3. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

A charge requiring an acquittal unless the jury "believes" a certain material fact was properly refused; it being sufficient that the proof dispels reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922; Dec. Dig. § 789.*]

4. LIBEL AND SLANDER (§ 141*)—CRIMINAL RESPONSIBILITY—"SLANDER"—"DEFAMATION."

"Slander" or "defamation" is anything which tends to blacken or injure one's character or reputation.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 402; Dec. Dig. § 141.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1927-1928; vol. 7, pp. 6527-6528.]

Appeal from Clarke County Court; Thomas W. Davis, Judge.

John D. Dungan was convicted of defamation, and he appeals. Affirmed.

The affidavit was as follows, omitting the formal charging part: "Personally appeared T. W. Walker, who, first being duly sworn, depose and says that he has probable cause for believing, and does believe, that within 12 months before the commencement of this prosecution, in said county, John D. Dungan did falsely and maliciously speak of and concerning T. W. Walker, in the presence of J. D. Bedwell and W. E. Estis, charging him with having committed perjury, in substance as follows, to wit: That the oath of said T. W. Walker had been impeached, and was worth nothing in the courts of Clarke county," etc. The bill of exceptions shows that the demurrer to this application was stricken on motion of the solicitor, for the reason that same was not filed at the first term of the court, at which the case was tried. The evidence tended to support the charge made in the affidavit. The evidence for the defendant tended to show that he asked the question if the witnesses knew if Walker's oath had ever been impeached, but did not state it as a fact that it had been. In its oral charge the court defined slander or defamation as anything which tends to blacken or injure a man's character or reputation. Charge B is as follows: "I charge you, gentlemen of the jury, that unless you believe that the words imputed to the defendant charged the said T. W. Walker with the commission of perjury, you must find the defendant not guilty."

Travis J. Bedsole, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. Even had it been the duty of the court to pass upon the demurrers that were stricken, the defendant's rights were not impaired, as the demurrers were not well taken and must have been overruled.

[1] The statement of facts set forth in the affidavit are sufficient to apprise the defend-

ant, and from which to determine certainly the offense charged. The affidavit charges the defendant with having spoken falsely and maliciously of affiant imputing to him the commission of the offense of perjury, a felony involving moral turpitude. Code 1907, § 7340; *Haley v. State*, 63 Ala. 89. The statement in the affidavit "that the oath of said T. W. Walker had been impeached and was worth nothing in the courts of Clarke county" is an assertion imputing false swearing, and presumptively imports the commission of the offense of perjury. Code, § 3747. The evidence was sufficient to authorize a conviction, and there was no error in overruling the defendant's motion to exclude the evidence and direct a verdict.

[2] Charge B referred to the jury a question of law, and was properly refused. *Tidwell v. State*, 70 Ala. 33; *Dotson v. State*, 88 Ala. 208, 7 South. 259; *Carr v. State*, 104 Ala. 4, 16 South. 150; *Whatley v. State*, 144 Ala. 68, 39 South. 1014; *Land Co. v. Edmondson*, 145 Ala. 557, 40 South. 505.

[3] The charge is also faulty in not limiting the belief in the evidence to a belief "beyond a reasonable doubt." The state is not required to prove defendant's guilt beyond all doubt, but only beyond a reasonable doubt. *Mills v. State*, 148 Ala. 633, 42 South. 816.

[4] The definition given by the court in its oral charge of slander or defamation is correct. *I. A. Pub. Co. v. Crudup*, 85 Ala. 519, 5 South. 332; *Moody v. State*, 94 Ala. 42, 10 South. 670; *Ivy v. P. S. & L. Co.*, 113 Ala. 349, 21 South. 531; *Wofford v. Meeks*, 129 Ala. 349, 30 South. 625, 55 L. R. A. 214, 87 Am. St. Rep. 66.

No error prejudicial to defendant is shown by the record, and the case will be affirmed. Affirmed.

SHANNON & CO. et al. v. McELROY.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. ASSUMPSIT, ACTION OF (§ 23*)—PLEA—WANT OF CONSIDERATION.

In assumpsit, want of consideration is available under the general issue, under which defendant may prove any matter showing that plaintiff never had any cause of action, or that he ought not to recover.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 130-152; Dec. Dig. § 23.*]

2. ASSUMPSIT, ACTION OF (§ 4*)—IMPLIED PROMISE—CONSIDERATION.

An express or implied promise sufficient to sustain assumpsit requires a consideration for its legal support.

[Ed. Note.—For other cases, see Assumpsit, Action of, Dec. Dig. § 4.*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Assumpsit by W. T. McElroy against Shannon & Co. and J. S. Shannon. Judgment for plaintiff, and defendants appeal. Affirmed.

The third plea is as follows: "There is no consideration for the account sued on."

D. A. McGregor, for appellants. M. B. McCullom and J. D. Acuff, for appellee.

WALKER, P. J. [1] The defendant was not prejudiced by the action of the court in striking his third plea. The defense of want of consideration was available to him under his plea of the general issue. In assumption, under the general issue, any matter which shows that the plaintiff never had any cause of action, or that, *ex aquo et bono*, he ought not to recover, may be given in evidence. That plea puts upon the plaintiff the burden of proving every fact which is an essential constituent of his cause of action.

[2] The express or implied promise upon which such action is based requires a consideration for its legal support and existence; and the plaintiff cannot maintain his action when the evidence shows that the promise counted on was without consideration. *Matthews v. Turner*, 2 Stew. & P. 239; *Robinson v. Windham*, 9 Port. 397; *Ala. Gold Life Ins. Co. v. Mobile Mutual Ins. Co.*, 81 Ala. 329, 1 South. 561; 4 Cyc. 353; 2 Ency. of Pleading & Pr. 1029.

In view of the conflicting evidence set out in the bill of exceptions, the assignments of error based upon the refusal of the court to give the general affirmative charge requested by the defendant, and to grant his motion for a new trial, are clearly without merit.

Affirmed.

BIRMINGHAM RY., LIGHT & POWER CO. v. DANIEL.

(Court of Appeals of Alabama. Dec. 21, 1911.)

1. STREET RAILROADS (§ 110*) — ACTIONS — PLEADING.

A complaint against a street railroad company, which alleged that plaintiff claimed as damages \$1,000 because the street railroad company, through its agent, to wit, its motorman, who had charge of a car, negligently ran the car against and killed a valuable horse, the property of the plaintiff, the said motorman acting within the scope and line of his employment at the time the horse was struck, states a cause of action.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 224; Dec. Dig. § 110.*]

2. STREET RAILROADS (§ 78*) — OPERATION — OWNERSHIP OF CAUSE.

A street railroad company, which negligently ran a car against plaintiff's horse, cannot escape liability because the car did not belong to it.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 166-171; Dec. Dig. § 78.*]

Appeal from Circuit Court, Jefferson County; E. C. Crow, Judge.

Action by F. B. Daniel against the Birmingham Railway, Light & Power Company.

From a judgment for plaintiff, defendant appeals. Affirmed.

Tillman, Bradley & Morrow and L. C. Leadbeater, for appellant. Frank S. Address, for appellee.

DE GRAFFENRIED, J. [1] The first count of the complaint in this case was as follows: "The plaintiff claims of defendant the sum of \$1,000 as damages for that on, to wit, the 5th day of May, 1910, the defendant operated an electric street railway in Birmingham, Jefferson county, Ala.; that while operating said railway on said date when at or near Thirty-Eighth street and First avenue, in said city, *the defendant through its agent, to wit, its motorman*, who had charge of said car, *negligently ran said car against and killed a valuable horse*, the property of plaintiff. The said motorman was acting within the scope and line of his employment at the said time said horse was struck by said car." The appellant challenges the sufficiency of the above count as a legal statement of a cause of action, and that is the only question presented by this record for our determination. The italics in the above count are ours, and, reading the italicized words together, we have: "*The defendant through its agent, to wit, its motorman, negligently ran said car against and killed a valuable horse.*" Who, according to the above count, *negligently ran said car*? The count says the defendant did so. "Through whom did it *run said car*?" The count says that it did so through its motorman. The count further says that "the said motorman was acting within the line and scope of his employment at the time said horse was struck by said car." If the defendant negligently ran the car through its agent, to wit, its motorman, and the motorman, at the time, was acting within the scope and line of his employment, necessarily the motorman was acting as the agent of the defendant. Otherwise the defendant was not "through its agent, to wit, its motorman," running the car, as the above count alleges it was doing when the horse was killed.

[2] The appellant claims that the count is also defective because it does not allege that "*said car*" was appellant's car. This can make no difference. If appellant negligently ran a car which did not belong to it over the appellee's horse, the appellant would be liable to the same extent as if the car was in fact its own property. To use a stock expression, the count may have been "inartificially drawn," but, under the decisions of the Supreme Court, it was a sufficient statement of a cause of action by the appellee against the appellant. *Russell v. Huntsville R. L. & P. Co.*, 137 Ala. 627, 34 South. 855.

The judgment of the court below is affirmed.

Affirmed.

NORTH ALABAMA TRACTION CO. v. DANIEL.

(Court of Appeals of Alabama. Nov. 30, 1911.)

1. PLEADING (§ 340*)—LOST PLEADINGS—USE OF RECORD.

Where a complaint is lost at the time of trial, plaintiff is authorized by Code 1907, § 5737, to use the record in lieu thereof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1026-1032; Dec. Dig. § 340.*]

2. DEPOSITIONS (§ 95*)—INTRODUCTION OF PART OF DEPOSITION IN EVIDENCE.

Where plaintiff took defendant's deposition as authorized by Code 1907, § 4049, plaintiff was not entitled over defendant's objection to introduce a part only of the deposition, as plaintiff, under Code 1907, § 4056, had the burden of contradicting the objectionable portions.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 276, 277; Dec. Dig. § 95.*]

3. APPEAL AND ERROR (§ 1058*) — REVIEW—HARMLESS ERROR—INTRODUCTION OF PART OF DEPOSITION IN EVIDENCE.

Error in permitting plaintiff to introduce a part only of defendant's deposition taken before trial was not cured by the fact that plaintiff stated that he had no objection to the introduction of the balance by defendant, nor because certain of defendant's witnesses swore to substantially the same facts as were contained in the excluded portions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200-4206; Dec. Dig. § 1058.*]

4. APPEAL AND ERROR (§ 1058*) — REVIEW—HARMLESS ERROR—RECEPTION OF EVIDENCE.

Defendant was not prejudiced by error in permitting plaintiff to introduce a part only of defendant's deposition, where the excluded portions were substantially embraced in defendant's answer to an interrogatory in the part of the deposition introduced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200-4206; Dec. Dig. § 1058.*]

5. CARRIERS (§ 276*)—CARRIAGE OF PASSENGERS—CARRYING PAST DESTINATION—EVIDENCE.

In an action against a carrier for taking a passenger past his destination, evidence of conversations between plaintiff and the conductor and motorman of the car, tending to show aggravation of the wrong and bearing on the issue of plaintiff's right to recover punitive damages, was admissible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1078, 1079; Dec. Dig. § 276.*]

6. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The sustaining of an objection to a question was without prejudice, where the witness answered and his answer remained in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

7. CARRIERS (§ 278*)—CARRIAGE OF PASSENGERS—FAILURE TO STOP—ACTION—INSTRUCTIONS.

In an action for injuries to a street car passenger for failure and refusal of defendant's servants to stop the car to allow plaintiff to get off at his destination and wrongfully allowing him to alight at a different and distant place, an instruction that defendant could not take advantage of its own wrong by inducing a passenger by misrepresentations to alight, and then declare a severance of his relations

with him as a passenger in order to avoid liability, did not constitute reversible error.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1080, 1081; Dec. Dig. § 278.*]

8. CARRIERS (§ 278*)—CARRIAGE OF PASSENGERS—FAILURE TO DISCHARGE AT DESTINATION—ACTION—INSTRUCTIONS.

In an action against a carrier for failure to discharge plaintiff at his destination, instructions that, if plaintiff left the car at the barn and started to walk home, he then ceased to be a passenger, and defendant owed him no further duty, and that plaintiff ceased to be a passenger when he got on the sidewalk, whether he left the car voluntarily or not, were properly refused; it being immaterial to the question whether defendant committed a breach of duty in failing to discharge plaintiff at his destination, and in wrongfully putting him off at another place.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1080, 1081; Dec. Dig. § 278.*]

9. CARRIERS (§ 277*)—CARRIAGE OF PASSENGERS—FAILURE TO DISCHARGE PASSENGERS—ACTION—DAMAGES—EXCESSIVENESS.

Plaintiff, a street car passenger, signaled defendant's servants to stop the car on which he was riding at a point near his home, but the car was not stopped there or at the next street crossing, a point equally near plaintiff's home, but plaintiff was taken to the end of the line and then compelled to walk back. There was also evidence indicating an aggravation of the wrong by mistreatment on the part of defendant's employees. Held, that a verdict awarding plaintiff \$1,000 damages was not excessive.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1084; Dec. Dig. § 277.*]

Appeal from Circuit Court, Morgan County; D. W. Spenke, Judge.

Action by Clarence E. Daniel against the North Alabama Traction Company for damages for carrying him past his destination. Judgment for plaintiff in the sum of \$1,000. Affirmed.

The charges refused to defendant are as follows: (4) "If you believe from the evidence that plaintiff left the car at the barn and started to walk home, he then ceased to be a passenger of the defendant, and the defendant then owed him no further duty." (11) "The plaintiff ceased to be a passenger when he got upon the sidewalk, if you believe from the evidence he did, whether he left the car voluntarily or not."

For the other facts in the case, see former appeal in 158 Ala. 414, 48 South. 50.

John C. Eyster, for appellant. Callahan & Harris, for appellee.

DE GRAFFENRIED, J. [1] 1. The appellee, when this case was tried, was permitted to use the record of the complaint in lieu of the complaint, because the complaint, when the trial was had, was lost. This was permissible under section 5737 of the present Code, and the action of the court below in permitting appellee to use the record of the complaint in lieu of the lost complaint, being authorized by statute, was without error.

[2] 2. The appellee, under the provisions of section 4049, took the deposition of appellant. When the trial was had, he moved the court to exclude certain portions of said deposition, and the court, against the objection of appellant, granted the motion. Thereupon the court, against the objection of appellant, permitted the appellee to introduce said deposition in evidence without introducing said excluded portions, to which action of the court the appellant duly excepted. In permitting appellee to introduce a part of said deposition without introducing the whole of it, the trial court was in error. *Birmingham R. L. & P. Co. v. Oden*, 164 Ala. 1, 51 South. 240; *Sullivan Timber Co. v. L. & N. R. R. Co.*, 163 Ala. 125, 50 South. 941; *Prestwood v. Carleton*, 162 Ala. 327, 50 South. 259.

This is an error for which this judgment would be reversed, but for the fact that we are of the opinion that the excluded parts of the deposition were not material to the real inquiry in the case and that the error was without injury to appellant. When appellee introduced the deposition, he should have introduced all of it which was in any way pertinent to any issue in the cause. Having elected to use the deposition as a part of his testimony, appellant had the right to demand that appellee introduce all of it as *his* testimony, thus subjecting it to such presumptions as the law would thereby impress upon it because of its introduction by appellee as a part of his testimony. While, under the provisions of section 4056 of the Code, the appellee could have *contradicted* such excluded portions, the refusal of the trial court to introduce the deposition, as a whole, relieved the appellee of that burden.

[3] We do not think that the mere fact that appellee, after he had introduced so much of the deposition as he saw fit, stated that he had no objection to the introduction by appellant of the balance of the deposition, in any way cured the error into which he had led the court. The introduction, by appellant, of the remaining parts of the deposition, would have robbed them of those efficient presumptions in appellant's favor to which they were entitled as a *part* of the evidence of his adversary. Neither are we of the opinion that because certain witnesses of appellant swore to substantially the same facts, on their examination by appellant as witnesses, as were contained in the excluded portions of the deposition, cured the error. To announce a rule and then to point out a method of practically evading the rule is but to destroy the efficiency of the rule, and we do not think that the rule announced in *Railway Company v. Arnold*, 162 Ala. 570, 50 South. 293, has any applicability to the question here presented.

[4] We are, however, of the opinion that the appellant suffered no injury because of the erroneous action of the trial court in excluding the parts of the deposition to

which exceptions were taken, and that therefore, while there was error, it was not such error as should result, on that account, in the reversal of the judgment in this case. The gravamen of the complaint was that appellant wrongfully carried appellee on one of its street cars, against his consent, for a long distance beyond his home, mistreated and insulted him, and then ejected him from its car and forced him to walk back home. The tendency of appellee's evidence was that he signaled appellant's servants to stop the car, on which he was a passenger, on Fourth avenue, a point near his home, while the tendency of appellant's evidence was that the signal was given too late for the car to be stopped at *that* point, but was given in time for the stoppage of the car at the *next* street crossing, a point *equally near* appellee's home, but that appellee agreed that he would remain on the car until it went to the end of the line and returned to Fourth avenue. It is evident that, in the absence of the above-mentioned alleged agreement on the part of appellee to remain on the car, if the car had, in fact, stopped at either of the places above mentioned and appellee had been given an opportunity to alight therefrom, he would have suffered no substantial damages, and this suit would not have been brought. The excluded portions of the deposition, as above stated, tended to show that the reason why the car was not stopped at either of the above-named places was because appellee agreed that he would remain on the car until it had gone to the end of the line and had returned, and the deposition as introduced without the excluded portions tended to show this identical same reason for the failure of the car to stop. The evidence showed, without dispute, that the car did not stop at *either* place, and the excluded portions of the deposition simply tended to show appellant's excuse for not stopping the car. The appellant's answer to the seventh interrogatory expressly says that: "Plaintiff was carried to the end of defendant's line, at his own request, after his refusal to get off opposite the photograph gallery upon the notification of the motorman that he would stop there to let him off. This, as stated, was in the same block of plaintiff's residence, and before the car reached the Somerville Road. Plaintiff went to the end of defendant's line in East Decatur of his own volition, after being notified by the motorman that he could get off at the photograph gallery." As appellant received all the substantial benefits to be derived by him by the admission of the excluded portions of the deposition from its answers to the seventh interrogatory, which remained in the deposition and formed a part of it when introduced, it is manifest that appellant was not in fact injured by this erroneous action of the trial court. 2 Mayfield's Dig. p. 177, § 871.

We have given this subject a full discussion because we think that the rule which

the court violated in this instance is an important rule and that it should be preserved in its full efficiency by all the courts.

[6] 3. The fifth and sixth assignments of error are predicated on the rulings of the court in refusing to exclude the conversations between the plaintiff and the conductor and motorman. This evidence tended to show aggravation of the wrong complained of, and hence was relevant to the issues under the pleading. This was ruled in principle in passing upon the pleadings when the case was in the Supreme Court on former appeal. 158 Ala. 414, 48 South. 50.

[6] 4. The action of the court in sustaining the plaintiff's objection to the question asked the witness Davis, "Did he give that signal in time to stop the car at Fourth avenue crossing?" resulted in no possible injury, even if error, for the reason that the witness answered the question and his answer remained in evidence.

[7] 5. The gravamen of the complaint was the failure and refusal of defendant's servants to stop the car and allow the plaintiff to get off at his destination, and in wrongfully causing him to get off at a different and distant place. Other matters averred in the complaint were but in aggravation of the wrong complained of. While charge 10 given at the request of the plaintiff might have well been refused, as being calculated to mislead, still the giving of it does not constitute reversible error. The charge in effect, when referred to the evidence, asserts nothing more than that the defendant cannot take advantage of its own wrong in inducing a passenger by misrepresentations to get off of its car and then declare a severance of its relations with him as a passenger, in order to avoid liability.

[8] 6. Assignments of error 10 and 13 based on refused charges 4 and 11 are grouped and insisted on in briefs. Both of these charges were properly refused. So far as the wrong relied on for a recovery, viz., the failure to discharge the plaintiff at his destination and wrongfully putting him off at another place, is concerned, whether the plaintiff was a passenger *vel non* after he left the car was foreign to the issues under the pleading, and the charges were calculated to mislead the jury.

[9] 7. It is insisted that the court erred in not granting defendant's motion for a new trial because of excessive damages assessed by the jury. If the jury believed the plaintiff's evidence, and it would seem that they did from the verdict returned, there were grounds for the assessment of exemplary damages. This is a second finding by a jury in this case. The second verdict is much smaller than the first, which the Supreme Court on former appeal said was excessive, and we are not willing, under all the circum-

stances, to say that this last verdict was excessive, and therefore decline to hold the trial court in error for refusing the motion for a new trial.

8. There are other assignments of error on the record; but, as they are not insisted on in brief, we will not consider them. All assignments insisted on having been considered by the court, and no reversible error appearing, the judgment appealed from is affirmed.

Affirmed.

LYNN v. BROYLES FURNITURE CO.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. SALES (§ 465*)—CONDITIONAL SALES—REGISTRATION.

Code 1896, § 1017, providing for the registration of conditional sale contracts does not affect their validity as between the parties; such contracts being valid between them whether recorded or not, failure to record rendering such instruments void only as against purchasers for value, mortgagees and judgment creditors without notice.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 465.*]

2. STATUTES (§ 184*)—CONSTRUCTION.

Courts in construing a statute will give it that construction which will effectuate the purpose of the Legislature in passing it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 262; Dec. Dig. § 184.*]

3. SALES (§ 472*)—CONDITIONAL SALE CONTRACTS—REGISTRATION—STATUTES.

Code 1896, § 1017, provided for the registration of conditional sale contracts in the office of the judge of probate of the county in which the purchaser resides, and also in the county in which the property is delivered and remains, and declared that, if the property was removed to another county the contract must be recorded in that county within three months after such removal, and that such instruments not recorded as provided should be void as against purchasers for valuable consideration, mortgagees and judgment creditors without notice. By Local Acts 1898-99, p. 1120, section 1017 was expressly repealed so far as it applied to Jefferson and Montgomery counties. *Held* that, where furniture was sold under a conditional sale contract in Jefferson county where it was delivered and remained in the possession of the buyers for nearly a year when it was removed to C. county, the fact that the instrument was not required to be recorded in Jefferson county did not exempt the seller from recording it in C. county within 90 days after the removal of the property to that county, and not having done so, the condition was invalid as against a subsequent purchaser.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1366-1376; Dec. Dig. § 472.*]

Appeal from Circuit Court, Cullman County; D. W. Speake, Judge.

Action by the Broyles Furniture Company against J. Lynn. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

F. E. St. John, for appellant; J. B. Brown, for appellee.

DE GRAFFENRIED, J. The Broyles Furniture Company, in the latter part of the year 1906 and in the early part of the year 1907, made what may be treated in this opinion as two separate conditional sales of certain household furniture to L. D. Overstreet and wife. The sales were made in Jefferson county, where Mr. and Mrs. Overstreet then resided, and were evidenced by two instruments in writing by which the title to the property was to remain in the Broyles Furniture Company until the purchase money was paid. Mr. and Mrs. Overstreet were put in possession of the property in Jefferson county and remained in its possession in said county until the fall of 1907, when they moved to Cullman county and took with them, with the knowledge of the Broyles Furniture Company, the said personal property. They remained in Cullman county until the latter part of 1907, when they left the state. While living in Cullman county Mr. and Mrs. Overstreet lived in a hotel of which the appellant was the proprietor, and the furniture involved in this suit was kept in the hotel.

There was evidence tending to show that from the time they came into the possession of the property until they removed from the state Mr. and Mrs. Overstreet remained in the possession of the furniture and held it in accordance with the terms of their written contract and in subordination to the title and rights of the Broyles Furniture Company, and that when they moved from Alabama they notified the Broyles Furniture Company of the fact of their removal, and that they had left the furniture at the Lynn Hotel in Cullman county, and that said company could get it there.

On the other hand the appellant, J. Lynn, offered to prove that on or about the 10th day of January, 1908, he, for value and without notice of the claim of appellee to the property, bought it from Mr. and Mrs. Overstreet, and that from that time the property remained in the hotel as his property and was used by him as such in Cullman county. In this connection he also offered to prove that the instruments evidencing appellant's title to the property were not recorded until after he had bought it and more than three months after its removal to Cullman county. The court declined to allow the appellant to introduce this evidence, and the appellant seasonably excepted to this action of the court.

This suit originated prior to the adoption of the present Code, and section 1017 of the Code of 1896, which we will hereafter discuss, was not applicable to Jefferson and Montgomery counties. Local Acts 1898-99, p. 1120. The two instruments evidencing the conditional sales by appellee of the furniture to Mr. and Mrs. Overstreet were therefore never recorded in Jefferson county, but they were filed for record and recorded in Cullman county in January, 1908, about 10

or 15 days after the time when appellant claims that he bought and paid for the property.

1. Section 1017 of the Code of 1896 requires all instruments evidencing conditional sales of personal property by the terms of which the vendor retains the title to the property, to be recorded within 30 days from their date in the office of the judge of probate of the county in which the purchaser resides and also in the county in which such property is delivered and remains. It also provides that if the property is removed to another county the contract must be recorded within three months from the time of such removal in the county to which it is removed. It further provides that such instruments, unless recorded as above provided, shall be void against purchasers for a valuable consideration, mortgagees and judgment creditors without notice. By the above-quoted act (Local Acts 1898-99, p. 1120), the Legislature expressly repealed the above section 1017 "so far as the same applies to Jefferson and Montgomery counties." Under the general law of the state, therefore, such instruments as those now under consideration were required to be recorded, but, under a local law applicable only to Jefferson and Montgomery counties, they were not required to be recorded in those counties.

The question then, simply, is this: Did the fact that a local law applicable only to that part of the state in which these conditional sales were made and in which the property was situated at the time of such sales exempted the instruments under consideration from registration in such part of the state so operate as to exempt them from the general registration laws of the state when the property described in them was removed from the county in which the sales were made to those parts of the state in which the general registration laws were in force? Was it the intention of the Legislature, when it passed the above act repealing section 1017 of the Code of 1896, "so far as the same applies to Jefferson and Montgomery counties" to, in effect, repeal the provisions of our general registration laws as to conditional sales of personal property situated in Jefferson county and made in Jefferson county, and evidenced by written instruments, when that property was removed from Jefferson county into another part of the state? If so, the above local act in fact became the general law of the state in so far as written instruments evidencing conditional sales of personal property in Jefferson and Montgomery counties is concerned, and it had, contrary to the general rule, an extraterritorial operation. *Ensley Lumber Co. et al. v. Lewis*, 121 Ala. 94, 25 South. 729.

[1] Our registration laws have nothing whatever to do with the legality of a sale or conveyance as between the parties. As

between them instruments conveying title to property are valid, whether they are recorded or not. The failure to record the instruments covered by the registration statutes as required by law simply renders them void as against purchasers for value, mortgagees and judgment creditors without notice. *Winston v. Hodges*, 102 Ala. 304, 15 South. 528. "The omission to record operates in the nature of a forfeiture of the reservation of title as to creditors and purchasers. The question is not one of validity and construction, but of notice by registration and privity of right. The failure to record does not divest the original vendor of the title, but debars its assertion against third parties, conferring on them, if judgment creditors, a lien, and, if purchasers, a right prior and superior to the vendor's reservation of title." *Weinstein v. Freyer*, 93 Ala. 257, 9 South. 285, 12 L. R. A. 700; *Gimon v. Davis*, 36 Ala. 589.

[2] It is a cardinal rule that, in construing a statute, courts shall give to it that construction which will effectuate the purpose of the Legislature in passing it. *Thompson v. State*, 20 Ala. 54. Our registration statutes are remedial in their nature, for they are designed to give notice that creditors and purchasers may not be deluded and defrauded. 4 Mayfield's Dig. p. 681, § 17. "A remedial statute must be construed largely and beneficially, so as to suppress the mischief and advance the remedy; and if the words are not clear and precise, such construction will be adopted as will appear the most reasonable and the best suited to accomplish the objects of the statute, and a construction which would lead to an absurdity will be rejected." *Sprowl v. Lawrence*, 33 Ala. 674.

Even penal statutes shall not be so strictly construed as to defeat the obvious intention of the Legislature which enacted them. *Crosby v. Hawthorn*, 25 Ala. 221.

[3] It was the evident purpose of the Legislature in calling into existence the statute providing for the registration of instruments evidencing conditional sales of personal property to require, for the protection of innocent purchasers, mortgagees and judgment creditors without notice, that, in the event any of the property covered by such instrument was removed from the county in which the sale was made and the property situated into some other county, such instrument should be recorded within 90 days after such removal in the county into which such property was removed, and that, unless so recorded within 90 days, such instruments should be void as against the parties for whose protection the statute was designed. *Pollak v. Davidson*, 87 Ala. 551, 6 South. 312.

The mere fact, therefore, that a local law of Jefferson county exempted the instru-

ments under consideration from our registration laws while the property covered by them remained in Jefferson county did not relieve the appellee of the duty which the general laws of the state placed upon him to record the written evidences of his claim upon the property when it was removed from Jefferson county into Cullman county. A contrary holding would extend the operation of the act above quoted exempting Jefferson and Montgomery counties from the operation of section 1017 of the Code of 1896 beyond the limits which the Legislature intended when it passed the act.

2. When the property was removed to Cullman county, the appellee had 90 days within which to record the instruments evidencing his title to the property in that county, and if, within the 90 days, the appellant bought the property for value and without notice, he did so at his peril, and if the instruments were in fact recorded in Cullman county within 90 days after the property was removed to that county, then the appellee is entitled to recover. If, on the other hand, the appellant bought the property within 90 days after its removal to Cullman county, for value and without notice of appellee's claim, and the appellee did not record the written evidences of its title to the property within 90 days after its removal to that county, then appellant is entitled to recover. *Teat v. Chapman*, 1 Ala. App. 491, 56 South. 267.

It follows from what we have above said that in our opinion the court committed reversible error in refusing to allow the appellant to offer evidence before the jury that he had bought for value and without notice of appellee's claim the property involved in this suit, after its removal to Cullman county, and that the appellee did not record the instruments evidencing its claim to the property within 90 days from the date of the removal of the property to Cullman county.

For the error pointed out, this cause is reversed and remanded.

Reversed and remanded.

COPELAND v. DIXIE LUMBER CO.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. MECHANICS' LIENS (§ 304*)—JUDGMENT AGAINST OWNER.

In an action to enforce a mechanic's lien for materials furnished a contractor, and used by him in the erection of a house, no personal judgment can properly be rendered against the owner, if he has not contracted with the materialman to pay for the materials.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 632-635; Dec. Dig. § 304.*]

2. MECHANICS' LIENS (§ 305*)—JUDGMENT AGAINST CONTRACTOR.

Under Code 1907, § 4770, providing that in an action to enforce a mechanic's lien, if it be held that plaintiff has a lien, judgment shall be rendered for the amount secured thereby

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

against the party liable for the same, and establishing a lien and condemning the property to sale for its satisfaction, but, if the verdict is for plaintiff only on the issue of indebtedness, a judgment shall be rendered in his favor as in other cases, where plaintiff proves an indebtedness against a contractor for material furnished to him and used in the building, he is entitled to a personal judgment against the contractor, and a lien upon the property described in the complaint for any unpaid balance due by the owner to the contractor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 636; Dec. Dig. § 305.*]

3. APPEAL AND ERROR (§ 1180*)—REVERSAL—EFFECT.

In a proceeding against a contractor and the owner of property to enforce a mechanic's lien, the owner cannot complain of a personal judgment against the contractor; and where the contractor does not defend the suit and does not object to judgment against him, and reserves no exception for the consideration of the appellate court, the judgment is final, and a reversal by the appellate court of the judgment rendered against the owner will not in any way affect the judgment against the contractor.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4626-4631; Dec. Dig. § 1180.*]

4. APPEAL AND ERROR (§ 325*)—WRIT OF ERROR—PARTIES.

A final judgment ascertaining separate sums to be paid severally by several recognizors will not support a joint writ of error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1810-1813; Dec. Dig. § 325.*]

5. HUSBAND AND WIFE (§ 25*)—NOTICE TO OWNER.

Where a husband is authorized to act for his wife in all matters connected with the erection of a building upon her property, a notice by a firm furnishing the contractor with lumber that it held a claim against the contractor for a stated amount for material furnished for the building, and that it would look to the owner for payment of the bill out of any unpaid balance due the contractor, served on the husband, was sufficient to bind the wife.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 148-154; Dec. Dig. § 25.*]

6. MECHANICS' LIENS (§ 281*)—ENFORCEMENT OF LIEN—EVIDENCE.

Evidence in a proceeding to enforce a mechanic's lien held sufficient to show that the material furnished by plaintiff was used in constructing the owner's residence.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 565-572; Dec. Dig. § 281.*]

7. TRIAL (§ 367*)—TRIAL BY COURT—CONSIDERATION OF EVIDENCE.

Where a case is tried by the court, it must weigh the evidence in the same way as a jury, and must draw therefrom all the natural inferences which a man of ordinary observation and intelligence would probably draw.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 879, 886; Dec. Dig. § 367.*]

8. APPEAL AND ERROR (§ 1010*)—QUESTIONS OF FACT.

Where the findings of the trial court are supported by the evidence, its conclusions as to all matters over which it had jurisdiction and the judgment as to all such matters should not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

9. APPEAL AND ERROR (§§ 485, 1234*)—SUPERSEDEAS—BONDS—LIABILITY.

On appeal by the owner alone, in proceedings to enforce a mechanic's lien where the appeal bond shows she only appeals from that part of the judgment in which she is interested, it will not supersede the judgment against the contractor, and neither she nor her sureties will be liable on such bond for the amount of the judgment against the contractor.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2264-2274, 4761-4777; Dec. Dig. §§ 485, 1234.*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by the Dixie Lumber Company against Genevieve Copeland and Karl Graf. From a judgment for plaintiff, defendant Copeland appeals. Corrected and affirmed.

Ervin & McAleer and J. Irwin Burgett, for appellant. Fitts & Leigh, for appellee.

DE GRAFFENRIED, J. The Dixie Lumber Company brought this suit against Karl Graf and Genevieve Copeland. It appears from the complaint that Karl Graf was a contractor, and that he made a contract with Genevieve Copeland to build her a residence on certain land in the city of Mobile, which is described in the complaint and referred to in the evidence as lot 6 and south half of lot 5 on Providence street. The Dixie Lumber Company furnished certain lumber to Karl Graf to be used by him in erecting said residence, and on the 28th day of December, 1907, the said lumber company delivered to William A. Copeland, the husband of Genevieve Copeland, a notice, which was as follows: "Messrs. Wm. A. and G. G. Copeland, Mobile, Alabama—Dear Sirs: This is to notify you that we hold a claim against Mr. Karl Graf, your contractor, for the sum of \$419.15, being a correct balance for material furnished by us for your residence in Providence street. We wish to notify you that we shall look to you for the payment of this bill out of any unpaid balance you may have, due the said Karl Graf now or upon completion of the contract. Yours truly, Dixie Lumber Company, F. M. Jeffries, Sec. & Treas." On the 8th day of January, 1908, the said lumber company filed its declaration of lien in the office of the judge of probate of Mobile county, which declaration was sworn to before a notary public, and claimed a lien for \$419.15 on any unpaid balance due by Genevieve Copeland and William A. Copeland to Karl Graf for that much lumber furnished by said company to Karl Graf "to be used in the construction of a house for Genevieve Copeland and her husband, William A. Copeland, on lots 6 and south half of lot 5 on Provident street, in Mobile, Alabama." The plaintiff in the complaint sued for "a money judgment against the said defendant, Karl Graf, for the amount due by him, and

for a money judgment for the unpaid balance due from Genevieve Copeland to the said Graf and the establishment of a lien against the above-described property of the defendant Copeland and for an order of condemnation and sale to satisfy the same." The case was tried without a jury, and the court, upon the evidence, rendered a judgment against Karl Graf for \$551.40 and the costs of the cause, and a judgment against Genevieve Copeland for \$337.40, and a judgment condemning the said residence and lots to the payment of the said judgment against the said Genevieve Copeland for said sum of \$337.40 and the costs of the cause, and an order was made that the said residence and lands be sold for the satisfaction of said judgment so rendered against the said Genevieve Copeland and the costs of the cause.

It is therefore plain that in this suit the plaintiff not only sought, but actually recovered, a personal judgment against Karl Graf and also a personal judgment against Genevieve Copeland, and, in addition to these two personal judgments, obtained an order condemning the said lots and residence to be sold for the satisfaction of the judgment so rendered against the said Genevieve Copeland.

[1] 1. It is manifest that, under the allegations of the complaint, the plaintiff was not entitled to a personal judgment against Mrs. Genevieve Copeland for any sum. Mrs. Copeland had no contract, express or implied, with the plaintiff to pay it for its lumber. While the plaintiff in the complaint seeks a personal judgment against Mrs. Copeland, the allegations of the complaint show plainly that no personal judgment could properly be rendered in said cause against Mrs. Copeland. It is therefore manifest that the personal judgment rendered against Mrs. Copeland was void. *May & Thomas Hdw. Co. v. McConnell*, 102 Ala. 579, 14 South. 768.

[2] 2. Under section 4770 of the Code of 1907, the plaintiff was entitled to the personal judgment against Karl Graf which was rendered by the court against him, and the court also had jurisdiction under said section to establish a lien in favor of the plaintiff upon the lots and residence described in the complaint for the amount of any unpaid balance which the evidence showed was due by Genevieve Copeland to the said Graf on account of the materials furnished by the plaintiff to the said Graf and used by the said Graf in the construction of said residence and the costs of the cause.

[3] So far as the judgment against Karl Graf is concerned, Mrs. Copeland had no right to complain of its rendition by the court, for, as to her, the said judgment was *res inter alios acta*. As Karl Graf did not defend the suit and made no objection to the rendition of a judgment against him, and reserved, for our consideration, no exception to its rendition against him, that

judgment is final, and a reversal by this court of the judgment rendered against Genevieve Copeland could not in any way affect the judgment against Graf.

[4] A final judgment ascertaining separate sums to be paid severally by several recognizors will not support a joint writ of error. *Howle & Morrison v. State*, 1 Ala. 113; *Farr v. State*, 6 Ala. 796.

[5] 3. After carefully considering all the evidence, we have arrived at the conclusion that the only error the trial court committed in this case was in rendering a personal judgment against Mrs. Copeland. It was fairly inferable from the testimony that in the matter of the construction of the residence appellant's husband was her agent, authorized to act for her in all matters connected with it, and we are of the opinion that there was, therefore, sufficient evidence in the case to authorize the court to hold that, when the notice was delivered to her husband on December 28th, it was delivered to an agent of appellant authorized by her to receive it and act for her in the premises. It was also fairly inferable that "lot 6 and the south half of lot 5" were, in fact, one residence lot, and that the residence was built on that land.

[6] We are also satisfied from the evidence that the material bought by Graf from appellee went into appellant's residence for Graf, who testified as a witness for appellant, swore that it all went into the residence "unless some of it was stolen." There was no evidence that any of it was stolen.

[7] When a case is tried by a court without the intervention of a jury, the court must weigh the evidence in the same practical, common-sense, business way in which a jury is authorized to weigh it, and must draw from it all the natural and common-sense inferences which a man of ordinary observation and intelligence would probably draw from it. In ancient times the jury came from the vicinage because the law presumed that jurors coming from the neighborhood of the parties would know something of them and would be in a better situation, on that account, to arrive at the real truth of the controversy than mere strangers. In the instant case the judge who tried the case and all the parties and witnesses resided in the city of Mobile, the property testified about was situated in the city, and the case was tried there.

[8] The findings of the court were supported by the evidence, and for that reason its conclusions as to all matters over which it had jurisdiction to render judgment, and the judgment as to all matters over which it had jurisdiction, should not be disturbed on this appeal. *McIntyre Lumber & Export Co. v. Jackson Lumber Co.*, 165 Ala. 268, 51 South. 767, 138 Am. St. Rep. 68.

[9] 4. The appeal bond shows that Mrs. Copeland only appealed from that part of the judgment of the court below in which

she was interested. This she had a right to do. "Though several defendants may be affected by a judgment or decree, there may be such a separate judgment or decree against one of them that he can appeal or bring a writ of error without joining the other defendants." *Germain v. Mason*, 12 Wall. 259, 20 L. Ed. 392. The appeal bond given by the appellant did not supersede the judgment against Graf, and she is not, nor are her sureties, liable on such bond for the amount of the judgment against him. *Germain v. Mason*, supra.

5. It follows from what we have above said that in our opinion the judgment rendered by the court below against Genevieve Copeland personally is void and of no effect, and an order will be here made annulling the said personal judgment so rendered against appellant. With this correction the judgment of the court below is affirmed.

Corrected and affirmed.

GILBERT v. STATE.

(Court of Appeals of Alabama. Dec. 21, 1911.)

1. CRIMINAL LAW (§§ 594, 1151*)—DISCRETION OF TRIAL COURT—DENYING CONTINUANCE—REVIEW.

The denial of accused's motion for a continuance because of absent witnesses rested in the court's discretion, the exercise of which will not be interfered with, in the absence of abuse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1811, 3045-3049; Dec. Dig. §§ 594, 1151.*]

2. CRIMINAL LAW (§ 1122*)—REQUESTS FOR INSTRUCTIONS—REFUSAL.

To make the refusal of requested charges reviewable, the record must show that they were requested in writing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2940-2945; Dec. Dig. § 1122.*]

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

Sam Gilbert was convicted of an offense, and he appeals. Affirmed.

R. C. Brickell, Atty. Gen., and William L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. [1] The trial court's action in overruling the defendant's motion for a continuance on account of absent witnesses was a matter resting in the sound discretion of the court. No abuse is shown of the discretion, and therefore no error was committed in denying the motion. *House v. State*, 139 Ala. 132, 135, 36 South. 732; *Terry v. State*, 120 Ala. 287, 292, 25 South. 176; *Walker v. State*, 117 Ala. 85, 87, 23 South. 670; *Carr v. State*, 104 Ala. 4, 14, 16 South. 150; *Lowery v. State*, 98 Ala. 45, 50, 13 South. 498; *Walker v. State*, 91 Ala. 76, 79, 9 South. 87; *White v. State*, 86 Ala. 69, 74, 5 South.

674; *De Arman v. State*, 77 Ala. 10, 15; *Starr v. State*, 25 Ala. 49, 51.

[2] The charges set out as requested by the defendant and refused are not shown to have been requested in writing, nor to have been separately requested. Immediately preceding the charges as they appear set out in the bill of exceptions is the following statement: "The defendant requested the following charges, which were refused." The bill of exceptions further shows that each of the charges was indorsed "refused" by the trial judge, and that an exception was reserved to the action of the court in refusing each of such charges; but it nowhere appears that the charges were separately requested, or that they were requested in writing, and it is necessary, to present the action of the trial court in refusing special charges requested for review by this court, to show affirmatively by the record that the charges requested were in writing. *Henderson v. State*, 137 Ala. 83, 84 South. 828; *Foxworth v. Brown*, 114 Ala. 299, 21 South. 413; *Bellinger v. State*, 92 Ala. 86, 9 South. 399; *Walker v. State*, 91 Ala. 76, 9 South. 87; *Ricketts v. B. S. Ry. Co.*, 85 Ala. 600, 5 South. 353; *Wheless v. Rhodes*, 70 Ala. 419; *Crosby v. Hutchinson*, 53 Ala. 5.

The record contains no error, and the case will be affirmed.

Affirmed.

SMILEY, SON & CO. v. KEITH.

(Court of Appeals of Alabama. Nov. 28, 1911.)

1. PARTIES (§ 69*)—DESIGNATION AND DESCRIPTION.

The complaint is not demurrable because of not designating the defendant, "Smiley, Son & Co.," as a corporation or partnership; the name fairly importing the one or the other, action against persons in the common name under which they transact business as partners being authorized by Code 1907, § 2506, and it not being necessary in suing a corporation by its corporate name to allege corporate existence.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 69.*]

2. CARRIERS (§ 131*)—INJURY TO GOODS—CONTRIBUTORY NEGLIGENCE—PLEADING.

The plea of defendants sued for injuring a piano while moving it in the line of their business under a contract from one house to another that plaintiff was guilty of contributory negligence, by consenting to an insufficient number of men attempting to move or load it on defendants' wagon, is bad, because not alleging plaintiff's knowledge of the necessary number of men to properly move it.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 131.*]

3. NEGLIGENCE (§ 117*)—CONTRIBUTORY NEGLIGENCE—PLEADING FACTS.

The plea in an action for injury to a piano by one while moving it in the line of his business under a contract from one house to another that plaintiff was guilty of contributory negligence, in that he was himself superintending the moving and loading of it, and that it was loaded and moved according to his instructions,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is bad in not averring any facts of negligence of plaintiff.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 117.*]

4. PLEADING (§ 194*)—PLEAS—DEMURRER.

The pleas of contributory negligence not showing to which of the counts of the complaint they are directed, and therefore being presumably directed to each of them, one of which claims punitive damages for wanton or intentional injury, it is not error to sustain a demurrer to them.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 194.*]

5. CARRIERS (§ 132*)—INJURIES TO GOODS—BURDEN OF PROOF.

A requested instruction in an action against a carrier for injury to goods that the burden of proof is on plaintiff to show that defendant failed to use due care exacts too high a measure of proof; the burden being not to show or prove facts certainly or absolutely, but only to the reasonable satisfaction of the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 578–582, 605; Dec. Dig. § 132.*]

6. TRIAL (§ 143*)—GENERAL AFFIRMATIVE CHARGE.

The evidence on the question of liability being in conflict, a general affirmative charge is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

7. TRIAL (§ 191*)—INSTRUCTION—ASSUMPTION OF FACT.

Plaintiff having testified positively that he engaged defendants to move his piano at a stipulated price, which was paid, defendants' responsibility for the negligent acts of their servants in moving it did not rest alone on ratification, as assumed by their requested instruction, that verdict should be for them, if the jury believe plaintiff agreed with defendants that household furniture, and not a piano, was to be hauled, and defendants never ratified the act of their servants in accepting the piano for transportation.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 191.*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by R. C. Keith against Smiley, Son & Co., for damages to a piano while undertaking to remove same for hire. Judgment for plaintiff, and defendants appeal. Affirmed.

The third plea is as follows: "That the plaintiff was guilty of negligence which proximately contributed to the injury of the said piano in this, to wit: That the plaintiff consented to an insufficient number of men attempting to move or load the said piano on the wagon of defendant." Plea 4: "That plaintiff himself was guilty of contributory negligence which proximately contributed to the injury of the said piano, in this, to wit: That the plaintiff was himself superintending the moving and loading of the said piano, and that the same was loaded and moved according to his instructions."

The following is charge 1: "I charge you that the burden of proof is on the plaintiff in this case to show that the defendant or

his agents or servants failed to use due care in handling the piano."

The following charge was refused to defendant, and made the basis of the sixteenth assignment of error: "I charge you that, if you believe from the evidence that plaintiff agreed with the manager of the defendant company that household furniture, and not a piano, was to be hauled, and that the defendant never ratified the act of Jim Maynard and Will Clements in accepting said piano for transportation, then you must find for the defendant."

Stallings, Drennen & Judge, for appellant. Bowman, Harsh & Beddow, for appellee.

PELHAM, J. Suit was brought in the court below by the appellee against the appellants, seeking to recover damages for injuries to a piano alleged to have been occasioned by the negligence of appellants' employés while moving it from the house in which appellee had been living to another house which he had rented, and to which he was removing his household effects; the appellants having undertaken for hire or reward in the course of their business to remove the piano.

[1] "Smiley, Son & Co." were named as the parties defendant in the complaint, and appellants demurred to the complaint on the ground that it was not stated and did not sufficiently appear whether the defendant is a corporation, partnership, or individual. Appellants insist that the failure of the complaint to designate the defendant "Smiley, Son & Co." either as a corporation or partnership renders it fatally defective, and that the court was in error in overruling the demurrer. The suit is against the common name, "Smiley, Son & Co.," which fairly imports a partnership (Birmingham Loan & Auction Co. v. First National Bank, 100 Ala. 251, 13 South. 945, 46 Am. St. Rep. 45), and section 2506 of the Code of 1907 authorizes a suit to be brought against a partnership in its common name. If the name can be said to fairly import either a partnership or an incorporated company, no incapacity to be sued appears on the face of the complaint; for, if a partnership or common name, section 2506 of the Code authorizes suit against it as such, and, if a corporation, it is suable by its corporate name without alleging corporate existence, and is not subject to demurrer founded on such objection. The demurrers to the complaint were not well taken. *Seymour & Sons v. Thomas Harrow Co.*, 81 Ala. 250, 1 South. 45; 10 Cyc. 1347, 1348.

[2-4] The pleas of contributory negligence are manifestly insufficient, and none of them constituted a good answer to the complaint. The first plea of contributory negligence, designated as plea No. 3, fails to allege any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

knowledge on the part of plaintiff of the necessary number of men required to properly move the piano. Plea No. 4 neither traverses defendant's negligence, nor avers any facts of negligence upon the part of plaintiff. The other special pleas were clearly defective and insufficient, and subject to the demurrers interposed to them. It does not appear to which count or counts of the complaint these special pleas of contributory negligence are directed. It is to be presumed that they are directed to each of the counts and one count claims punitive damages for wanton or intentional injury, and no error was committed by the court in sustaining demurrers to them. *City of Greenville v. Greenville Water Co.*, 125 Ala. 625, 27 South. 764; *Smith v. Heineman*, 118 Ala. 195, 24 South. 364, 72 Am. St. Rep. 150.

[5] Charge No. 1 requested in writing by appellants and refused by the court exacts too high a measure of proof. The burden is not to show or prove facts certainly or absolutely by the evidence, but only to the reasonable satisfaction of the jury. *Eagle Iron Co. v. Baugh*, 147 Ala. 613, 41 South. 663; 6 Mayfield's Dig. p. 340, § 105.

[6] The general affirmative charges requested on the different counts of the complaint were properly refused, as the evidence on the question of defendants' liability was in conflict, and its weight and sufficiency were questions for the jury on each of the counts submitted by the court to the jury for their determination. *C. of G. Ry. Co. v. Dothan M. Co.*, 159 Ala. 225, 49 South. 243.

[7] The plaintiff testified positively that he engaged the defendants to move his piano at a stipulated price, which was paid, and the defendants' responsibility for the negligent acts of the parties doing the moving did not rest alone upon ratification of their acts by defendants, as assumed by the charge made the subject of the sixteenth assignment of error.

We are cited to no authority in support of other refused charges, nor do the assignments of error as to them seem to be seriously insisted on. They clearly are not such charges as the court can be put in error for refusing.

There is no reversible error shown by the record, and the case is affirmed.

Affirmed.

J. A. HARTSELLE & CO. v. WILHITE et al.
(Court of Appeals of Alabama. Nov. 28, 1911.)

1. EXCEPTIONS, BILL OF (§ 43*)—PRESENTATION—TIME

Code 1907, § 3019, provides that bills of exception may be presented within 90 days from the entry of judgment, and not afterwards, and must be signed by the judge within 90 days thereafter. *Held* that, where a bill of

exceptions is not presented within the time required, it is not a bill of exceptions, and cannot be considered, though signed.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 72½; Dec. Dig. § 43.*]

2. EXCEPTIONS, BILL OF (§ 43*)—PRESENTATION—TIME.

Code 1907, § 3019, prescribing the time when bills of exceptions must be presented, is not affected by section 2020, which declares that the Supreme or Appellate Court shall not of its own motion strike a bill of exceptions because not signed by the presiding judge within the time required by law; the presentation of the bill within 90 days from the entry of judgment being jurisdictional.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 72½; Dec. Dig. § 43.*]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Action between J. A. Hartselle & Co. and J. W. Wilhite and others. From a judgment in favor of the latter, the former appeal. Affirmed.

Tidwell & Sample, for appellants. Wert & Lynne, for appellees.

DE GRAFFENRIED, J. In this case the judgment appealed from was rendered on January 18, 1909, and the bill of exceptions was not presented to the judge who presided at the trial for his signature until April 29, 1909, more than three months from the date of the rendition of the judgment.

[1] Section 3019 of the Code provides that bills of exceptions may be presented at any time within 90 days from the date on which the judgment is entered, *and not afterwards*, and that the bill of exceptions so tendered must, if correct, be signed by him within 90 days thereafter. It is manifest that what purports to be a bill of exceptions in this case is in fact no bill of exceptions, because it was not presented to the presiding judge within the time required by law, and we therefore cannot consider any question attempted to be raised by appellant in said bill of exceptions.

[2] The provisions of the above section 3019 relative to the time when a bill of exceptions shall be *presented* are not affected by section 2020, which declares that the Supreme Court or Appellate Court shall not, *ex mero motu*, strike a bill of exceptions because it was not *signed* by the presiding judge within the time required by law. The *presentation* of the bill of exceptions to the presiding judge within 90 days from the date on which the judgment was entered is *jurisdictional*, and unless the bill of exceptions is presented within the time specified by the statute, it is *no* bill of exceptions, and the signature of the presiding judge cannot give it life. *Spivey's Case*, 56 South. 232; *Thomas v. Daniel Bros.*, 42 South. 623; *McPher-*

* Reported in full in the Southern Reporter; reported as a memorandum decision without opinion in 149 Ala. 675.

son v. Wiggins, 40 South. 961;² Smith v. State, 166 Ala. 24, 52 South. 396.

As the errors insisted upon on this appeal are raised only by the alleged bill of exceptions, they are not before us for review. The judgment of the court below is affirmed. Affirmed.

POLYTINSKY v. M. F. PATTERSON & SON.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. TRIAL (§ 39*)—INTRODUCTION OF DOCUMENTS—RECORDING OF CONVEYANCES.

Under Code 1907, §§ 3368, 3999, providing that the official entry of the proper officer on a paper shall be sufficient evidence of its registry, the admission in evidence of a recorded instrument bearing a proper certificate places before the court the indorsement on the instrument, and in the absence of an express limitation in the offer of the instrument, so as to exclude the indorsement, the conduct of the parties may be looked to in determining whether the indorsement is in evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 92-98; Dec. Dig. § 39.*]

2. APPEAL AND ERROR (§ 206*)—QUESTIONS REVIEWABLE—QUESTIONS RAISED FOR THE FIRST TIME ON APPEAL.

Where plaintiff's counsel in his opening statement stated without objection that a mortgage relied on was recorded and exhibited the indorsement of the record on the mortgage, and the court orally charged that the recording of the mortgage was constructive notice, and defendant's exception to the charge did not raise the point that the indorsement of the mortgage was not in evidence because not offered when the mortgage was received in evidence, defendant waived the requirement that the indorsement must be offered in evidence, and he could not for the first time on appeal urge that the indorsement was not in evidence.

[Ed. Note.—For other case, see Appeal and Error, Dec. Dig. § 206.*]

3. EVIDENCE (§ 473*)—CONCLUSION OF WITNESS.

A question which calls for an inference of the witness, which it is the province of the jury to draw from the facts detailed, is properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220-2223; Dec. Dig. § 473.*]

4. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—ERRONEOUS RULINGS ON EVIDENCE.

The error, if any, in sustaining an objection to a question put to a witness, is not prejudicial, where the question was practically answered by what the witness testified to without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1053.*]

5. CHATTEL MORTGAGES (§ 177*)—CONVERSION OF MORTGAGE CHATTELS—ACTIONS—EVIDENCE.

Where, in an action by a mortgagee against the buyer of the mortgagor for a conversion of mortgaged chattels, the evidence showed that purchases were really made from the mortgagor, and that a crop sold was embraced in the mortgage to plaintiff, it was not error to exclude evidence in reference to a

crop shown by defendant's books to have been purchased from a third person.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 352; Dec. Dig. § 177.*]

6. CHATTEL MORTGAGES (§ 177*)—CONVERSION OF MORTGAGE CHATTELS—ACTIONS—EVIDENCE.

Where a mortgagee suing for the conversion of mortgaged chattels testified in reference to his getting one mule which was embraced in a mortgage to him, and that he did not get two mules under the mortgage, questions as to what the other mule was worth and what became of it was immaterial, in the absence of other evidence that plaintiff obtained the other mule mentioned in the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 352; Dec. Dig. § 177.*]

7. EVIDENCE (§ 317*)—HEARSAY EVIDENCE.

In an action by a chattel mortgagee for conversion of mortgaged chattels by defendant purchasing them from the mortgagor, statements made by the mortgagor as to the source from which he obtained a sum paid by him on the mortgage were properly excluded as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

8. CHATTEL MORTGAGES (§ 177*)—ACTION FOR CONVERSION—HARMLESS ERROR—INSTRUCTIONS.

An instruction in an action by a chattel mortgagee for conversion by defendant of mortgaged chattels, based on his having purchased the same from the mortgagor, that the recording of a mortgage gives constructive notice followed by an illustrative statement that the recording of the mortgage in the county in which the trial was had, instead of in the county in which the property was, was not prejudicial.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 357; Dec. Dig. § 177.*]

9. CHATTEL MORTGAGES (§ 147*)—CONSTRUCTIVE NOTICE—ACTUAL NOTICE.

Actual notice of a chattel mortgage is the equivalent of constructive notice of it afforded by registration of it in the proper office.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 242; Dec. Dig. § 147.*]

10. CHATTEL MORTGAGES (§ 177*)—ACTION FOR CONVERSION—INSTRUCTIONS.

Where, in an action by a chattel mortgagee for conversion of mortgaged chattels by defendant purchasing the same from the mortgagor, plaintiff made no claim based on defendant's dealing with goods belonging to any other than the mortgagor, a charge that, if the goods involved in the suit were produced in a designated county, the recording of the mortgage in that county was notice to defendant of the mortgage lien, was not prejudicial to defendant, because it was not expressly limited in its application to goods belonging to the mortgagor.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 357; Dec. Dig. § 177.*]

11. APPEAL AND ERROR (§ 1078*)—QUESTIONS REVIEWABLE—QUESTIONS NOT ARGUED.

Assignments of error based on the giving of charges not supported by argument or citation of authority need not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

² Reported in full in the Southern Reporter; reported as a memorandum decision without opinion in 147 Ala. 692.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by M. F. Patterson & Son against Abraham Polytsky for several acts of conversion and for money had and received to the use of the plaintiffs. Judgment for plaintiffs, and defendant appeals. Affirmed.

It appears that C. H. Morgan was indebted to Patterson & Son in the sum of \$240, which was secured by mortgage, and this is the mortgage, the indorsement on which is spoken of in the opinion. The suit was to recover crops alleged to have been bought by the defendant, and certain sums of money paid to the defendant arising from crops and other things alleged to have been covered by said mortgage.

The following is the part of the oral charge of the court objected to: "Under the law, if a mortgage has been recorded in the probate office of this county, the law is that, whether or not another person has actual notice, he has constructive notice; and if he has actual notice of it, of course, he has constructive notice."

The following charges were given at the instance of the plaintiffs: "(1) If you believe that the cotton involved in this suit was raised in Cullman county, then the record of the mortgage in Cullman county was notice to the defendant of plaintiffs' mortgage lien on the cotton. (2) Under the facts in this case, the defendant is not entitled to a verdict by reason of being an innocent purchaser of the cotton. (3) If the jury believe from the evidence that Polytsky bought from Morgan, or J. T. Godby, cotton on October 2, or on October 25, 1909, and that said cotton was Morgan's cotton, which he raised in Cullman county, then you should find for defendant for the value of said cotton, not exceeding the amount of plaintiffs' mortgaged indebtedness."

Tidwell & Sample, for appellant. Callahan & Harris, for appellees.

WALKER, P. J. [1] It is urged in behalf of the appellant that this court, in reviewing the rulings of the trial court, cannot look to or consider as a part of the evidence on which the case was tried the certificate of the judge of probate of Cullman county, indorsed on the mortgage of C. H. Morgan to the appellees, which showed the filing and recording of that instrument. This contention is based upon the fact, disclosed by the bill of exceptions, that the appellees in offering that instrument in evidence made no mention of the indorsement upon it, and that that indorsement was not separately and formally offered in evidence. As the statutes provide that "the judge making the record of any conveyance must certify on the same when it was received and recorded, and in what book and page the same is recorded," and that "the official entry of the proper officer on a paper shall be sufficient evidence of its registry" (Code, §§ 8368, 8999), when such a document which has in fact been re-

corded and has upon it the certificate to that effect contemplated by the statute is put in evidence, a necessary result of this action is to place in the hands of the court the indorsement found on the instrument, constituting evidence that it has been registered and recorded. It is not questioned that the offer of such a document as evidence may be so limited as to exclude the conclusion that there was an intention that the indorsement upon it also was produced for the inspection and consideration of the court. But, in the absence of an express limitation to this effect in the offer of the document in evidence, the conduct of the parties in the trial may be looked to in determining whether the indorsement is to be regarded as a part of the evidence on which, without objection, the case was tried. If in the trial that writing, unquestionably in fact in the hands of the court, was by the court and one of the parties, without question or objection by the other party, treated as a part of the evidence submitted to the jury for its consideration, such other party is to be regarded as having acquiesced in the treatment of it as evidence in the case, and on appeal it is too late for him to suggest for the first time that it was not in evidence.

[2] The bill of exceptions recites that "in the opening argument plaintiffs' counsel commented on the fact that the mortgage was recorded in the probate judge's office in Cullman county, and that this was notice to the defendant, and exhibited the indorsement of the record of the mortgage on the back of the mortgage to the jury. This was without objection from defendant's counsel." The court in its oral charge to the jury gave them instructions on the subject of the recording of a mortgage in the office of the judge of probate affording constructive notice of it. With the indorsement in question out of the case, this instruction was without pertinency to any evidence before the jury. No objection was made in behalf of the defendant to the court's instructing the jury on this subject. It is true that an exception was reserved by the defendant to a part of the court's oral charge dealing with this subject, but the exception was in such form as to indicate that the purpose was, not to except to the action of the court in charging on a matter claimed not to be embraced in the evidence in the case, but to challenge the correctness of the language excepted to as a statement of the law applicable to the subject dealt with. *Humphries v. State*, 56 South. 72. So it plainly appears that the court and the counsel for the plaintiffs, in the presence of the defendant and without objection or protest from him, treated the indorsement on the mortgage as a part of the evidence in the case to be considered by the jury in rendering the verdict. If there is a requirement, as is indicated by some rulings in other jurisdictions which are cit-

ed in the brief for the appellant, that such an indorsement on an instrument which is in evidence must itself be offered in evidence in order for it to be subject to consideration in the case, yet the conduct of the appellant in this case, when the indorsement in question was unequivocally referred to by the court and opposing counsel as constituting an item of the evidence on which the case was being tried, was such as to amount to a waiver of that requirement and to a consent that the indorsement be regarded as before the court and jury for their consideration as part of the evidence in the case. The formality of getting a writing indorsed on an instrument offered in evidence before the court by an explicit statement that the indorsement also is offered in evidence may be waived by conduct evincing a consent that it be treated as evidence in the case. The appellant's conduct in the trial has precluded him from now sustaining the claim that the indorsement on the mortgage was not in evidence.

[3, 4] One of the plaintiffs detailed a conversation he had with the defendant in reference to the latter's buying cotton from Morgan. The witness testified that the defendant said, when asked if he had bought any cotton from Morgan lately: "I don't know. I think I have, but I will have to see my books." The witness further testified that he (the witness) then went to the defendant's bookkeeper, and, after telling her that defendant had referred him to the books, examined the books, made a memorandum, and then had another conversation with the defendant, in reference to which he testified as follows: "I told him the books showed he got three bales. It was his suggestion that he would make Charlie settle up, and I told him if he did that it would be satisfactory. I don't know that Polytinsky bought any cotton from Charlie Morgan. Mr. Polytinsky's books didn't show it, not from Morgan. When I went back to Mr. Polytinsky with this memorandum, showing the three bales of cotton, I told him that I found that he had bought three bales of cotton. I didn't tell him that I had got it from the bookkeeper. My memorandum showed the dates, the number of bales, and the weights. And I went and talked with him as though the books showed he got the cotton from Charlie Morgan. I showed him the memorandum I got from the books. * * * I do not know that Mr. Polytinsky don't even write." In reference to this conversation, the witness was asked on cross-examination if he left the impression on the defendant that the latter had bought those three bales of cotton from Morgan. The plaintiffs objected to the question, the court sustained the objection, and the defendant excepted. This ruling is assigned as error. Leaving out of view the consideration that the question called for an inference or deduction which it was the

province of the jury, not of the witness, to draw from the facts and conversation detailed, it can be said that it is plain that the appellant could not have been prejudiced by the ruling on this particular question as it was practically answered by what the witness testified to without objection.

[5] The refusal of the court to exclude the evidence in reference to cotton shown by the defendant's books to have been purchased by him from one Godby was justified by the fact that there were circumstances in evidence tending to show that the purchases were really made from Morgan, and that the cotton was embraced in Morgan's mortgage to the plaintiffs.

[6] The witness Patterson having testified in reference to the plaintiffs' getting one mule which was embraced in the mortgage of Morgan to them, and that they did not get two mules under that mortgage, in the absence of other evidence tending to show that the plaintiffs got the other mule mentioned in the mortgage, the questions to the witness as to what such other mule was worth and what became of it called for immaterial evidence, and it was not error to sustain objections to those questions.

[7] The questions asked the witness Carl Patterson on cross-examination as to statements made by Morgan in reference to the source from which he obtained a sum paid by him on the mortgage to the plaintiffs called for mere hearsay testimony, and the court was not in error in sustaining objections to those questions.

[8, 9] There was nothing in the part of the court's oral charge which was excepted to that could have involved prejudice to the defendant. The first proposition involved in that part of the charge is that the recording of a mortgage in the office of the judge of probate of a county constitutes constructive notice of it. The fact that in the illustrative statement made by the court on this subject the county in which the trial took place was mentioned, instead of the county in which the only cotton in question in the case was grown, did not render the statement erroneous. As actual notice of the mortgage is the equivalent of the constructive notice of it afforded by a registration of it in the proper office (*Gamble v. Black Warrior Coal Co.* [Sup.] 55 South. 190), the other statement embodied in that part of the charge could not have involved injury to the appellant.

[10] As the only cotton involved in the suit was cotton claimed by the plaintiffs to have been the property of Morgan, written charge 1 given at the instance of the plaintiffs could not well have been understood by the jury as asserting anything more than if that cotton was raised in Cullman county, then the record of the mortgage in that county was notice to the defendant of the plaintiffs' mortgage lien. In view of the fact that the plaintiffs were not making any

claim against the defendant based upon his dealing with cotton belonging to any one other than Morgan, the suggestion that that charge was erroneous and prejudicial because it was not expressly limited in its application to cotton belonging to Morgan cannot be sustained.

[11] The assignments of error based upon the giving of written charges 2 and 3 requested by the plaintiffs are not supported by argument or citation of authority, and need not be considered. It may be said, however, that we discover no error in either of them.

As the ground of attack made in behalf of the appellant upon the action of the court in refusing to give written charges requested by him is the claim, already disposed of, that the indorsement of the judge of probate on the mortgage of Morgan to the plaintiffs, showing that it had been registered and recorded, was not in evidence, further mention of those rulings is not necessary. Affirmed.

LONG-RICHARDSON MERCANTILE CO. v. HERRON.

(Court of Appeals of Alabama. Dec. 21, 1911.)

1. TRIAL (§ 253*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in an action for goods sold the answer pleaded a set-off for goods claimed to have been purchased by a tenant of the plaintiff on plaintiff's order directed to a third person, testimony in support of plaintiff's reply, setting up the statute of frauds, tended to show that any authorization by the plaintiff to the tenant to use the order at defendant's store was conditioned on the inability of the tenant to secure the goods desired at the store of the addressee of the order, a requested instruction to find for the defendant if satisfied from the evidence that the plaintiff authorized the use of the order at the defendant's store was properly refused as ignoring the tendency of the evidence, since it was not a necessary inference that the goods could not be secured from the addressee, and if that were possible the statute of frauds was a sufficient defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

2. TRIAL (§ 85*)—ADMISSION OF EVIDENCE—OBJECTION.

Where, though part of a question asked a witness was improper, another part called for evidence as to a declaration made by the representative of the defendant, and did not show on its face that it called for improper testimony, an objection thereto should have been specific, and there was no error in overruling an objection to the question as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 223-225; Dec. Dig. § 85.*]

Appeal from Circuit Court, Walker County; J. J. Curtis, Judge.

Action by J. M. Herron against Long-Richardson Mercantile Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff was a farmer, and had a tenant named Abel, to whom he gave an order, di-

rected to J. M. Cranford, bookkeeper for the Cranford Mercantile Company, directing them to let Abel have \$40 or \$50 worth of goods, and to take his note for same, and he would come in and take up the note, or sign it himself. Abel claimed that Herron directed him to use the order at the Long-Richardson Mercantile Company, if he failed to get what he wanted at Cranford's. Herron denied this. The testimony of Abel was that he went through Cranford's stock, and, not finding what he wanted, he carried the order to the Long-Richardson Company and got what he wanted. Mr. Long and another witness testified that afterwards Herron came in and ratified the order, and instructed them to let Abel have further goods, and to take papers from Abel for Herron's benefit, which they did. Herron denied this. In the fall Herron sold them cotton, and in making the settlement they deducted the amount to cover the goods which they had sold Abel. Herron declined to accept the settlement, and brought suit. The defendant filed the plea of set-off, and the plaintiff replied with the statute of frauds. The other facts sufficiently appear in the opinion. The following charge was requested by the defendant: "The court charges the jury that, if you are reasonably satisfied from the evidence that Herron authorized Abel to use the order at Long-Richardson's, then I charge you that Herron could not avoid the payment of the amount advanced under said order under the statute of frauds."

Bankhead & Bankhead, for appellant.
James J. Ray, for appellee.

WALKER, P. J. [1] To the complaint containing the common counts the defendant (the appellant here) pleaded the general issue, and also two special pleas, one of which set up as an offset a claim for a sum alleged to be due to the defendant for goods, wares, and merchandise furnished to a tenant of the plaintiff at the latter's instance and request. This plea of set-off was sought to be sustained by evidence that the plaintiff authorized the tenant to use a written order addressed by the plaintiff to another merchant in getting the amount of merchandise mentioned in the order from the defendant if he could not get it from the merchant addressed, and also by evidence tending to show that the plaintiff in person authorized the defendant to let the tenant have merchandise up to a limit stated. The evidence was in conflict on the questions as to whether the plaintiff in either way authorized the defendant to charge him with the price of goods furnished to the tenant. The written charge refused to the defendant referred to the phase of the evidence tending to show that the plaintiff authorized the use of his written order to another in get-

ting goods from the defendant. The refusal of that charge may be justified on the ground that it ignored the tendency of the evidence in that connection to show that if such authority was given it was conditioned upon the tenant's being unable to get what he wanted from the merchant to whom the order was addressed, and the fact that it was not a necessary inference from the evidence that the tenant could not get what he wanted from the merchant to whom the order was addressed. Under that charge as framed the plaintiff could be held liable to the defendant on his written order to another, though the condition upon which he had authorized its use with the defendant had not arisen. This being true, the court was not in error in refusing to give that charge.

[2] The evidence tended to prove that the defendant's claim to an offset covered considerably less than the amount due from it to the plaintiff for cotton bought of the latter. A witness for the plaintiff, who testified that he went with him to the defendant's store when he asked for a settlement for the cotton sold, was asked about a writing presented by the plaintiff to the representative of the defendant for the latter's signature—the writing being a receipt for the amount claimed to be due for the cotton, less the amount of the offset claimed by the defendant, and expressing an agreement that that claim of offset was to be settled thereafter—and as to what the representative of the defendant said to the plaintiff when he handed that paper back to him. The defendant excepted to the action of the court in overruling its objection to the question as a whole. We are not of opinion that the court was in error in this ruling. Conceding that the part of the question in reference to the paper to which the plaintiff sought to get the defendant's signature was subject to objection, yet the objection as made was too broad, as the question called also for testimony as to what was said by the representative of the defendant as to the matter then in dispute between them. That part of the question on its face did not show that it sought to elicit improper testimony. It was calculated to elicit evidence of an admission by the defendant's representative in reference to the dealings between them which might be available to the plaintiff as evidence in his behalf.

Affirmed.

SANDFORD v. STATE.

(Court of Appeals of Alabama. Dec. 21, 1911.)

1. HOMICIDE (§ 169*)—EVIDENCE.

In a prosecution for murder, evidence of decedent's widow that he had an engagement to go to town with defendant on the day of the killing was admissible as explanatory of de-

cedent's conduct and object in going to defendant's home, just prior to the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 841-850; Dec. Dig. § 169.*]

2. HOMICIDE (§ 174*)—EVIDENCE—RELEVANCY—CONDUCT OF ACCUSED.

In a prosecution for homicide, evidence of decedent's widow as to what defendant said and how he acted toward witness when she was on her way to defendant's house after the shooting was irrelevant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359-371; Dec. Dig. § 174.*]

3. CRIMINAL LAW (§ 404*)—DEMONSTRATIVE EVIDENCE—IDENTIFICATION.

A shirt worn by deceased at the time he was killed, having been identified, was properly admitted in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.*]

4. WITNESSES (§ 280*)—CROSS-EXAMINATION—QUESTIONS—SELF-SERVING DECLARATIONS.

A question asked on cross-examination, "What did he [defendant] tell you, what did he say to any one?" was improper as calling for a self-serving declaration, not a part of the res gestæ; the declaration not being shown to be a part of a conversation previously brought out by the state.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 993; Dec. Dig. § 280.*]

5. CRIMINAL LAW (§ 364*)—EVIDENCE—RES GESTÆ.

What defendant said to witness when the witness met him at a time subsequent to and disconnected with the killing, a quarter of a mile from the scene thereof, was not res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 816; Dec. Dig. § 364.*]

6. HOMICIDE (§ 188*)—EVIDENCE—REPUTATION OF DECEASED.

In a prosecution for homicide, defendant may prove decedent's character as a violent or turbulent man, but not his general reputation as a man.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 391-397; Dec. Dig. § 188.*]

7. HOMICIDE (§ 163*)—EVIDENCE—REPUTATION OF DECEASED—RELEVANCY.

In the absence of evidence in a prosecution for murder that deceased was or had been drinking on the occasion in question, evidence as to his reputation for sobriety was inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 313; Dec. Dig. § 163.*]

8. HOMICIDE (§ 189*)—EVIDENCE—FORMER DIFFICULTY—PARTICULARS.

Evidence of particulars of a former trouble or difficulty that caused certain threats to be made by deceased against defendant was inadmissible in a prosecution for murder.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 189.*]

9. WITNESSES (§ 277*)—CROSS-EXAMINATION—SCOPE.

Questions asked defendant on cross-examination as to his wife having cried out just before deceased went to defendant's house, and as to what defendant said about such circumstance, were proper to show the purpose of decedent's visit to defendant's house at the time of the killing, and also to lay a predicate on which to impeach the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 979-984; Dec. Dig. § 277.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

10. WITNESSES (§ 337*)—CREDIBILITY—REPUTATION OF ACCUSED.

Defendant having testified as a witness in his own behalf, evidence of his general reputation was admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1118, 1129-1132; Dec. Dig. § 337.*]

11. HOMICIDE (§ 300*)—INSTRUCTIONS—FREEDOM FROM FAULT.

In a prosecution for homicide, a requested charge that if the jury believed defendant shot deceased at defendant's own home, and that deceased was assailing defendant in his home, defendant was not required to retreat, but had the protection of his home to excuse him from retreating, and that the law did not require one to fly from his home and give up the protection of his house to his adversary, was properly refused for failure to include in the hypothesis defendant's freedom from fault.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

12. HOMICIDE (§ 118*)—SELF-DEFENSE—ATTACK ON PREMISES OF ACCUSED.

The rule that a man's house is his castle for purposes of defense only applies so as to free the owner from obligation to retreat when he has been free from fault in bringing on the difficulty, and when he acts under an impending necessity to protect himself or his home.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 170; Dec. Dig. § 118.*]

13. CRIMINAL LAW (§ 829*)—TRIAL—REQUEST TO CHARGE—INSTRUCTIONS ALREADY GIVEN.

It is not error to refuse instructions substantially covered by other instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

14. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE—ARGUMENT.

An instruction in a prosecution for homicide that the law does not require that a man who is without fault shall lose his own life in order to spare that of his assailant, that we are not commanded to love our neighbor better than ourselves, was properly refused, as mere argument.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 618; Dec. Dig. § 300.*]

15. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE.

An instruction that if defendant was not at fault in bringing on the difficulty, and was assailed by deceased in his own home, he could then stand his ground and defend himself even to the extent of taking human life, was properly refused, as ignoring the question of imminent danger to life and limb, and the impending necessity to kill to save human life, or to protect defendant from great bodily harm.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 630; Dec. Dig. § 300.*]

16. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE.

An instruction that in the eyes of the law every man's home is regarded as his castle, from which he is not required to retreat, and, if assailed, he is justified in taking life to save his own life or his body from great bodily harm, was erroneous for failure to include freedom from fault in the hypothesis.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 630; Dec. Dig. § 300.*]

17. HOMICIDE (§ 300*)—INSTRUCTIONS—THREATS.

An instruction that if the jury believed that deceased had threatened to kill defendant,

and at the time of the killing deceased was manifesting an intention of carrying such threats into execution, or from the acts of deceased at the time of the killing it would have appeared to a reasonable mind that deceased was attempting to execute the threats against defendant, then defendant was justified in taking deceased's life, was properly refused as ignoring the question of freedom from fault and imminent danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 627-630; Dec. Dig. § 300.*]

18. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE—IMPENDING NECESSITY.

An instruction that every person may defend himself and may take the life of his assailant in defending himself from death or great bodily harm, and that the necessity need not be actual, but the circumstances must be such as to impress him with the reasonable belief that such necessity is impending, was properly refused as misleading, in that it ignored the necessity of defendant's being free from fault in bringing on the difficulty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 627-630; Dec. Dig. § 300.*]

19. CRIMINAL LAW (§ 786*)—TRIAL—TESTIMONY OF ACCUSED.

An instruction that defendant is authorized by statute to testify in his own behalf, and that the jury may give all the credit to his own statement, was misleading, and incorrect as a statement of law.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 786.*]

20. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE—THREATS.

An instruction that if the jury believe deceased had made threats against defendant's life, which had been communicated to him, they might consider them as tending to show reasonableness for defendant's apprehension of danger of death or serious bodily harm from the attack made upon him by deceased, and, if the jury found that deceased was the aggressor, they must acquit defendant, was properly refused, as failing to hypothesize defendant's freedom from fault.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 627-630; Dec. Dig. § 300.*]

21. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE—ARGUMENTATIVENESS.

An instruction that we are not commanded to lose our own life in order to save that of one who assails it, and when assailed in the home of defendant, or its yard or place of business, he need not retreat, but may use measures to save his own life even to the extent of killing his assailant, if he is without fault in bringing on the difficulty, was properly refused, as argumentative.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 618; Dec. Dig. § 300.*]

Appeal from Circuit Court, Fayette County; Bernard Harwood, Judge.

Boss Sanford was convicted of murder in the second degree, and he appeals. Affirmed.

The following charges were refused to defendant: (5) "I charge you, gentlemen of the jury, if you believe the defendant shot the deceased in his home, or if you also believe deceased was assailing defendant in his own home, the defendant did not have to retreat, but had the protection of his home to excuse him from retreating, and the law

does not require one to fly from his home and give up the protection of his house to his adversary." (9) "I charge you that the law does not require that a man who is without fault shall lose his own life in order to spare that of his assailant. We are not commanded to love our neighbor better than ourselves." (10) "I charge you that if you believe the defendant was not at fault in bringing on the difficulty, that he was assailed by the deceased in his own home, that he could then stand his own ground and defend himself, even to the extent of taking human life." (12) "I charge you that in the eyes of the law every man's home is regarded as his castle, from which he is not required to retreat, and, if assailed, he is justifiable in taking life, in order to save his own life or his body from great harm." (45) "If the jury believes from the evidence that the deceased had threatened to kill the defendant, and if, at the time of the killing, the deceased was manifesting an intention of carrying such threats into execution, or that from the acts of the deceased at the time of the killing it would have appeared to a reasonable mind that the deceased was attempting to execute the threats against the defendant, then the defendant was justified in taking the life of said deceased." (48) "I charge you that the law is that every person has the right to defend himself, and may take the life of his assailant in defending himself from death or great bodily harm; and the necessity need not be actual, but the circumstances must be such as to impress him with the reasonable belief that such necessity is impending." (50) "The court charges the jury that the defendant is authorized under the statute to testify in his own behalf, and the jury have a right to give all the credit to his own statement." (57) "I charge you that if you believe that deceased has made threats against defendant's life, which had been communicated to him, then you may consider the same as tending to show a reasonableness for defendant's apprehension of danger of death or serious bodily harm from the attack made upon him by the deceased; and if the jury would believe the deceased was the aggressor, then they must acquit the defendant." (59) "I charge you that we are not commanded to lose our own life in order to save that of one who assails it, and when assailed in the home of defendant, or yard or place of business, he need not retreat, but may use measures to save his own life, even to the extent of killing his assailant, if he was without fault in bringing on the difficulty."

Beasley & Wright, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. Under an indictment charging murder in the second degree, the defendant was convicted of the offense charged.

The defendant admitted the killing, but claimed that he acted in self-defense; the only eyewitness to the homicide being the defendant.

Boss Sandford, the defendant, was the son-in-law of Yancy Sexton, the deceased, and the parties lived on the same place, close neighbors, but in separate houses, their respective homes being about 200 yards apart, Sandford, the son-in-law, renting from his father-in-law, Sexton. On the morning of the tragedy, Sexton left his home between daylight and sunup, and went over to the house of Sandford, where he was shot and killed by Sandford in the back yard near the steps leading into the house. No one else, save the principals, was present or saw the shooting, and the state relied for a conviction on the circumstances connected with and leading up to the shooting, the physical conditions surrounding the dead body of the slain party when found, the nature and location of the wound, etc., and the statements made by the defendant immediately after the shooting. The wife of the deceased testified that, when the deceased left home to go to the defendant's house, he had no weapon; that he carried a bucket of slop, and went past the pasture to feed the hogs; that in about 10 minutes after the deceased left home she heard the gun fire in the direction of Sandford's house, whereupon she ran to the door of her house and heard the defendant's wife (her daughter) screaming; and that she immediately went over to Sandford's house, where she found her husband lying in the back yard dead near the steps leading into the house with a gunshot wound in his body. This witness' testimony is confused and contradictory with reference to seeing the axe and where it was lying with reference to the deceased body, but the state's witness Butler, who arrived on the scene of the killing at about the same time as Mrs. Sexton, testified that the axe was lying "right out in front of the body," and that the handle was across his legs. Several other witnesses introduced by the state who came to the place only a few minutes after the witness Butler testified to substantially the same facts as to the position in which the body and axe were found. The wound on the deceased's body was shown by the state to be about 1½ inches in diameter, and about 1½ to 2 inches from the hip bone, "kinder back," and ranging "straight through," as expressed by one of the witnesses. All of the state's witnesses who came to the scene of the shooting, including the wife of the deceased, testified that the defendant stated to them when they came up immediately after the shooting that Yancy was advancing with an axe drawn on him (defendant), and that he had to shoot in self-defense. The defendant proved threats made by the deceased, and, as a witness in his own behalf testified, that the deceased came around the house with an axe and called to

him (defendant) to come out, that he was going to kill him. The top of the back steps of the house was about three feet from the ground, and defendant testified that, when deceased came up to the steps with the axe drawn and advancing on him in striking distance, he reached around inside the door facing, picked up the gun, pointed it in the direction of deceased, and fired, that he was on the top step, and that deceased was on the ground near the steps when he shot.

[1] The state's counsel asked the wife of the deceased when she was testifying as a witness in behalf of the state if the deceased and defendant had an engagement to go to town on the day of the killing, and the witness was allowed to testify, against the objection of the defendant, that they did. This evidence was properly admitted as explanatory of the conduct and object of the deceased in going to the home of the defendant.

[2] There was no error committed by the court in refusing to allow the defendant to show, on the cross-examination of Mrs. Sexton, what he said and how he acted towards her when she was on the way to his house after the shooting. The defendant's good will or ill will towards the deceased's wife was not an issue in the case.

[3] The shirt worn by the deceased at the time he was killed was sufficiently identified, and was properly allowed to be introduced in evidence. *Andrews v. State*, 159 Ala. 14, 48 South. 858; *Pate v. State*, 150 Ala. 10, 43 South. 343; *Holley v. State*, 75 Ala. 14.

[4] The question asked the witness Butler on cross-examination, "What did he [defendant] tell you, what did he say to any one?" was properly refused, as calling for a self-serving declaration on the part of the defendant that was no part of the *res gestæ*. The declaration is not shown to be part of a conversation previously brought out by the state, and was not offered as such, but as independent statements constituting part of the *res gestæ*.

[5] The questions asked the witness Blackburn on cross-examination as to what the defendant said when the witness met him referred to a time subsequent to and disconnected with the killing when the witness met the defendant between his home, a quarter of a mile distant, and the defendant's home, and were clearly inadmissible.

[6] The general reputation of deceased was not admissible, but only his character as a violent or turbulent man. *Montgomery v. State*, 56 South. 92; *Rhea v. State*, 100 Ala. 119, 14 South. 853; *Smith v. State*, 88 Ala. 73, 7 South. 52; *Lang v. State*, 84 Ala. 1, 4 South. 193, 5 Am. St. Rep. 324; *De Arman v. State*, 71 Ala. 352; *Eiland v. State*, 52 Ala. 322.

[7] Nor was the reputation of the deceased as a drinking man admissible. There was no evidence that the deceased was or had been drinking on the occasion in question.

Cauley v. State, 92 Ala. 71, 9 South. 456; *Hussey v. State*, 87 Ala. 121, 6 South. 420; *Franklin v. State*, 29 Ala. 14.

[8] The questions asked the witness Powers with reference to what the deceased said about burning the fence for stove wood at the time he (deceased) made threats was nothing more than the hearsay particulars of a former trouble or difficulty that caused the threats to be made, and were inadmissible. The threat was proven without objection, and the particulars of the trouble causing the threat to be made were properly not allowed. *Bluett v. State*, 151 Ala. 41, 44 South. 84.

[9] The legitimate limits of cross-examination that are largely within the discretion of the court were not exceeded in the cross-examination of the defendant. The questions asked in reference to the defendant's wife having cried out just before the deceased went to the house of defendant and what defendant said about this were relevant to show the purpose of the deceased's visit to the defendant's house, and also admissible for the purpose of laying a predicate on which to impeach the witness.

[10] The defendant having testified as a witness in his own behalf, his general reputation was admissible. *Sweatt v. State*, 156 Ala. 85, 47 South. 194; *Buchanan v. State*, 109 Ala. 7, 19 South. 410; *Jones v. State*, 96 Ala. 102, 11 South. 399; *Mitchell v. State*, 94 Ala. 68, 10 South. 518; *Dolan v. State*, 81 Ala. 11, 1 South. 707.

[11] Charge 5 requested by the defendant differs from the charge cited by appellant's counsel, and set out in *Harris' Case*, 96 Ala. 24, 11 South. 255, in that the charge in this case hypothesizes the jury's belief in the defendant's having shot the deceased while being assailed in his own home without regard to the belief being based upon the evidence, while the charge in *Harris' Case* hypothesizes as a fact the defendant's having been assaulted in his own home. The natural effect calculated to be produced on the minds of a jury by this charge, including in the hypothesis a belief that the defendant, while being assailed, shot and killed the deceased, would be more like that which would have been produced by the charge in *Medlock's Case*, 114 Ala. 6, 22 South. 112, which was held properly refused because not including freedom from fault in the hypothesis. Although the defendant was the only eyewitness who testified to the killing, yet it was shown by the testimony of one of the witnesses that the deceased went to the house of the defendant for the purpose of going to town with him as arranged between them in a friendly spirit the day previous, and it was clearly open to the jury to find on this evidence that the deceased went to the home of the defendant with no felonious intent or purpose to bring on a difficulty, and, so finding, it was with them to conclude that the defendant was not

free from fault in bringing on the difficulty. *Medlock's Case*, supra.

[12] A man's house is his castle for purposes of defense, but not for offensive or aggressive operations, and he can claim the right to stand his ground, and, if necessary, kill his adversary without being under an obligation to retreat from his home only when free from fault in bringing on the difficulty, and when acting under an impending necessity to protect himself or home. *Watkins v. State*, 89 Ala. 82, 8 South. 134; *Gibson v. State*, 126 Ala. 59, 28 South. 673.

[13] The law of self-defense as applicable to one's being under no obligation to retreat in his home was fully covered by charges Nos. 2, 3, 4, 8, 11, 17, 18, and 44, given at the request of the defendant, and the court cannot be put in error for refusing instructions which are fully or substantially covered by other instructions given at defendant's request. *Montgomery v. State*, 160 Ala. 7, 49 South. 902; *Boyd v. State*, 154 Ala. 9, 45 South. 634; *Parham v. State*, 147 Ala. 57, 42 South. 1; *Birmingham Ry. Co. v. Rutledge*, 142 Ala. 195, 39 South. 338.

[14] Charge 9 is a mere argument.

[15] Charge 10 ignores the question of imminent danger to life or limb, and the impending necessity to kill to save life or to protect one's self from great bodily harm.

[16] Charge 12 is bad for the same reasons discussed in passing on the court's ruling as to charge 5.

[17] Charge 45 ignores the question of freedom from fault and imminent danger.

[18] Charge 48 is misleading. In defining the right of a person to defend himself and kill his assailant, the charge ignores the necessity of being free from fault in bringing on the difficulty.

[19] Charge 50 singles out the defendant's testimony, gives undue prominence to it, and is decidedly misleading in tendency in the wording used, and incorrect as a statement of law.

[20] Charge 57 includes disputed facts in the hypothesis and omits freedom from fault.

[21] Charge 59 is argumentative. The principles of law contained are covered by given charge No. 18.

There being no error shown by the record, the judgment of conviction will be affirmed.

Affirmed.

BELL v. TOWN OF JONESBORO.

(Court of Appeals of Alabama. Dec. 21, 1911.)

1. MUNICIPAL CORPORATIONS (§ 639*)—CITY ORDINANCE—VIOLATION—PLEADING.

A complaint for violation of a city ordinance which set out the title, expressing the subject of the ordinance, also its number and the sections claimed to have been violated, sufficiently pleaded the existence of the ordinance

and the provisions claimed to have been violated.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 281-285; Dec. Dig. § 639.*]

2. MUNICIPAL CORPORATIONS (§ 642*)—PROSECUTIONS—APPEAL—HARMLESS ERROR—STRIKING PLEAS.

In a prosecution for violation of a city ordinance, defendant was not prejudiced by the striking of pleas which merely questioned the legality of the evidence which defendant supposed would be offered to support the charge; the same objection to any of the evidence offered at the trial being available under the plea of not guilty.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.*]

3. MUNICIPAL CORPORATIONS (§ 642*)—PROSECUTIONS—APPEAL—HARMLESS ERROR—RULINGS ON PLEADINGS.

Defendant in a prosecution for violating a city ordinance was not prejudiced by the overruling of his demurrer to the replication of his second plea, where that plea merely raised a separate issue as to the legal existence of the ordinance in question of which defendant had the full benefit under his plea of not guilty.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.*]

4. MUNICIPAL CORPORATIONS (§ 109*)—ORDINANCES—PUBLICATION—POSTING—RECORD.

Code 1907, § 1258, providing that all general and permanent ordinances shall take effect five days after publication except as otherwise provided, a further provision for recording is merely directory, and an ordinance duly passed and published was effective, though not recorded or certified by the clerk.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 237, 238; Dec. Dig. § 109.*]

5. MUNICIPAL CORPORATIONS (§ 122*)—ORDINANCES—PUBLICATION—EVIDENCE.

Under Code 1907, § 1258, providing that ordinances may be published in a local newspaper, or, if there is no newspaper, by posting at three public places, two of which shall be the post office and the mayor's office, evidence in an action for violating a city ordinance that there was no post office and no newspaper in the town was admissible to show which provision of the statute was applicable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 287; Dec. Dig. § 122.*]

6. MUNICIPAL CORPORATIONS (§ 122*)—ORDINANCES—PASSAGE AND PUBLICATION—PROOF.

Minutes of a city ordinance showing that there were five members beside the mayor, and that three of the members beside the mayor were present at a regular meeting, that a motion to suspend the regular order of business and to take up a certain ordinance was made which was referred to by the introductory words of the title, and that certain members voted in the affirmative, none voting against the same, held sufficient to show the regular passage of the ordinance, notwithstanding mistakes were made in setting out the names of two of the councilmen.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 289; Dec. Dig. § 122.*]

7. MUNICIPAL CORPORATIONS (§ 122*)—CITY ORDINANCES—ADOPTION—PROOF.

A city ordinance offered in evidence had at the end thereof the following recital: "Adopt-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed Feb. 15, 1910, J. D. Martin, mayor." The town clerk identified it as the ordinance mentioned in the minutes of the council introduced in evidence showing the passage thereof under a suspension of the rules, and he also testified to publication of the ordinance in the mode required by statute. *Held*, that such method of identifying the subject of the recorded action of the city council was proper.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 281-289; Dec. Dig. § 122.*]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Sam Bell was convicted of violating an ordinance of the town of Jonesboro, and he appeals. Affirmed.

The complaint was as follows: "Comes the town of Jonesboro solicitor, and complains that within 60 days before the commencement of this prosecution Sam Bell did violate the terms of Ordinance No. 149 of the town of Jonesboro, in substance as follows:

"An ordinance to be entitled an ordinance to further suppress the evil of intemperance, and secure obedience to and the enforcement of and to prevent the evasion of the laws of the town of Jonesboro for the promotion of temperance, and for the prohibition or manufacture of and traffic in an unlawful disposition of prohibited liquors and beverages, to provide for the abatement of liquor nuisances and the seizure and forfeiture of such liquors and beverages, to prosecute the proceedings in said case.

"Section 1. Be it ordained by the town council of Jonesboro that, if any person shall willfully let or suffer another person to use any premises which he owns or controls for the illegal sale or manufacture or other unlawful disposition of spirituous, vinous or malt liquors prohibited by the laws of the town of Jonesboro, to be sold or otherwise disposed of in said town or the police jurisdiction thereof, and for the illegal storage or maintaining of such liquor, shall be guilty of a misdemeanor.

"Sec. 2. * * *

"Sec. 3. That the keeping of liquors or beverages prohibited by the laws of the town of Jonesboro to be sold or otherwise disposed of in any building not used exclusively for a dwelling shall be prima facie evidence that they are kept for sale, or with intent to sell the same, contrary to law.

"Sec. 28. That any violation of any provision of this act, when no other penalty is provided for, shall be punishable by a fine of not less than \$50, nor more than \$100, to which may be added, at the discretion of the recorder, or other officer holding municipal court, trying the case, imprisonment in the town jail, or at hard labor for the town of Jonesboro, for not more than six months; this being the general penal clause of this article."

The demurrers were: (1 and 2) The improper passage and recording of the ordinance. (3) That the ordinance is neither set out in substance nor in so many words. (4) Conclusion of the pleader. (5) In direct conflict with the state statute. (6) Ordinance was improperly recorded, if recorded at all. (7) Fatal variance between complaint and warrant and affidavit under which the defendant was tried in the recorder's court. (8) Insufficient number of councilmen voting for the ordinance. (9 and 10) Go to the validity of the ordinance for various reasons.

The pleas were: (1) The general issue. (2) "For further answer to the complaint, defendant says that the ordinance set out was invalid, in this: That on February 15, 1910, the council met in the town of Jonesboro with only three of its members present, and with its mayor presiding at that time, there being five members of such council holding office; that, as appears from the minutes pasted in the Book of Minutes at page 157, there was an ordinance offered, entitled 'An ordinance ordered to suppress the evils of intemperance,' by one councilman, J. M. Smithson, moving to place the same on its first reading, which was seconded by Jack Sanders, another councilman, and said vote following said reading, and was seconded by only three, to wit, Jack Sanders, J. M. Smithson, and O. C. Walls, when as a matter of fact there was no such councilman by such name as O. C. Walls; that on said same night or time the said ordinance was put on its last reading and final passage with said same parties voting for the same; that at no time did the mayor vote on the final passage of said ordinance. And defendant avers that the town of Jonesboro is a town of less than 6,000 population, and the defendant avers that at no time has said ordinance been recorded, but merely pasted in or attached by leaf fasteners to page 103 of the book; that said ordinance does not bear a certificate of its passage and promulgation, by showing that there was no newspaper published in the town of Jonesboro, and that notices were posted at the post office, giving the time, date, or manner of how the same was posted. Therefore said ordinance is absolutely void for said reason." Pleas 3 and 4 set up the character and evidence to be offered against the defendant, and allege that it was obtained by search and seizure.

Replications to the second plea are as follows: "That said Ordinance No. 149, on which this prosecution is based, was duly passed on February 15, 1910; that there were present a majority of the members of said council; that the minutes show that J. M. Smithson, Jack Sanders, and Q. C. Walls were members of the council; that Alderman Q. C. Walls is the identical and same person as O. C. Walls; that unanimous consent was

given for the suspension of the rule, and all three aldermen present voted for the ordinance, and so did the mayor, John D. Martin; that the ordinance was published by posting three copies in three public places, one copy in each place at the office of the mayor; that there was on such date no post office in the town of Jonesboro, nor was there any newspaper published in said town; that the mayor voted for the passage of the ordinance; that the ordinance was and is bound and recorded in a book of ordinances of the town of Jonesboro and duly certified by George H. Bumgardner, clerk of the town."

The demurrers are that there is nothing showing the substance of the certificate; the replication seeks to supply omission to the minutes on the passage of the ordinance, which cannot be done by parol proof; the facts alleged seek to explain and offer correction to the name of Q. C. Walls appearing on the minutes, which cannot be done; it is not alleged that the majority of the council elected to that office voted on the final passage of the ordinance for the same, including the mayor.

Pinkney Scott, for appellant. Perry & Bumgardner, for appellee.

WALKER, P. J. [1] The complaint in this case set out the title of an ordinance of the town of Jonesboro, which expressed the subject of it, also its number, and the sections of it claimed to have been violated. The averments sufficiently disclosed the existence of a municipal ordinance and the provisions of it which were alleged to have been violated. *Rosenberg v. City of Selma*, 168 Ala. 195, 52 South. 742; *Turner v. Town of Lineville*, 58 South. 603. The question of the sufficiency of the general averment of the complaint of a violation by the defendant (the appellant here) of the terms of the ordinance was not raised by any of the grounds assigned in the demurrer to the complaint.

[2] Conceding that the third and fourth pleas contained any matter proper for a plea, yet the defendant could not have been prejudiced by the striking of those pleas, which merely questioned the legality of the evidence which the defendant supposed would be offered to support the charge against him, as under his plea of not guilty he could avail himself on the trial of any legal objection to which the evidence actually offered against him might be subject.

[3] Nor could the defendant have been prejudiced by the overruling of his demurrer to the replication to his second plea, as that pleading merely raised a separate issue as to the legal existence of the ordinance alleged in the complaint, of which issue the defendant had the full benefit under his plea of not guilty, which put in issue the material allegations of the complaint, including

its allegation of the existence of the ordinance mentioned.

[4] The statute provides that: "All ordinances of a general or permanent nature shall be published in some newspaper of general circulation in the city or town, but if no such newspaper is published within the limits of the corporation, such ordinances or resolutions may be published by posting copies thereof in three public places within the limits of the city or town, two of which places shall be the postoffice and the mayor's office in such city or town. When the ordinance is published in the newspaper it shall take effect from and after its publication, and when published by posting it shall take effect five days thereafter, except as herein otherwise provided." Code 1907, § 1258. This is an explicit provision as to the time when an ordinance shall take effect. Except as otherwise provided in the statute, an ordinance which may be published by posting takes effect five days after it is so published. A compliance with the other provisions contained in the same section of the statute as to the recording of an ordinance is not made a prerequisite to its taking effect. The provision for recording is merely directory, and an ordinance duly passed and published is effective, though not recorded and certified by the clerk as directed by the statute. *Dillon on Municipal Corporations* (5th Ed.) § 607.

[5] Evidence that there was no post office in the town, and that no newspaper was published there, was admissible for the purpose of showing which provision of the statute as to publication was applicable.

[6] Without regard to the question as to whether the act of the clerk of the town in fastening the ordinance to a page of the book of ordinances of the town constituted a recording of the ordinance within the meaning of the provision on that subject contained in section 1258 of the Code, so as to make his certificate as to the time and manner of the publication thereof presumptive evidence that the publication was made as stated in the certificate, the evidence as to the passage and publication of the ordinance was such as to justify the court in overruling the objections made to its introduction in evidence. The minutes of the council, which were introduced in evidence without objection, read in the light of the evidence as to the number of members constituting that body, and identifying the paper offered as the ordinance acted on at that meeting, sufficiently showed the due passage and publication of the ordinance. The evidence showed that there were five members of the town council besides the mayor, John D. Martin; three of them being J. N. Smithon, Jack Saunders, and O. C. Walls. The minutes of the regular meeting of the council which were offered in evidence recited the presence of the mayor and the three mem-

bers mentioned. They show that on a motion to suspend the regular order of business and to take up a certain ordinance, which was referred to by the introductory words of the title of the ordinance offered in evidence, "the following members voted in the affirmative: J. N. Smithson, Jack Saunders, and Q. C. Walls, and John D. Martin, none voting against same." The mistakes made in setting out the names of two of the councilmen in this statement of the vote on that resolution do not prevent that recital from sufficiently showing that unanimous consent for the immediate consideration of the ordinance was given and evidenced as required by section 1252 of the Code. The recital shows that the affirmative vote was cast by the members of the council and the mayor. Obviously the mistakes made in setting out the names of two of the councilmen are mere clerical errors, which are corrected by a reference to that part of the minutes which states the names of the councilmen present at the meeting. The minutes further recite that said ordinance was unanimously adopted. This shows a compliance with the requirement of the statute (Code, § 1252) that, on the final passage of such a town ordinance, a majority of the members elected to the council, including the mayor, shall vote in its favor.

[7] The paper offered in evidence had at its end the following: "Adopted, February 15, 1910. G. H. Bumgardner, Town Clerk. Approved February 15, 1910. J. D. Martin, Mayor." And the testimony of the clerk identified it as the ordinance mentioned in the minutes above referred to. Such a method of identifying the subject of the recorded action of a municipal body is not legally objectionable. 2 Dillon on Municipal Corporations (5th Ed.) § 555; Woodruff v. Stewart, 63 Ala. 206. Publication of the ordinance in the mode required by the statute under the circumstances disclosed by the evidence was testified to by the town clerk.

The finding and judgment of the court were amply sustained by evidence showing a violation by the defendant of the provisions of the ordinance which were set out in the complaint.

Affirmed.

TAXICAB CO. v. GRANT.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. DAMAGES (§ 56*)—BREACH OF CONTRACT—MENTAL ANGUISH.

Where a party to a contract suffered inconvenience and physical discomfort in consequence of the adverse party's breach of contract, mental distress proximately resulting from the breach constituted a ground for award of additional compensatory damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 104, 105; Dec. Dig. § 56.*]

2. CARRIERS (§ 275*)—BREACH OF CONTRACTS—CONTRIBUTORY NEGLIGENCE—PLEADING.

A plea in an action for breach of contract to carry plaintiff and companions in an automobile from one place to another and return, which alleges that, after the breaking down of the automobile, plaintiff left the disabled car, and could not be found when defendant reached the car with another automobile, but which fails to aver that plaintiff was at fault in leaving the broken-down car before another car came, or that defendant exercised proper care in sending relief after notice, is bad on demurrer.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 275.*]

3. CARRIERS (§ 275*)—BREACH OF CONTRACT—CONTRIBUTORY NEGLIGENCE—PLEADING.

A plea which fails to show that any negligence of plaintiff proximately contributed to the breaking down of the car, and which shows that the results were attributable to the act of defendant, is bad on demurrer.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 275.*]

4. PLEADING (§ 194*)—DEMURRER TO PLEA—MATTERS AVAILABLE UNDER GENERAL ISSUE.

A plea which merely sets up matter available under the plea of the general issue is demurrable on that ground.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 450; Dec. Dig. § 194.*]

5. CARRIERS (§ 263*)—CARRIAGE OF PASSENGERS—PERFORMANCE OF CONTRACT.

Where defendant contracted to carry plaintiff and companions in an automobile from one place to another and return, and the automobile broke down, and defendant could perform his contract only by sending another automobile for plaintiff and his companions, defendant was under obligation to send out another automobile.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1035-1074; Dec. Dig. § 263.*]

6. CARRIERS (§ 263*)—BREACH OF CONTRACT—WAIVER.

Where defendant contracted to carry plaintiff and his companions in an automobile from one place to another, and the automobile broke down, and defendant failed within a reasonable time after being informed of the accident to carry plaintiff and his companions, the act of plaintiff in leaving the automobile and walking back was not a waiver of performance.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 263.*]

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

Action by W. B. Grant against the Taxicab Company for damages for breach of contract of carriage. From a judgment for plaintiff, defendant appeals. **Affirmed.**

The third plea alleges the contract, the undertaking to carry, and the fact that at about 5:40 p. m. the driver of the defendant was unable to make the automobile go or do the service expected by plaintiff; that the defendant learned the fact at about 6 p. m. of said day, and sent another automobile out to plaintiff, which reached the disabled car about 8 p. m.; and that when it reached said car plaintiff had left the disabled car, and, if he had remained with the car, defendant would have been able to have car-

ried out his contract, and brought the defendant and his party home. It is then alleged that the inconvenience, trouble, and suffering was due to the proximate consequence of the failure of the plaintiff to remain in the car so engaged by him. Plea 4 alleges that the car engaged by the plaintiff returned to Birmingham about 10 p. m., and that plaintiff left the car when it was unable to travel, and that, if he had remained with said car, he would have been returned by defendant to Birmingham by 8:30 p. m., by means of another car sent out by plaintiff; and it is alleged that his failure to remain with the car and his leaving the car was the cause of his suffering the damages, etc. Plea 5 alleges that in a short time after the arising of the said condition resulting in the failure of the car to go, and within three hours thereafter, defendant had another car at said point able, ready, and willing to transport plaintiff and said passengers to Shades Mountain and return. Wherefore it is alleged that the only breach was the delay of two hours, and that such delay does not authorize nor entitle plaintiff to recover the damages here sought. Plea 6 is a short plea of contributory negligence for a negligent failure to remain with said broken-down car, as it was their duty to do until said car could return to Birmingham, which it did on the night of the same day. Plea 7 is practically the same as plea 5. Pleas 8 and 10 set up that the automobile is a vehicle that is not adapted to use as a means of transportation or carriage over roads of every kind, and is unfitted for travel up certain hills, and that it is not capable of climbing all hills and going to all places, and that this fact entered into and formed a part of the contract; that the car furnished plaintiff was of a reputable make, in reasonably and ordinarily fit and good condition and working order at the time it was furnished plaintiff, and that, while it was being used for the benefit of plaintiff, it was driven in an ordinarily careful, safe, skillful, and proper manner, and that while being so driven, without negligence on defendant's part, it became out of order, and said impairment prevented defendant from returning plaintiff and said passengers to Birmingham. Plea 9 alleges practically the same state of facts, with the additional averment that plaintiff caused said car, while heavily loaded, to be driven up a steep hill and along and up a mountain road, and thereby rendered said car unfit and incapable of returning with plaintiff and said passengers. Wherefore defendant says that plaintiff assumed the risk of said car getting out of fix.

The following charges were refused the defendant: (32) "There can be no recovery in this case on account of defendant's failing to send another car to the relief of plaintiff before plaintiff left the car that was first furnished him by the defendant." (21) "If the plaintiff voluntarily left the automobile

that he had engaged, then you cannot award him any damages on account of any inconvenience, trouble, injury, suffering, or expense incurred or sustained by him after the time he left the automobile." (22) "If, under all the evidence, you are reasonably satisfied that, if plaintiff had remained at the automobile that he and said ladies went in to Shades Mountain Inn, he would not have had to walk to town, and would have been returned to Birmingham by the defendant in the night of the day he engaged said automobile, then you cannot award him any damages sustained by him after leaving said automobile."

Stallings & Drennen, for appellant. Bowman, Harsh & Beddow, for appellee.

WALKER, P. J. This is an action to recover damages for the alleged negligent breach by the defendant of the duty assumed by it by a contract to carry the plaintiff, who was engaged in the real estate business, and four ladies, who were his prospective customers, from Birmingham to Shades Mountain and to return them to Birmingham in an automobile, the claim being that the automobile in which the party was sent out broke down, owing to the negligence of the defendant or its employes, and that the party was not returned to Birmingham by the defendant, and was caused to remain out on Shades Mountain for a long time and into the night, and finally to walk into Birmingham; the complaint alleging that "plaintiff was put to great trouble, inconvenience, and expense in and about getting himself and said passengers into said Birmingham, and was greatly bothered, and suffered great mental and physical pain in and about remaining at said place."

[1] By motions to strike parts of the complaint embraced in the above quotation and by charges requested, the defendant raised the question of the right of the plaintiff to have his bother or mental worry considered as a basis for recoverable damages. We find no error in the rulings of the trial court in that connection. Where, besides the inconvenience and physical discomfort resulting from the breach of duty complained of, the plaintiff also was subjected to vexation, worry, or distress of mind as natural, proximate and reasonably to be expected consequences of such wrongful act, these last-mentioned results may constitute a support for an award of additional compensatory damages. *East Tenn. Va. & Ga. R. Co. v. Lockhart*, 79 Ala. 315; *Louisville & Nashville R. Co. v. Dancy*, 97 Ala. 338, 11 South. 796; *Louisville & Nashville R. R. Co. v. Quick*, 125 Ala. 553, 28 South. 14; *Alabama City, G. & A. Co. v. Brady*, 160 Ala. 615, 49 South. 351.

[2] It is enough to say of the defendant's pleas numbered 3, 4, 5, 6, and 7 that each of them fails to aver either that the plaintiff was at fault in leaving the broken down car

before another car came, or that defendant exercised proper care or diligence in sending relief after it had notice of the trouble. There was no error in sustaining the demurrers to those pleas.

[3] The averments of pleas 8 and 10 do not show that any negligence of the plaintiff proximately contributed to the results which the complaint attributed to the breach of duty on the part of the defendant, and plea 9 affirmatively shows that such results were attributable to the act of the defendant. These considerations suffice to support the conclusion that there was no error in sustaining the demurrers to those pleas.

[4] If plea 11 could be regarded as setting up any matter of defense, it was matter available under the plea of the general issue, and the demurrer to it was properly sustained on that ground.

[5] According to the plaintiff's pleading and proof, part of the duty assumed by the defendant was to return plaintiff's party to Birmingham in an automobile. If, in consequence of the breakdown of the car in which the party was sent out, this duty could be performed only by defendant's sending another car for them, it cannot be said that defendant was under no obligation to send out another car. In view of the evidence tending to show the existence of such duty and the negligent failure to perform it, it was not error to refuse charge 32 requested by the defendant.

[6] If, as there was evidence tending to show, the plaintiff did not abandon the broken-down automobile and incur the trouble and inconveniences of walking back to Birmingham until after the defendant had failed, within a reasonable time after being informed of the casualty to that machine, to perform the duty of returning the party to Birmingham in an automobile, that conduct of the plaintiff could not be treated as a waiver by him of the performance by the defendant of the duty assumed by it in that regard. This consideration discloses the incorrectness of charges 21 and 22, refused to the defendant, without determining whether they were otherwise free from fault.

The foregoing disposes of the assignments of error sought to be sustained by the argument of the counsel for the appellant.

Affirmed.

STINSON v. FAIRCLOTH BYRD CO.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. WITNESSES (§ 379*)—IMPEACHMENT—CONTRADICTORY STATEMENT.

Upon proper foundation, a witness may be impeached by proof of contradictory statements not made in the presence of the party calling him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1220-1222; Dec. Dig. § 379.*]

2. CHATTEL MORTGAGES (§ 173*)—RIGHT OF CHATTEL MORTGAGEE.

The right of a chattel mortgagee depends wholly upon whether the mortgagor had the right to encumber the property when he executed the mortgage, and his interest at the time a levy was had in detinue by the mortgagee for the recovery of the property, is immaterial, so that a charge that, if at the time the levy was made the mortgagor did not own such property, judgment should be for the claimant, was erroneous.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 316-328; Dec. Dig. § 173.*]

3. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In detinue for mortgaged crops, where the evidence showed that part of the crop was grown on rented land, and was in conflict upon the issue whether claimant or the mortgagor owned the crop on the rented land, a charge assuming that all the crops were grown on claimant's land was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

4. TRIAL (§§ 240, 244*)—INSTRUCTIONS.

A charge which is argumentative, and which singles out part of the evidence for consideration of the jury, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 561, 577-581; Dec. Dig. §§ 240, 244.*]

5. DETINUE (§ 25*)—JUDGMENT.

In detinue for chattels claimed by a third person where the issue of ownership is found against him, the proper judgment is condemnation of the property, and that it is subject to a writ of detinue, and a judgment in favor of plaintiff against the claimant for the assessed value of the property is erroneous.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 47-50; Dec. Dig. § 25.*]

6. APPEAL AND ERROR (§ 1175*)—DETERMINATION—REVERSIBLE ERROR.

In an action of detinue, where the jury in a verdict responsive to the issue found that the property belonged to the claimant, not to plaintiff, the error in rendering a judgment against claimant for the assessed value of the property sued for is not reversible, but the appellate court will enter an appropriate judgment of condemnation of the property.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

Appeal from Circuit Court, Coffee County; H. A. Pearce, Judge.

Detinue by the Faircloth Byrd Company against J. T. Stinson, with Sarah Stinson as claimant. Judgment for plaintiff, and defendant appeals. **Affirmed.**

The following charges were refused to the claimant: (1) "If the jury are not reasonably satisfied from the evidence in this case that, at the time the levy was made upon the property involved in this suit, J. T. Stinson owned such property, you will find for the claimant." (6) "I charge you, gentlemen of the jury, that the claimant in this suit has made out a prima facie case as to the crops by showing her title to the land upon which the crops were raised, and the burden of proof is upon the plaintiff to show that the property claimed by the claimant

was, at the time of the execution of the mortgage relied on by plaintiff to recover on, owned by plaintiff." The plaintiff relied for recovery upon a mortgage executed by J. T. Stinson on January 17, 1907, covering all crops of the years 1906, 1907, 1908, 1909, and 1910, in Coffee county, Ala. It is further shown that the property described in the mortgage was in the possession of Stinson, and that he was living on the land on which part of the crops were grown at the time of the signing of the mortgage. The claimant set up that the lands were hers, and that her husband did not raise any crops that year, but merely superintended the raising of a crop for her.

J. F. Sanders and Claude Riley, for appellant. H. L. Martin, for appellee.

WALKER, P. J. [1] On laying the proper predicate, the testimony of a witness may be impeached by the opposing party by proof of former statements made by the witness which are inconsistent with any part of his testimony which is material to the issue in the case; and it is not a prerequisite to the admissibility of the proof of such contradictory statements that they were made in the presence of the party in whose behalf the witness was examined. This statement disposes of several of the assignments of error which are sought to be sustained by the argument of the counsel for the appellant.

[2] The following statements in reference to the several written charges which it is urged in argument were improperly refused to the claimant indicate a fault in each of those charges which, in the opinion of the court, justified the lower court in refusing to give it: If the mortgagor had the right to mortgage the property in question at the time he executed the mortgage to the plaintiff, it was immaterial whether he retained any interest in it at the time of the levy of the plaintiff's writ in detinue. Charge 1 ignored this fact.

[3] Charge 6 improperly assumed that all the crops in question were grown on land to which the claimant showed title. The evidence showed that part of the crop was grown on rented land, and the evidence was in conflict on the issue as to whether the claimant or her husband, the mortgagor, owned the crop grown on the rented land.

[4] Charge 10 was properly refused as argumentative, and because it singled out a part of the evidence for the consideration of the jury. Charge 12 ignored the evidence tending to show ownership by the mortgagor of property embraced in the mortgage. As to such property, authority from the claimant was not required to give validity to the mortgage in question. The conflict in the evidence was such as to make the case plain-

ly one in which the claimant was not entitled to the general affirmative charge requested in her behalf.

[5] Upon the trial of the right of property in chattels upon which a writ of detinue has been levied, if the issue is found against the claimant, the appropriate judgment is a condemnation of the property, and that it is subject to the writ of detinue. The judgment rendered in this case in favor of the plaintiff against the claimant for the assessed value of the property sued for, together with the costs of the suit, was erroneous.

[6] This is not an error constituting a ground for the reversal of the judgment. The verdict of the jury was duly responsive to the issue tried. The record furnishing sufficient matter to amend by, the appropriate judgment will be rendered here, and, as so amended, the judgment will be affirmed. *Seisel & Co. v. Folmar & Sons*, 103 Ala. 491, 15 South. 850; *Keyser v. Maas*, 111 Ala. 390, 21 South. 348; Code, § 6042. The statute makes provision for the proceedings against the principal and sureties on the claim bond in the event of the failure of the claimant to deliver the property for which judgment is rendered against her. Code, §§ 6042, 3792.

Corrected and affirmed.

WRAY v. STATE.

(Court of Appeals of Alabama. Dec. 21, 1911.)

1. INDICTMENT AND INFORMATION (§ 72*)—ALTERNATIVE ALLEGATIONS.

Under Code 1907, § 6306, punishing assault or assault and battery, an affidavit, alleging that accused assaulted a person named with a pistol or other weapon, or unlawfully assaulted such person, or unlawfully assaulted and beat such person, charges offenses of equal degree, subject to the same punishment; and the offenses may, as authorized by section 7151, be charged in the alternative in the same count.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 195-199; Dec. Dig. § 72.*]

2. INDICTMENT AND INFORMATION (§ 185*)—OFFENSES INCLUDED IN CHARGE.

Under the affidavit, accused could be convicted of assault and battery.

[Ed. Note.—For other cases, see *Indictment and Information*, Dec. Dig. § 185.*]

3. ASSAULT AND BATTERY (§ 89*)—CRIMINAL RESPONSIBILITY—EVIDENCE—ADMISSIBILITY.

On a trial for assault and battery, it is competent to show what was said and done by those present during the assault as giving character to the assault.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 128; Dec. Dig. § 89.*]

4. CRIMINAL LAW (§ 368*)—EVIDENCE—RES GESTÆ.

It is competent to show, on a trial for assault and battery, what was said and done by those present during the assault as a part of the res gestæ.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 812; Dec. Dig. § 368.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. CRIMINAL LAW (§ 448*)—EVIDENCE—BELIEF OF ACCUSED—ADMISSIBILITY.

On a trial for assault and battery, a question whether prosecutor had a hatchet and expected outsiders was objectionable, as calling for testimony by the witness on the mental state of another.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1037; Dec. Dig. § 448.*]

6. CRIMINAL LAW (§ 368*)—EVIDENCE—ADMISSIBILITY—STATEMENTS OF THIRD PERSONS.

On a trial for assault and battery, the testimony of a witness as to what he told an officer or others after the assault is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 815; Dec. Dig. § 368.*]

7. WITNESSES (§ 268*)—CROSS-EXAMINATION—EVIDENCE—ADMISSIBILITY.

On a trial for assault and battery, it is error to allow the prosecutor to testify on cross-examination as to his uncommunicated purpose in having a weapon, or to elicit from him what he testified on the subject in a former trial.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 268.*]

8. WITNESSES (§ 270*)—CROSS-EXAMINATION.

It is not error to refuse to allow accused, on a trial for assault and battery, to extend the cross-examination of the prosecuting witness to inquiries on immaterial matters, or to refuse to allow questions fully answered.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 926, 955-957; Dec. Dig. § 270.*]

9. CRIMINAL LAW (§ 380*)—EVIDENCE—CHARACTER OF ACCUSED.

It is proper to refuse to permit accused, on trial for assault and battery, to testify that another case against him had been nolle prosequi in the absence of any connection of the two offenses charged.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 380.*]

10. ASSAULT AND BATTERY (§ 83*)—EVIDENCE—ADMISSIBILITY.

On a trial for assault and battery, evidence whether a witness had a pistol on his person the day before the trial while in court was immaterial.

[Ed. Note.—For other cases, see Assault and Battery, Dec. Dig. § 83.*]

11. CRIMINAL LAW (§ 775*)—TRIAL—INSTRUCTIONS—ALIBI.

A charge that, in weighing the testimony of an alibi, the jury must give it the same weight they give any other material fact, and if accused fails in the proof of his alibi it is a circumstance that may be weighed against him, in connection with other evidence, is proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1833-1837; Dec. Dig. § 775.*]

Appeal from Criminal Court, Jefferson County; M. Frank Cabalan, Judge.

Richard Wray was convicted of assault and battery, and he appeals. Affirmed.

The affidavit as amended, omitting the formal charging part, is as follows: "J. J. Barber, who, being duly sworn, says that he has probable cause to believe and does believe that Richard Wray, alias Dick Wray, whose name is otherwise unknown to affiant, within 12 months before making this affida-

vit, in said county, did unlawfully assault Arlie Barber with a pistol or other weapon, or did unlawfully assault Arlie Barber, or did unlawfully assault and beat Arlie Barber." The demurrers raise the question as to the alternative averment, both as to the means and as to the offense, and the fact that the affidavit charged the commission of more than one offense. The portion of the oral charge excepted to is as follows: "In weighing the testimony of an alibi, you must give that same weight as you would any other material fact in the case. If the defendant should fail in any way or any manner in the proof of this alibi, it is a circumstance that may be weighed against the defendant in connection with the other evidence."

C. P. Beddow and Gibson & Davis, for appellant. R. C. Brickell, Atty. Gen., and William L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. [1] The amended affidavit charged offenses of equal degree, subject to the same punishment, and was not subject to the demurrers interposed. Such offenses may be charged in the alternative. Code 1907, §§ 6306, 7151; Bonner v. State, 97 Ala. 47, 12 South. 408; McClellan v. State, 118 Ala. 122, 23 South. 732; Sims v. State, 135 Ala. 61, 33 South. 162.

[2] Under the charge preferred, the defendant could be convicted of assault and battery. Smith v. State, 123 Ala. 64, 26 South. 641.

[3, 4] It was competent to show what was done and said by those present during the commission of the assault, both as directly going to give character to the assault and as part of the res gestae. Smith v. State, 123 Ala. 64, 26 South. 641.

[5, 6] The objections to the questions asked the witness Fulton about a discussion and what was said at another time than on the occasion of the assault, and subsequent to the assault, were properly sustained. The question asked this witness, "Did not Mr. Barber have a hatchet and expect outsiders?" called for testimony by the witness of the mental status of another person, and an objection to it was properly sustained. What the witness told an officer or others after the assault was not admissible.

[7, 8] It was not proper to allow the prosecuting witness to testify, on cross-examination, to his uncommunicated purpose or secret intent in having the hatchet, nor to elicit from him what he swore on the subject in a former trial. The court committed no error in refusing to allow the defendant to extend the cross-examination of the prosecuting witness to inquiries about immaterial matters, or in refusing to allow questions which had been fully answered. Moulton v. State, 88 Ala. 116, 6 South. 758, 6 L. R. A. 301; Mar-

tin v. State, 104 Ala. 78, 16 South. 82; Braham v. State, 143 Ala. 28, 38 South. 919; Newman v. State, 160 Ala. 102, 49 South. 786.

[9] It was immaterial that some case against the defendant (the record does not disclose that it had any connection with the particular offense for which the defendant was on trial) had been nolle pros'd in the police court; and the court correctly refused to allow defendant, when being examined as a witness, to testify to the fact, if it was a fact.

[10] Whether or not the witness Fulton had a pistol on his person the day before the trial while in court was entirely immaterial and irrelevant to the issues.

[11] The portion of the court's oral charge on the question of alibi to which exception was reserved is free from error. Jackson v. State, 117 Ala. 155, 23 South. 47.

No error being shown by the record, the case will be affirmed.

Affirmed.

NORTH ALABAMA TRACTION CO. v. TAYLOR.

(Court of Appeals of Alabama. Dec. 19. 1911.)

1. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSIONS.

In an action for injuries to a street car passenger, questions asked a witness whether the car was not running slowly enough for a woman to get off in safety, and if plaintiff did not change her mind about alighting, were properly excluded, as calling for the witness' opinion.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.*]

2. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

When, in an action for negligent personal injury, contributory negligence, as well as the general issue, is pleaded, allegation in the complaint that plaintiff used due and proper care does not affect the rule placing the burden to prove contributory negligence on defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 229-234; Dec. Dig. § 122.*]

3. TRIAL (§ 234*)—INSTRUCTIONS.

In an action against a street railway company for injury to a passenger, an instruction that she could not recover if, after a careful consideration of all the evidence, an individual juror was satisfied by any material part of the evidence that she ought not to recover was properly refused.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 234.*]

4. APPEAL AND ERROR (§ 758*)—BRIEFS—SUFFICIENCY.

Civ. Code 1907, p. 1508, rule 10, requiring each ground of error insisted on to be separately presented, is not complied with by submitting a single proposition dealing in a summary way with several rulings involving different propositions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. § 758.*]

5. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL—MATTER COVERED.

Instructions covered by other instructions given are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

6. TRIAL (§ 194*)—INSTRUCTIONS—INVADING JURY'S PROVINCE.

In an action for personal injury to a street car passenger, an instruction that it was negligent for one of her age to attempt to alight from a moving car, if she attempted to do so, and if such attempt caused her injury, was properly refused, as invading the jury's province; the evidence presenting a jury question whether plaintiff's act was contributory negligence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Action by Laura Taylor against the North Alabama Traction Company for damages for injury while a passenger. Judgment for plaintiff, and defendant appeals. Affirmed.

The two questions propounded to Zella Coleman on cross-examination were: "(1) She started to get off while it was not running slow enough for a woman to get off in safety, is that right? (2) Isn't it a fact that when the car stopped she was going down to the next corner, and changed her mind after the car stopped again?"

The following charges were refused the defendant: (2) Affirmative charge as to the first count. (3) Same as to the second count. (9) "The plaintiff cannot recover damages in this case if, after a careful consideration of all the evidence, an individual juror is satisfied by any material part of the evidence that she ought not to recover damages." (15) "It was negligence on the part of the plaintiff at her age to attempt to get off a moving car, if you believe from the evidence she did so attempt; and if you further believe that from said attempt the injury to her thereby resulted, this was negligence on her part, for which she is not entitled to recover in this action."

John C. Eyster, for appellant. Wert & Lynne, for appellee.

WALKER, P. J. The complaint attributes the injury complained of to the alleged negligence of the defendant's (appellant here) employé or employés in charge of a street car on which the plaintiff was a passenger in starting the car while the plaintiff was in the act of alighting. The defendant pleaded the general issue and also contributory negligence on the part of the plaintiff.

[1] The rulings of the court in sustaining objections by the plaintiff to two questions propounded to plaintiff's witness Zella Coleman on cross-examination are assigned as errors. Each of those questions called for a mere deduction or opinion of the witness, and

it was not error to sustain the objections interposed to them.

[2] It is suggested that written charge 2 requested by the defendant should have been given, because of the absence of proof to sustain the allegation of count 1 of the complaint that the plaintiff was "exercising all due and proper care on her part." Under the evidence, it was a question for the jury whether such was the fact. Besides, it seems that when contributory negligence, as well as the general issue, is pleaded, such an averment in the complaint does not change the burden of proof, and that in such case a defendant who sets up and relies on the defense of contributory negligence has the burden of proving that defense. *McDonald v. Montgomery Street Railway*, 110 Ala. 161, 177, 20 South. 317.

The only reason advanced by counsel for the appellant for imputing error to the refusal to give charge 3 requested in its behalf is that there was an absence of proof to sustain the allegation of the second count of the complaint in reference to the conductor's signaling the car to start. This claim is not founded in fact. There was proof in support of the allegation referred to.

[3] There was no error in the refusal to give charge 9 requested by the defendant. That charge was susceptible of conveying the impression that the plaintiff's right to a recovery did not depend upon the findings by the jury on the issues of fact submitted to them, but might be defeated if a juror was satisfied from the evidence that "she ought not to recover," without regard to whether the law, as applicable to the facts as found from the evidence, would justify such a conclusion.

[4] In the brief of the counsel for the appellant, it is stated that "charges 12, 13, 17, 18, 19, 21, and 24 should have been given;" and the only proposition advanced in support of this assertion is that "a reasonable time is all that is required of defendant to allow passengers to make up their minds as to whether they will get off, or remain in the car." The charges mentioned, considered together, involved several separate and distinct propositions. This summary method of dealing with a number of rulings involving different propositions is not a compliance with the requirement of the rule governing the method of preparing a brief in behalf of the appellant that each ground of error insisted on be "separately presented and numbered in proper order" (Civil Code 1907, p. 1508, rule 10), and cannot be regarded as such an insistence in argument on the assignments of error so referred to as to put upon the court the duty of reviewing the several rulings thus merely called to its attention. *Harper v. Raisin Fertilizer Co.*, 148 Ala. 360, 42 South. 550; *Hodge et al. v. Rambo*, 155 Ala. 175, 45 South. 678. Besides, it is

apparent at a glance that some of the charges embraced in the one sweeping imputation of error were properly refused on the authority of the ruling in the case of *Highland Avenue & Belt R. Co. v. Burt*, 92 Ala. 291, 9 South. 410, 13 L. R. A. 95, as to the duty of the conductor of a street car to see and know, before starting the car again after it has stopped, that no passenger is in the act of getting off or on, or otherwise is in a perilous position.

[5] The appellant cannot complain of the refusal of the court to give charges 11, 17, and 25, as it had the benefit of the propositions embodied in those charges under other written charges given at its instance.

[6] Charge 15 requested by the defendant was properly refused, as being an invasion of the province of the jury. The evidence in the case was such as to make it a question for the jury whether an attempt by the plaintiff to alight from a moving street car constituted negligence on her part. *Watkins v. Birmingham Railway & Electric Co.*, 120 Ala. 147, 24 South. 392, 43 L. R. A. 297.

Affirmed.

DISTRICT GRAND LODGE NO. 23, UNITED ORDER OF ODD FELLOWS IN AMERICA, v. HILL.

(Court of Appeals of Alabama. Dec. 1, 1911.)

1. INSURANCE (§ 813*)—MUTUAL BENEFIT INSURANCE—ACTIONS ON POLICIES—PARTIES.

Where the constitution of a state grand lodge of a fraternal order provides that every member of each of its lodges in good financial standing is insured in the sum of \$500, the order is a beneficial life insurance association, and, though for the convenience and proper management of the insurance feature it has a special endowment department, the order, and not the endowment department, is liable on contracts of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1994; Dec. Dig. § 813.*]

2. INSURANCE (§ 818*)—MUTUAL BENEFIT INSURANCE—INSURABLE INTEREST—EVIDENCE.

In an action on an insurance policy, evidence that the beneficiary therein, who was no relation to the insured, upon his request and promise to will her his life insurance, moved into his house and cared for him until his death, and that, in pursuance to such agreement, he did in fact surrender an existing policy, and had a new one issued with her as beneficiary, was relevant to show her insurable interest.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2003; Dec. Dig. § 818.*]

3. INSURANCE (§ 767*)—MUTUAL BENEFIT INSURANCE—INSURABLE INTEREST.

Where, at the time a person was made a beneficiary upon a policy of life insurance, she had cared for the insured for three years at an average cost of \$15 a month, under an agreement that he would will her his life insurance, she had such an insurable interest as will render untenable an objection that the certificate was void in its inception as a wager policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1929-1931; Dec. Dig. § 767.*]

4. WITNESSES (§ 133*)—COMPETENCY—INSURABLE INTEREST.

The beneficiary on a policy of life insurance was competent to testify as to facts showing her insurable interest in an action by her against the insurance company on the certificate, as it was not the assertion of a claim against the estate of decedent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 566-569; Dec. Dig. § 133.*]

5. INSURANCE (§ 750*)—MUTUAL BENEFIT INSURANCE—FORFEITURE—CONSTRUCTION OF CONSTITUTION AND BY-LAWS.

Though the constitution of a beneficial life insurance association provides that a member of a lodge which is not in good financial standing with the order on account of nonpayment of dues is, during such period of disability, not insured, the association must furnish reasonable security to its members against the negligence and inefficiency of the officers under whose control its affairs are placed, and the provision cannot be asserted as a defense unless made out with literal exactness.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1895, 1896, 1903; Dec. Dig. § 750.*]

6. INSURANCE (§ 755*)—MUTUAL BENEFIT INSURANCE—FORFEITURE—WAIVER OF RIGHT.

Where the constitution and by-laws of the state grand lodge of a fraternal life insurance association provided that subordinate lodges in arrears should be suspended, that no member thereof should be entitled to insurance during the suspension, and that reinstatement might be had by the payment of a certain sum per member, and the constitution and by-laws of the order provided for certain notice in the lodge publication of such delinquency, failure to notify a subordinate lodge claimed to have been delinquent at the death of an insured member, or to attempt to collect the penalty on reinstatement, taken with the collection and retention of dues in arrears, amount to a waiver of the right to forfeit policies for the alleged delinquency of the lodge.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.*]

7. APPEAL AND ERROR (§ 1002*)—REVIEW—CONCLUSIVENESS OF VERDICT.

Where, in an action on an insurance policy of a fraternal benefit association, the evidence whether the insured paid his dues is conflicting, the verdict of the jury thereon is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

8. INSURANCE (§ 789*)—MUTUAL BENEFIT INSURANCE—PROOFS OF DEATH—WAIVER OF DEFECTS.

Defects in proofs of death under an insurance policy are waived by failure to make seasonable and specific objection thereto, so that, where a fraternal benefit association, upon receipt of proofs of death of an insured, based its refusal to pay upon the ground that the lodge to which the member belonged was in arrears with the grand lodge at the time of his death, it thereby waived any other defense which may have existed in the proofs when presented.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1965; Dec. Dig. § 789.*]

Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge.

Action by Annie Hill against the District Grand Lodge No. 23, United Order of Odd Fellows in America. From a judgment for plaintiff, defendant appeals. Affirmed.

The facts sufficiently appear in the opinion of the court. The following portions of the oral charge were excepted to: (1) "But it is insisted here by the plaintiff that Pines was financial, in that he was entitled to certain sick benefits, and that these sick benefits paid the premium. If that be true, then he would have been financial, if, as a matter of fact, his indebtedness to the local lodge had been paid at the time of his death, either in money sent by him, or by the beneficiary, to the lodge, or if the money was taken out of the sick benefit to which he was entitled and appropriated to the payment of the premium." (2) "If you find from this evidence, in connection with this policy that was offered in evidence, that there was an endowment department of the defendant, which was controlled and operated in effect by the defendant itself through its executive committee, or through its grand officers, and that the department representing the company itself issued this policy, then the defendant would be liable for the acts of its department in that behalf."

The following charges were refused the defendant: (8) "If the policy sued on had become null and void before the death of said Pines, the evidence in this case does not show a waiver of said forfeiture after his death." (5) "The policy offered in evidence in this case does not purport to be the contract or policy or certificate of the defendant." (6) "Unless the evidence in this case shows that said Pines was in good standing in his lodge and the order at the time of his death, and that due proof thereof was furnished the said endowment department, as stated in said forfeiture, the plaintiff cannot recover herein." (12) "If the jury believe from the evidence in this case that at the time of the death of Pines his lodge had not sent to the endowment secretary 35 cents dues paid by said Pines, or at his instance, for May, June, or July, 1908, the plaintiff cannot recover." (9) Practically same as 12. (10) "If the jury believe from the evidence that said Pines, or his lodge, failed to comply with the requirement set forth in said policy, such failure rendered said policy null and void." (3) "If the jury believe, from all the evidence in this case, that the lodge of which said Pines was a member failed to forward to the endowment secretary, on or before the 10th day of May, June, or July, 1908, 35 cents for each financial member on said lodge roll at the time said dues became due under said policy, the plaintiff cannot recover." The other charges assert the proposition of no waiver of death notice.

Ball & Samford, for appellant. Tyson, Wilson & Martin, for appellee.

DE GRAFFENRIED, J. The Grand United Order of Odd Fellows in America is a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

beneficial unincorporated association operating in the United States, and having for its object the social enjoyment and good fellowship of its members, the insurance of their lives for the benefit of their wives or children, or such other persons as the members may designate as their beneficiaries, and providing means for the comfort or sustenance of its members when sick, their funerals, etc. The order seems to be composed of one Supreme Lodge, of Grand Lodges, and of lodges. The Supreme Lodge is the general governing body of the entire order, having certain officers whose duties require them to supervise the various Grand Lodges, and the Grand Lodges are, of course, subject to all the reasonable rules and regulations adopted by the Supreme Lodge. A Grand Lodge appears to be that part of the order which governs its business and social affairs in a state or territory, and a lodge that part of it which is confined in its operations to a particular community. The Supreme Lodge, the Grand Lodges, and the various lodges constitute the order or society. 1 Bacon on Benefit Societies and Life Ins. § 74.

[1] In Alabama the Grand Lodge, through which the order operates in the state, is known as "District Grand Lodge of Alabama No. 23, Grand United Order of Odd Fellows," and in article 3 of the constitution of said Grand Lodge it is provided: "The amount of insurance to which each member shall be entitled under this plan shall be five hundred dollars to be paid to the person or persons named on the face of the policy within sixty days after the filing of the death notice, as per requirements under article xi of this constitution." Under the constitution of the parent order, a member in good standing in his lodge is a financial member, and each Grand Lodge is authorized by proper by-laws to create an endowment department, and to compel each of its members to become an endowment member. Under the constitution of the endowment department of the Grand Lodge in control of the affairs of the order in Alabama and known as "District Grand Lodge of Alabama Number 23, Grand United Order of Odd Fellows," every financial member is required to be an endowment member, viz., a member with a policy of insurance payable to some beneficiary named by him for the sum of \$500. So that, under regulations authorized and sanctioned by "District Grand Lodge of Alabama Number 23, Grand United Order of Odd Fellows," every member of each of its lodges in good financial standing with the order is insured in the sum of \$500 by said Grand Lodge. A member of a lodge not in good financial standing, on account of the nonpayment of dues, is during such period of disability and for such period of disability only not insured. It is therefore manifest that, while the appellant has certain officers whose principal duties are to look after the financial standing of each of its lodges

and each of its members and for that reason has what it terms its endowment department, this is for the convenience and proper management of the insurance feature, and the appellant is, as to each of its members, a beneficial life insurance association. It follows, therefore, that appellant, and not its endowment department, is the party liable to appellee if appellee is entitled to recover on the certificate of life insurance in evidence in this case. No other conclusion can be drawn from the language of the constitution of the order or the constitution of the endowment department of said Grand Lodge of Alabama. The money collected by the endowment department is for the equal benefit of all the members of the Grand Lodge in good financial standing, just as is all the other money paid in by its members, except such part of it as is necessary to meet the current expenses of the lodges, the Grand Lodge, etc., and all of such members in the aggregate, therefore, are the real owners of the money for said purposes. There is no magic in mere words to change the real into the unreal. A device of words cannot be imposed upon the court in place of an actuality of fact. *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. 235, 20 L. Ed. 617.

[2] 1. It appears from the evidence that one Pines, who was an old man, and who, so far as the evidence discloses, had no relations, several years before his death went to appellee, who was a married woman, and asked her to move with her husband to his home, and care for him while he lived, saying that, if she would do so, "he would treat them as a parent and will her his life insurance policy." It further appears that Pines owned a home, but that he had no other property, as the evidence shows that appellee accepted his proposition and for several years furnished him with food and clothing, paying his medical bills, nursing him when sick, and, as appellee in her testimony expresses it, expending on him an average of \$15 per month from the time she moved into his home until he died. Appellee testified that prior to the issuance of the certificate sued on in this action Pines had another policy, which had been issued to him by appellant; that he destroyed this policy, and in its stead received from appellant the certificate payable to her as his beneficiary, which is the subject of this litigation. When the first policy was, if ever, issued by appellant, the evidence does not disclose, but we are of the opinion that appellee's testimony on this subject was competent and material. Appellant denied liability to appellee upon the ground, among others, that appellee was not related to Pines, and had no insurable interest in his life, and we think that all this evidence was relevant to that issue. The undisputed evidence shows that appellee was not related to Pines, and that, when the present certificate was issued, it was issued to Pines for appellee's benefit "as his

guardian." If it be true, as testified by appellee, that she undertook the care of Pines under an agreement that he would, for so doing, "will her his life insurance policy," the above evidence has a strong tendency to show that the certificate was not "void in its inception as a wagering policy." It tends to show, on the contrary, that the present certificate was issued in lieu of an already existing policy, and that in having appellee named in the certificate as his beneficiary Pines was simply complying with his agreement to "will her his life insurance policy" when she moved with him and undertook to care and provide for him. 1 Bacon on Benefit Societies and Life Ins. § 249.

[3] The evidence further tended to show that, when the certificate was issued, Pines had been provided for by appellee for about three years at a cost of about \$15 per month, a sum aggregating over \$500, and it therefore seems clear that under the most rigid application of the doctrine that the beneficiary in a life insurance policy must possess an insurable interest in the life of the assured, the appellee, if her evidence is to be believed, had an insurable interest in the life of the assured to the full amount of the certificate when it was issued by the appellant. *Helmetag's Adm'r v. Miller*, 76 Ala. 183, 52 Am. Rep. 316.

[4] Manifestly the appellee was competent to testify as a witness to the facts about which she was interrogated. She was by name the beneficiary in the certificate, and this suit was brought by her against the appellant, whose officers, for it, had issued the certificate. Pines' estate was not interested, and on this issue the question simply was whether appellee possessed an insurable interest in the life of Pines. Appellee was not undertaking to enforce a claim against the estate of Pines, and the question of his indebtedness to appellee, as a matter to support the legality of the certificate, was, so far as the estate of Pines was concerned, merely a collateral fact to which the witness could testify. Pines' indebtedness to appellee was simply the foundation upon which her rights against appellant rested, and was not the foundation of any claim asserted or sought to be asserted by her against the estate of Pines. *Wood v. Brewer*, 73 Ala. 259; *Miller v. Cannon*, 84 Ala. 69, 4 South. 204; 3 Mayfield's Dig. 501, § 1305.

[5] 2. It is insisted by appellant that appellee was not entitled to recover because Hope Lodge, of which Pines was a member, was in arrears with the District Grand Lodge at the time of Pines' death, and that his beneficiary, on that account, was not entitled to participate in its endowment fund. While appellant is a social organization engaged in the business, among other things, of furnishing a limited amount of insurance upon a professed nonremunerative basis to its members, nevertheless the purposes of its organization must not be lost sight of, and it

must conduct its affairs under reasonable regulations and so enforce those regulations through its officers as to furnish at least reasonable security to its members, acting in good faith and meeting their obligations, against the negligence or inefficiency of those under whose control it places its affairs. *Supreme Lodge Knights of Pythias v. Withers*, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762.

The defense relied upon is an extremely technical one, and is opposed to that true sense of reason, right, and justice which should form the basis of every contract, by-law, or regulation affecting the obligations of the members of society to each other. When it is remembered that the appellant is a beneficial society, permitted by the law to exercise its various functions because of its express purpose to minister to the needs of its members when they become the subjects of disease or misfortune and to furnish to each of them, at his death, a modest sum, in the form of life insurance, to be paid to his beneficiary, some person named by him in his certificate as the object of his care and solicitude, the hardship and oppression which would result from a rigid enforcement of the particular provision set up as a defense to this action become apparent. Such a provision would not be permitted in a life insurance policy issued by a purely business organization, and in such case such a defense could not, and would not, be tolerated. When interposed by a beneficial society—a society of benevolence—the law will certainly not permit such a defense to prevail unless it is made out with literal exactness. *Supreme Lodge Knights of Pythias v. Withers*, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762.

There was abundant evidence in the case tending to show that Hope Lodge was never, during the period covered by this controversy, treated by appellant as not in good standing or as suspended on account of the lax manner in which its secretary remitted its dues to his superior officer. Appellant claimed in November, when the certificate was presented for payment, that the policy was void because the lodge was in arrears when Pines died, and yet, during that period of alleged suspension, Hope Lodge, as a part of appellant's organization, was in the active performance of its functions, holding itself out as a lodge in good standing, collecting money, holding its meetings with full authority to take in new members, and in full possession of every power possessed by any other lodge in Alabama. The tendency of men to form themselves into social and beneficial associations has been long recognized, and the law will not permit the officials of such organizations by a systematic course of neglect or misconduct to so conduct the affairs of such an association that some provision of its constitution or one of its by-laws adopted for a possible good purpose, shall in fact become an instrument of oppression or fraud upon

its innocent and helpless members. *Supreme Lodge Knights of Pythias v. Withers*, supra.

[6] There was, it seems to us, sufficient evidence in this case from which the jury might have inferred that the refusal of appellant to pay the amount of this certificate because of the fact that Hope Lodge was in arrears or in a state of suspension at the time Pines died was an afterthought of appellant's agent; that such condition of the lodge was claimed because Pines died, and for no other reason; and that, in truth, appellant's officials so conducted its affairs certainly during the year of Pines' death that, as to Hope Lodge, there was a waiver by appellant of the provision of its constitution or by-laws which provides as follows: "Sec. 8. Any lodge 60 days in arrears for the amount of two consecutive months' dues shall be suspended and reported to the District Grand Lodge, and no member of said lodge shall be entitled to insurance under this plan, except as hereinafter provided." In this connection it may be well for us to call attention to the following other provision of the constitution and by-laws of said District Grand Lodge: "Sec. 4. Any lodge suspended by the operation of the preceding section may be reinstated upon the payment of \$2.00 per member." We call attention also to the following provision of the constitution and by-laws of the parent order, of which the District Grand Lodge of Alabama is but a part: "Sec. 6. The Grand Secretary is hereby required to notify each nonfinancial, delinquent, suspended, or forfeited lodge of its being nonfinancial, delinquent, suspended, or forfeited, with the amount of its indebtedness, adding in each case a fine of \$2.00, and publish each such notice in the regular quarterly circular."

It is not contended that the members of Hope Lodge were at any time required to pay the \$2 provided for in section 4 of the constitution or by-laws of the District Grand Lodge of Alabama, nor is it pretended that Hope Lodge was ever notified of its suspension, as provided in the above-quoted section 6 of the constitution or by-laws of the parent order. In other words, the evidence in the case tends to show that, while the dues of Hope Lodge were not remitted in strict compliance with the by-laws of the order, appellant took at no time any steps against Hope Lodge on account of such default, but, on the contrary, accepted the remittances when made, treated them when received as a compliance with its rules and regulations, and took no steps to notify the lodge or any of its members of any dereliction of duty on the part of the officials of the lodge, but permitted them to remain in utter ignorance of the fact that the lodge was not in perfect standing with the order. We take it that our Supreme Court has conclusively declared that in all cases forfeiture of insurance provided by mutual benefit associations is not encouraged by the courts, and in all cases where

a forfeiture is claimed will preserve, if possible, the equitable rights of the holder of the certificate; and that, where a subordinate lodge of an organization, "through its officers, collects from its membership assessments and dues payable to the organization, such subordinate lodge or its officers are to be considered as the agents of the organization, and they may, by collecting and retaining dues in arrears, effect a waiver of a forfeiture and a revival of the liability of the organization, notwithstanding the prescribed mode of reinstatement has not been complied with." *United Order of the Golden Cross v. Hooser*, 160 Ala. 334, 49 South. 854.

It is manifest that there was evidence in this case from which the jury had the right to infer that certainly during the year in which Pines died the officers of the District Grand Lodge were so lax in their enforcement of the forfeiture clause of its by-laws above quoted as to evidence a waiver by the appellant of such clause in the by-laws and in the certificate, the subject of this suit. *United Order of the Golden Cross v. Hooser*, supra.

The above being our conclusion, it is unnecessary for us to consider the reasonableness or validity of the by-law in question, or the reasonableness or validity of the similar provision in the policy.

[7] 3. It is insisted by appellant that Pines did not pay his dues as required by his policy and the by-laws, and that, therefore, the appellee was not entitled to recover. It is sufficient for us to say that the evidence was at least in conflict on this subject, and that there was evidence in the case for the jury to have found by its verdict that Pines did pay his dues as they matured.

4. It is also insisted by appellant that the proofs of loss furnished by appellee to appellant did not comply with the requirements of the policy and of the by-laws of the association.

[8] It is a well-recognized principle that when any defects are found to exist in proofs of loss made to an insurance company which are capable of being remedied, if intelligently pointed out, such defects in the proofs of loss are deemed to be waived, unless pointed out by the company within a reasonable time after receipt of the proofs. In other words, the insurer must object seasonably if at all. "Insurance companies must not lure their patrons into false security by which the latter may lose the means and opportunity of remedying defects in their preliminary proof, must not lead them astray by giving notice of one objection and then relying upon another, nor by a general refusal to pay, retain in reserve, for a surprise on the trial, some defect in the proof, which, perchance, if known might have been remedied. The law expects exact candor and good faith, and punishes with adverse presumptions those who fail to observe these cardinal virtues." Objections to the proofs are too late if not

made until the trial. Bacon on Benefit Societies and Life Insurance, § 411; Fire Ins. Co. v. Felrath, 77 Ala. 201, 54 Am. Rep. 58. In the present case, upon the receipt of the proof of the death of Pines, the appellant based its refusal to pay upon the sole ground that Hope Lodge was in arrears with the Grand Lodge at the time of his death. It is therefore evident that it thereby waived any other defects which may have existed in the proof of loss when presented to it. It is apparent, from what we have above said, that in our opinion the court below on the trial of this case committed no error in those portions of its oral charge to the jury to which exceptions were taken by appellant, and that it was free from error in refusing to give to the jury any of the written charges found in the bill of exceptions, which the appellant requested the court to give to the jury in its behalf.

There is no error in the record, and the judgment of the court below is affirmed.

Affirmed.

BURTON v. PHILLIPS et al.

(Court of Appeals of Alabama. Dec. 1, 1911.)

1. APPEAL AND ERROR (§ 737*)—ASSIGNMENTS OF ERROR—JOINT ASSIGNMENT.

Where one of two counts of the complaint was not subject to demurrer on either of the grounds stated, an assignment that the court erred in overruling demurrers to the first and second counts was unsustainable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3030-3032; Dec. Dig. § 737.*]

2. MORTGAGES (§ 312*)—SATISFACTION—PENALTY—EVIDENCE.

In a suit to recover a statutory penalty for defendant's failure to enter payments on the margin of the record of a mortgage, evidence as to whether another person was indebted to defendant before the mortgage was executed was irrelevant.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 312.*]

3. TRIAL (§ 46*)—RECEPTION OF EVIDENCE—RELEVANCY—DISCLOSURE.

In the absence of any disclosure as to how the answer of a witness to a question objected to would be material, the court was not in error in sustaining an objection to the question, though subsequent developments in the trial showed it to be admissible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 115-117; Dec. Dig. § 46.*]

4. EVIDENCE (§ 256*)—ADMISSIONS—NECESSITY OF PREDICATE.

Where testimony is of such a character as to constitute an admission by the adverse party, it is not necessary to lay a predicate or foundation for its admission.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 256.*]

5. APPEAL AND ERROR (§ 1078*)—ASSIGNMENTS OF ERROR—WAIVER.

An assignment that the court erred in refusing to give certain charges was waived

where appellant's counsel for argument merely asserted that their refusal was error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from Circuit Court, Walker County; J. J. Ray, Judge.

Action by C. W. Phillips and others against Adeline Burton for penalty for failure to enter partial payment upon a mortgage. Judgment for plaintiffs, and defendant appeals. Affirmed.

Count 2 is as follows: "Plaintiffs claim of the defendant \$200, the penalty provided for by section 4897 of the Code of Alabama, and they aver that heretofore, to wit, on the 10th day of July, 1890, they executed to the defendant, Adeline Burton, a mortgage to secure an indebtedness, which said mortgage is of record in Book AA of Mortgages, p. 412, in the office of the judge of probate of Walker county, Alabama. Plaintiffs aver that on, to wit, the 4th day of June, 1908, after said mortgage had been fully paid or satisfied, and after the defendant had received full payment or satisfaction, they requested said defendant in writing to enter the fact of payment or satisfaction on the margin of the record of the mortgage. Plaintiffs aver that, although more than two months had passed since said request was so made to the defendant, she has wholly failed to so enter the fact of payment or satisfaction on the margin of the record of said mortgage. Plaintiffs further aver that there is not pending a suit in which the fact of payment or satisfaction of said mortgage is or may be contested, and that no suit has been instituted in which the fact of payment or satisfaction is or may be contested."

The demurrers to this count were as follows: "Because same states no cause of action. Because the same fails to aver that said mortgage is fully paid and satisfied. Said count fails to allege that plaintiffs made payment of said mortgage to defendant."

The testimony of the plaintiffs tended to show that the mortgage was given to secure two notes, one for \$20, due at a certain date, and one for \$35, due at another date; that W. F. Wright was his stepfather, and interested in the land, and that W. T. Wright was also interested in the land; that he and W. T. Wright gave W. F. Wright the money to pay the \$20 note, and went with him to the house of Mrs. Burton, but did not go in, and that when W. F. Wright came out he had with him the \$20 note; that later on he gave W. F. Wright \$10, and W. T. Wright gave him \$20, and W. F. Wright was to furnish the other \$5 to pay off the \$35 note, and that he went to Mrs. Burton's, but the witness did not know whether he paid her or not, although he afterwards instituted a proceeding against her to have her settle the mortgage. It also appeared that W. F.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Wright conducted all negotiations concerning the land and the mortgage, but did not sign the mortgage. Whereupon, on cross-examination, the defendant propounded to C. E. Phillips the following question: "Don't you know that Squire Wright (who was W. F. Wright) owed Mrs. Burton a debt on July 1, 1899?" The court sustained objection. The question to Irwin Wright was: "Did you hear a conversation between John Powell and Mrs. Burton, some two or three years ago, somewhere between the places where John Powell lives and where Mrs. Burton lives?" The witness answered, "Yes," and detailed the following: "This conversation was near Shannon's Push, Shannon's little mine; but I have no idea what time it was. Mr. Powell asked her if she held a note against Mr. Wright, and she said she held a small note, and a part of it had been paid. It did not amount to much. She said the credits were written with a pencil, and she took a pen and ink and went over it to make it plain. At the time they were talking about some land that Powell bought from the Wrights. The conversation was about some debt on the land." Seasonable objection was interposed to the question and answer.

Zac P. Shepherd and D. A. McGregor, for appellant. J. D. Acuff and R. A. Cooner, for appellees.

WALKER, P. J. [1] The first assignment of error is as follows: "The court erred in overruling defendant's demurrers to the first and second counts of the complaint." Obviously the second count was not subject to demurrer on either of the grounds stated. The counsel for the appellant do not even claim in argument that the demurrers to that count should have been sustained. When two or more rulings are embraced in one assignment of error, if either of the rulings was free from error, the appellant can take nothing by the assignment, as a single assignment of error, to be supported, must be good in whole. *Brent v. Baldwin*, 160 Ala. 635, 49 South. 343.

[2] This is a suit to recover the statutory penalty for the alleged failure of the defendant to enter payments on the margin of the record of a mortgage executed by the plaintiffs to her. O. W. Phillips, one of the plaintiffs, was the first witness examined in their behalf. He testified that the mortgage was given for the price of real estate purchased from the defendant, and that it and the notes secured by it were executed and bore date July 10, 1899. His testimony also tended to show that payments had been made on the mortgage. There was nothing in his testi-

mony to indicate how the question as to whether a person other than the mortgagors, Squire Wright, was or was not indebted to the defendant before the mortgage was executed, could be at all relevant or material to any issue in the case. At this stage of the trial, the witness was asked on his cross-examination: "Didn't you know that Squire Wright was owing Mrs. Burton a debt on July 1, 1899?"

[3] In the absence of any disclosure to the court as to how the answer of the witness to the question could be relevant or material testimony, it is not to be charged with error because of its action in sustaining an objection to the question. It may be conceded that, in the light of subsequent developments in the trial, an affirmative answer to the question might have had some tendency to sustain a contention advanced by the testimony of the defendant. But, at the time the question was asked, the court was justified in treating it as an inquiry in reference to a matter foreign to the issues in the case. As the bill of exceptions does not show that it was then made known how the answer of the witness to the question might have a bearing on the issue in the case, the court is not to be charged with error because of its refusal to permit the prosecution of an inquiry then apparently irrelevant and immaterial.

[4] There was no error in the refusal of the court to exclude the answer of the witness Irwin Wright to the question in reference to a conversation between John Powell and the defendant, on the ground that no predicate had been laid for the admission of the proof. The matter deposed to was an admission by the defendant as to the subject in controversy in the case. If the testimony is of such a character as to constitute an admission by the adverse party to the suit, it is not necessary to lay a predicate or foundation for the reception of the evidence. *Jones on Evidence*, § 236. The rule as to laying a predicate for the admission of proof of contradictory statements made by a witness has no application here.

[5] The refusal of the court to give charges 2, 3, 5, and 6 requested by the defendant is made the subject of one assignment of error. Some, if not all, of those charges were obviously faulty. Besides, this assignment of error is to be treated as waived, as the counsel for the appellant do no more in the way of argument in support of it than mention the four charges and assert that the court erred in refusing to give them. *Fitts v. Phoenix Co.*, 153 Ala. 635, 45 South. 150.

Affirmed.

BELL v. STATE.

(Court of Appeals of Alabama. Dec. 21, 1911.)

1. INTOXICATING LIQUORS (§ 139*)—ILLEGAL KEEPING.

Under Acts Sp. Sess. 1909, pp. 64, 68, §§ 4, 16, prohibiting the keeping of liquors in a building not used exclusively as a dwelling, or on premises where the business of selling beverages was conducted, the keeping of prohibited liquors in a place where the defendant was running a store and soft drink stand was illegal.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 139.*]

2. CRIMINAL LAW (§ 404*)—TRIAL—VIEW AND INSPECTION—BOTTLES OF LIQUOR.

In a prosecution for keeping and selling prohibited liquors in a place of business, bottles of wine and beer found on the premises were properly produced for the inspection of the jury, under Acts Sp. Sess. 1909, p. 93, § 32½, providing that evidence that the beverage which the defendant is shown to have kept, sold, etc., possesses the same color, odor, taste, and general appearance of a prohibited liquor is prima facie evidence that it is such.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 404.*]

3. INTOXICATING LIQUORS (§ 239*)—ILLEGAL KEEPING—INSTRUCTIONS.

Where the evidence tended to show that the place where defendant kept prohibited liquors was not used exclusively as a dwelling, a requested instruction that the mere keeping of prohibited liquors on the premises was not presumptive of his having it there for an unlawful purpose, where he lived, ate, and slept in the house in question, was properly refused, under Acts Sp. Sess. 1909, p. 64, § 4, providing that the keeping of liquors in a building not used exclusively as a dwelling is prima facie evidence that they are kept for sale.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 239.*]

Appeal from City Court of Bessemer; J. O. B. Gwin, Judge.

Joe F. Bell was convicted of violating the prohibition laws, and appeals. Affirmed.

The exceptions to evidence sufficiently appear in the opinion. The charge refused to the defendant is as follows: "If the jury believe from the evidence that the defendant lived in the house, and that he ate and slept there, and that the liquors found in defendant's house, unless kept there for an unlawful purpose by the defendant, then the mere keeping it there by the defendant is not presumptive of having it there for any unlawful purpose."

Pinkney Scott, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. [1] It was permissible to admit evidence that in the place of the defendant, in which evidence tended to show that prohibited liquors were found, he was running a store and soft drink stand, as it was contrary to law to keep prohibited liquors in any building not used exclusively as a dwelling, or on premises where the busi-

ness of selling beverages was conducted. Acts Special Session 1909, p. 63, §§ 4, 16; Toole v. State, 54 South. 195.

[2] In connection with other evidence tending to support the charge that the defendant offered for sale, or kept for sale, or otherwise disposed of, prohibited liquors, it was permissible to allow the production, for the inspection of the jury, of the two bottles of scuppernong wine and two bottles of beer, which the evidence tended to show were found in the defendant's place of business. Acts Special Session 1909, p. 63, § 32½.

[3] Under the evidence in the case tending to show that the place of the defendant in which prohibited liquors were found was "not used exclusively for a dwelling," the written charge requested by him was properly refused. Acts Special Session 1909, p. 63, § 4.

Affirmed.

(129 La.)

No. 18,692.

HUGHES et al. v. EDSON et al.

(Supreme Court of Louisiana. Dec. 11, 1911.
Rehearing Denied Jan. 2, 1912.)

(Syllabus by the Court.)

1. EXECUTION (§ 311*)—REAL ACTIONS (§ 7*)—SHERIFF'S DEED—VARIANCE—PETITORY ACTION—DEFENSES.

Where there is variance between the recitals of a sheriff's return and deed, the latter will prevail. Defendant in a petitory action cannot avail himself of relative nullities in the title of the plaintiff.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 918-920; Dec. Dig. § 311.* Real Actions, Cent. Dig. § 23; Dec. Dig. § 7.*]

2. VENDOR AND PURCHASER (§ 229*)—BONA FIDE PURCHASER—UNRECORDED AGREEMENTS.

Plaintiff's title derived from the record owner cannot be affected by unrecorded agreements or understandings between prior holders of the title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 479; Dec. Dig. § 229.*]

Appeal from First Judicial District Court, Parish of Caddo; Thomas F. Bell, Judge.

Action by W. J. Hughes and others against J. A. Edson and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

Thigpen & Herold and Alexander & Wilkinson, for appellants. Frank J. Looney and W. H. Scheen, for appellees.

LAND, J. This was a jactitation suit, which has been converted into a petitory action by the defendant's alleging title to the tract of land in controversy, to wit, the N. W. ¼ of S. E. ¼, section 15, township 20, range 15 W., in the parish of Caddo.

The plaintiffs and defendants trace their titles to Helperin and Leonard, who made-

two conveyances of the tract in dispute, one to Tom Thomas in October, 1902, and the other to Benjamin F. Shaver in January, 1904.

Tom Thomas purchased the E. $\frac{1}{2}$ of N. E. and N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section 15, township 20 N., range 15 W., for \$3,288, represented by eight notes maturing respectively, on December 1, 1903, 1904, 1905, 1906, 1907, 1908, 1909, and 1910.

All of these notes were acquired by the Merchants' & Farmers' Bank & Trust Company, of Shreveport, which foreclosed on them in the year 1908. The property was adjudicated to Charles Ellerbe, who subsequently sold to the defendants Edson, Etchison, and Hicks.

Shaver sold to Browne in December, 1904, and Browne in 1907 conveyed an undivided two-third interest in the property to Wm. J. Hughes and W. Clarke Hughes.

The judge a quo held that the sheriff's sale to Ellerbe was null and void because made for cash, contrary to the order of the court directing a sale for cash to pay the notes due, and on terms of credit to pay the notes to become due.

Defendants have appealed from a judgment rejecting their demands. Plaintiffs have answered the appeal, and prayed that the judgment below be amended by recognizing them as the owners of the property in dispute.

The order for executory process directed the sheriff to seize and sell the mortgaged premises for cash without the benefit of appraisal to pay the amounts due, and on terms of credit to pay the amounts to become due on December 1, 1908, 1909, and 1910, with all costs, interest, and attorney fees. The notice, writ, and advertisement of sale were all in accordance with the terms of the decree of foreclosure.

The return of W. R. Thomas, deputy sheriff, of even date with the sale, recited that he had received the writ on May 21, 1908, and had proceeded to execute the same by seizing the property described therein, by serving notice of seizure on the defendant, by advertising, for 30 clear days, in a certain public newspaper, that he would offer said property for sale at public auction, on the terms specified in said writ, at the courthouse between the legal hours of sale on Saturday, July 11, 1908; and the said return further recited as follows, to wit:

"And after complying with all the requirements of law, I on said day and at said place of sale and between the legal hours for sales, after reading the writ, advertisement and mortgage certificate, and announcing the terms and conditions of sale, did offer said property at public outcry, and at such offering the sum of two hundred dollars (the same being two-thirds or more of the appraised value) was bid by Clarence Ellerbe, which being the highest and best bid, said property was adjudicated to the said Clarence Ellerbe for the said sum of \$200.00, which amount was paid and applied as follows:

Total amount of sale.....	\$200 00
Paid sheriff	\$11 86
Clerk	5 20
Curator	10 00
Advertising	9 00
	<u>\$63 94</u>

"Wherefore I return this writ satisfied as above shown on this the 11th day of July, 1908."

On the back of the writ appears the receipt of the attorneys for the plaintiff in execution, for \$163.94.

On the same day the sheriff executed a deed, containing, among others, the following recitals:

"And at said time and place, within legal hours for sales, and after the writ, the advertisement and the mortgage certificate (a copy of which is annexed to and made part hereof) having been read aloud by me, and after complying with all the requirements of law, I exposed said property for sale at public auction, for cash, according to law, and at said offering Clarence Ellerbe, of the parish of Caddo, and state of Louisiana, bid for said property two hundred dollars, and that this bid being the highest and best bid, the before described property was adjudicated to the said Ellerbe for the said sum, * * * which said sum was applied as shown by my return and the receipt on the back of the writ of seizure and sale."

Article 698 of the Code of Practice reads:

"This act thus recorded and delivered to the purchaser, shall be held as full proof of which it contains, in all the courts of this state, in the same manner as an act before a notary would be."

Article 693 of the Code of Practice declares that such acts must make mention:

"Of the nature of the object sold, with a description of it, as well as of the price and conditions on which it has been adjudged," and
 "Of the manner in which the purchaser has paid the price, or bound himself to discharge it."

Article 686 of the Code of Practice provides that, where some of the installments are not due, the creditor "may demand that the whole property be sold for the payment of the whole debt, provided it be on such terms of credit as are granted to the debtor by the original contract for the payment of such installments as are not due."

The sheriff's deed recites that he "exposed said property for sale at public auction for cash according to law." The purchaser paid the whole amount of his bid in cash, which was applied in part by the sheriff to the payment of costs, and the residue paid to the attorneys of the seizing creditor. The sale throughout was treated by the sheriff, the purchaser, and the plaintiff in execution as a *cash sale*. This fact rebuts any inference that might be deduced from the language of the return that the adjudication was *partly* on terms of credit.

In Carroll v. Scheen, 34 La. Ann. 423, it was held that, in case of a variance in the sheriff's deed and his return on the writ, as to the identity of the adjudicatee, the deed will prevail. In McCall v. Irion, 41 La. Ann.

1126, 6 South. 845, the doctrine of *Carroll v. Scheen* was reaffirmed, and applied to a variance in the sheriff's deed and his return as to the payment of the price of adjudication. These cases have never been overruled. In *Chaffe v. Minden Lumber Co.*, 118 La. 753, 43 South. 397, there was ambiguity in the deed as to the description of the property, and it was properly held that the procès verbal and other proceedings might be consulted to determine what property was really intended to be conveyed.

[1] Assuming that, in the case at bar, the property was offered for cash, instead of *part* cash and *part* on terms, it does not appear that the defendant in execution thereby suffered any pecuniary injury, and it is doubtful whether he could have annulled the judicial sale on that ground. But, assuming that he could have done so, it does not follow that the plaintiffs, occupying the position of defendants in a petitory action, can urge such informality or illegality. Article 686 of the Code of Practice was enacted in the sole interest of defendants in execution, and secures to them the right to have the property sold on the terms of credit stipulated in their contracts with the seizing creditors. This right is purely personal to the debtor, and the nonobservance of the law made to enforce the right creates a relative nullity. When the law prohibits an act, but from no motive of public policy or utility, the nullity is relative only and can be invoked alone by those in whose interest the prohibition is made. *Whitehead v. Cramer*, 9 La. Ann. 214; *Id.*, 9 La. Ann. 216. In both cases, the property was adjudicated for less than the amount of the prior conventional mortgages in contravention of article 684 of the Code of Practice. In a previous case, the court had held that such a sale could not be treated by third persons as an absolute nullity. *Lawrence v. Birdsall*, 6 La. Ann. 688. In the case of *Southern Mutual Insurance Company v. Pike*, 33 La. Ann. 825, the court said:

"The nullity resulting from the sheriff's omission to make the announcement (required by C. P. 684) is not absolute, but relative."

The adjudication of a minor's property for less than its appraised value is a relative nullity. *Frazer v. Zylcz*, 29 La. Ann. 537. It is well settled that errors and mistakes in judicial sales, where the nullity is entirely a matter of private interest, cannot be inquired into collaterally, but a direct action must be brought to have the nullity declared. It is equally well settled that a defendant in a petitory action cannot avail himself of a mere relative nullity in plaintiff's chain of title. *West v. Negrotto*, 52 La. Ann. 391, 27 South. 75; *Adolph v. Richardson*, 52 La. Ann. 1160, 27 South. 665. The same rule applies to a plaintiff in a petitory action. *Smith v. Lumber Co.*, 125 La. 705, 51 South. 693. The informality in the

adjudication urged by the plaintiffs in this case concerns only the defendant in execution, Tom Thomas, and did not cause him any pecuniary loss. The fact that a small portion of the price was paid to the seizing creditor, instead of being retained by the purchaser to be paid in driplets, to the creditor from year to year, worked no injury to the defendant in execution. Neither the plaintiff nor defendant in execution are parties to this suit, and therefore the judicial sale cannot be annulled or revoked in this proceeding.

The cases cited by plaintiffs' counsel do not overrule any of the cases cited *supra*. In *Thibodeaux v. Thibodeaux*, 112 La. 906, 38 South. 800, it was held that the sale of succession property, on the first offering, for less than one-tenth of its value, according to the last appraisement, is a matter of substance and not a mere informality. In *Doucet v. Fenelon*, 120 La. 18, 44 South. 908, the court held that the nullities alleged were absolute. In *Cronan v. Cochran*, 27 La. Ann. 120, the property of the defendant had been seized and sold under a judgment in rem, which the court held to be a nullity.

[2] Plaintiffs, as defendants in the petitory action, aver that they hold the title held by Tom Thomas, with the right to sue for a rescission or otherwise. There is no evidence that the title of Thomas was ever transferred to the plaintiffs. Plaintiffs further aver that Ellerbe, the purchaser at the sheriff's sale, was interposed for *Helperin* and *Leonard*, and that said purchase inured to the benefit of the plaintiffs. *Helperin* had nothing to do with the sheriff's sale. *Leonard*, one of the liquidators of the *Merchants' & Farmers' Bank*, bought in the property for Ellerbe, his son-in-law, and advanced the money to pay the price. *Leonard* testified that he had no interest in the purchase. More than a year later, Ellerbe sold the property to *Edson*, *Hicks*, and *Etchison*. There is not sufficient proof that Ellerbe was a party interposed for *Helperin* and *Leonard*. Ellerbe was the record owner of the property, and any secret understanding between him and *Leonard* as to the title did not affect third persons purchasing from Ellerbe on the faith of the public records. The contention that the sale from *Helperin* and *Leonard* was simulated finds no support in the evidence, and, even if true, could have no legal effect against the bank, which acquired the notes given by Thomas for the purchase price, and against subsequent purchasers of the property from the record owner.

The plaintiffs, when they purchased, had record notice that the property had been previously sold to Thomas by their vendors. This notice had the legal effect of actual knowledge, and the plaintiffs purchased at their peril.

Plaintiffs called *Helperin* and *Leonard* in

warranty, and prayed for judgment over against them for the return of the purchase price and damages.

The warrantors answered that the deed by them, to Shaver, was made in error, they having previously sold the same land to Thomas, and that the mistake was unintentional and inadvertent, and resulted solely from a clerical error in the description of the land intended to be conveyed. The warrantors tendered to plaintiffs the purchase price, with interest and costs.

It is therefore ordered that the judgment below be reversed, and it is now ordered that the defendants, L. E. Etchison, J. A. Edson, and S. B. Hicks be recognized as the lawful owners of the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 15, township 20 N. of range 15 W., in Caddo parish, state of Louisiana, and be put in possession of the same according to law; and it is further ordered that this cause be remanded to the court below for trial and adjudication of plaintiffs' call in warranty; and it is further ordered that plaintiffs pay costs in both courts, without prejudice to their rights against the warrantors.

(129 La.)

No. 18,691.

CHRISTINA v. CUSIMANO et al.

(Supreme Court of Louisiana. Nov. 27, 1911.
Rehearing Denied Jan. 2, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1097*)—REVIEW—SUCCESSIVE APPEALS—LAW OF THE CASE.

Where a motion to dismiss an appeal has been overruled by this court, and the judgment has become final, the matter is concluded, and will not be inquired into on grounds considered in such judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

2. PLEADING (§ 248*)—AMENDMENT—PETITION—NEW CAUSE OF ACTION.

Where suit is brought on a mortgage note received as a substitute for other notes similarly secured on the same property, an amendment to the petition, praying, in the alternative, that, should it be found that plaintiff cannot recover on the note sued on, he be allowed to recover on those which he surrendered in exchange for it, does not change the substance of the demand or ask a different remedy, and is properly allowed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

3. BILLS AND NOTES (§§ 497, 525*)—ACTIONS—BURDEN OF PROOF—SUFFICIENCY OF EVIDENCE.

Where it is shown that a mortgage note left in the hands of a notary to be delivered on certain conditions to a particular person has been fraudulently disposed of, the burden of proof rests upon a subsequent holder seeking to recover to show that he acquired the note in good faith before maturity and for a valuable consideration; and, where such holder, as a witness in his own behalf, testifies that he acquired the instrument from the notary at a

certain hour on the day of its issue, and paid for it with his check for the amount expressed upon its face, whereas, his account in the bank shows that no such check was paid, and other evidence shows that the note had not been made at the hour stated, the burden of proof is not discharged, and there can be no recovery.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1675-1687, 1832-1839; Dec. Dig. §§ 497, 525.*]

4. APPEAL AND ERROR (§ 485*)—EFFECT OF TRANSFER OF CAUSE—ISSUANCE OF EXECUTION.

Where suit is brought on a mortgage note, which is identified with a particular act, and other persons intervene, claiming upon similar notes, which they assert are the genuine ones, and there is judgment in favor of one of the parties, holding his note to be genuine and rejecting the claims of the others, and the others obtain orders granting them appeals, suspensive and devolutive, and fixing the amount of the bonds to be given, and they give the bonds and perfect the appeals, the party in whose favor the judgment is rendered has no capacity to ignore the orders of the court and issue execution. Where an appellant gives an insufficient bond, the remedy of the appellee lies in an application to the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2264-2274; Dec. Dig. § 485.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Frank Christina against Mrs. Theresa Cusimano and others, and Louis Spiro and others intervene. From the judgment, Spiro and another appeal. Affirmed.

Joseph Lautenschlaeger and Benjamin R. Forman, for appellant Spiro. Alfred D. Danziger, for appellant Dreyfous. Frank E. Rainold, for appellee Christina. P. J. Paterno, for appellees Rocco and Theresa Cusimano and Salvatore Cantioato.

Statement of the Case.

MONROE, J. Plaintiff brought suit on a note for \$3,300, purporting to have been made by a person whose name really appears to be Salvatore Cantioato, to his own order and by him indorsed, dated July 15, 1907, payable in one year, with interest, and secured by mortgage on certain real property in this city. He alleged that he acquired the note from Rocco Cusimano and his wife, Theresa Cusimano, who acquired it from Cantioato, in part payment of the purchase price of said property; that he gave said Rocco and Theresa Cusimano, in exchange for said note, six notes, each for \$500, made and indorsed by them, dated April 19, 1906, payable in from one to six years, and secured by mortgage and vendor's lien on the property mentioned, which notes he acquired as the vendor of said property. He further alleged that he had been paid \$325, which was duly credited on the note sued on, and he prayed for citation and for judgment against the Cusimanos and Cantioato for the amount of said note, with interest,

attorney's fees, and costs, less \$325, and with recognition of the mortgage by which said note purports to be secured.

The Cusimanos answered, in effect, that they purchased the property referred to in the petition from the plaintiff on April 19, 1906, and gave in part payment of the purchase price six notes of \$500 each made by Theresa Cusimano, with Rocco Cusimano, her husband, to authorize her; that, at plaintiff's request, they on July 15, 1907, repaired to the office of Robert J. Maloney, notary, where they were made to affix their marks to an act which, they are now informed, purports to be an act of sale of said property to Cantiotto, and to a note for \$3,300; that they are illiterate and are unable to speak, read, or write English; that said purported sale was not a sale; that they never delivered the property to Cantiotto, never received the \$2,500, which, the act declares, was the cash portion of the price, never received the six notes of \$500 each, which plaintiff alleged he surrendered; and that they found that their property stood in the name of Cantiotto, and that there were outstanding against it the seven notes mentioned. They further alleged that all this was brought about at the instance of plaintiff, and that they did not understand it; that Cantiotto was in Italy, and was here represented by a curator ad hoc; that the property in question was the separate property of Theresa Cusimano; that Maloney acted as the agent and adviser of plaintiff, and that they paid him in that capacity at different times sums aggregating \$410. They prayed that the pretended sale to Cantiotto be decreed a simulation; that the note and mortgage given and executed in connection therewith be decreed of no effect; and that plaintiff be decreed not to be the holder for value of the note sued on. The curator ad hoc, appearing on behalf of Cantiotto, filed a general denial.

Louis Spiro intervened, alleging that he was the owner of the genuine Cantiotto note for \$3,300, that it was renewed, by Maloney, up to July 15, 1909, and interest paid, but that Maloney was without authority to renew it.

William Schroeder intervened, alleging that he was the owner of the genuine Cantiotto note, and praying to be so recognized. Plaintiff answered, alleging that the signatures on the notes held by the interveners were forged. There was a trial, in the course of which, the expert appointed by the court reported that the note held by Spiro was genuine, and that the others were forged, and there was judgment in favor of Spiro and against Rocco Cusimano and Cantiotto in solido for \$3,300, with interest, recognition of mortgage, etc., and directing that the property in question be sold, for cash, without appraisal, and that Spiro be paid by preference, out of the proceeds; the

concluding paragraph of the judgment, however, limiting its effect as to Cantiotto to the property.

From the judgment so rendered (which was signed Jan. 3, 1910), the plaintiff and Schroeder appealed on January 7, 1910; and an appeal was granted to the "defendant" on March 9, and lodged in this court on March 11, 1910. Thereafter, on March 31st, an agreement signed by the different counsel, to the effect that the Cusimanos and Cantiotto should be considered parties to the appeal, was filed in the record; and shortly afterwards, on a motion to dismiss the appeal of the Cusimanos, it was held that the agreement was binding on the parties. *Christina v. Cusimano et al.*, 125 La. 1063, 52 South. 157. Considering the merits, the court concluded that further inquiry should be made into any and all facts which might throw light on the forgeries; that the act of sale to Cantiotto should be corroborated by other evidence, and that something more should be ascertained concerning Cantiotto, and the case was therefore remanded, to be tried in accordance with the view thus expressed. *Christina v. Cusimano*, 125 La. 1062, 1063, 52 South. 157.

When the matter again reached the district court, additional pleadings, to which we shall refer hereafter, were filed on behalf of plaintiff and defendants. Jules S. Dreyfous intervened, alleging that pending the appeals from the original judgment the property involved in the litigation had been sold by the sheriff under a writ of *fi. fa.* issued at the instance of Spiro, and had been purchased by him, and praying that the title so acquired be sustained, and there were some other pleadings, after which and after hearing evidence and argument there was judgment decreeing the nullity of the alleged sale to Cantiotto, rejecting the demands of Spiro, Schroeder, and Dreyfous, condemning the Cusimanos on the six notes sued on (in the alternative) by plaintiff, ordering that the property affected be sold, and that plaintiff be paid, by preference, from the proceeds; that each intervenor pay the costs of his intervention; and that the balance of the costs be paid by the Cusimanos. From the judgment so rendered, Spiro and Dreyfous have appealed.

We find the facts of the case to be as follows:

The Cusimanos (man and wife), who can neither speak nor understand English, nor read nor write in any language, had acquired two lots of ground, or an interest in two lots, by paying the price in small monthly installments, and had built, or had begun to build, a house on them, the purchase having been made in the name of the wife, though there is no suggestion that it was with paraphernal funds; but they concluded that they needed more money for their building operations, and an arrangement ap-

pears to have been made whereby the title was placed in the name of Christina, who on April 19, 1906, executed an instrument purporting to be a sale of the property to them for \$4,000, of which, according to the act, \$1,000 was paid in cash, and the balance was represented by their six notes of \$500 each. The \$1,000, as we infer, was the amount that they had already paid, and the six notes were given for \$3,000 in cash, which was then and there loaned to them by Christina. The first of the six notes fell due in April, 1907, and, as it was not paid, Christina instructed or authorized his wife to see about it, and she saw Maloney, the notary who had attended to their business for them, and who, as it turned out afterwards, was about that time, and had been engaged in various fraudulent practices, and particularly in the practice of forging and issuing for his own benefit multiples of genuine mortgage notes executed in his office and paraphed by him. The Christinas being as ignorant and helpless as the Cusimanos, Maloney, giving some foolish reason, told them that it would be better for the Cusimanos to make a transfer of the property in the form of a sale to some third person, and, taking his note as in part payment of the price for a sufficient amount to cover that represented by the notes held by Christina, exchange the one for the others; and, as between the notary and the wives of the two Italians, that plan was agreed on, and Cantoto, a poor cousin of Mrs. Cusimano's, who was living with them and at their expense, was selected as the third person who was to take the title in his name and issue the note, with the understanding, however, that he was to execute a counter letter showing the real nature of the transaction. The notary accordingly some time in June drew up an act whereby Mrs. Cusimano, aided by her husband, was apparently to sell the property to Cantoto. For some reason, not explained, he did not get the parties together until July 15 (1907), and he then appears to have found that there were quite a number of errors in the act which he had prepared, which errors he proceeded to correct by erasures and interlineations to which no reference in the margin or otherwise was made. As thus corrected, the act was signed by Cantoto, and received the mark of Mrs. Cusimano, and it appears to have received the mark of Rocco Cusimano, but in point of fact he was not there, and did not then or at any other time make the mark that is attributed to him. The execution of the act also appears to have been witnessed by M. R. Newhauser and J. V. Le Clerc, but they testify that they were not present, and that they signed as witnesses at some other time, neither of them knowing exactly when. Mrs. Christina, who acted as her husband's agent in the matter, had in the meanwhile left the past-due \$500 note with the notary, and on

the morning of July 16th brought down the other five notes which were held by her husband and received, in place of the six (with accrued interest), the note for \$3,300, originally sued on in this case, together with a policy of insurance upon the buildings, as per the act of sale and mortgage purporting to secure said note. The notes issued by the notary to Spiro and Schroeder each, like that issued to plaintiff, purports to be the identical, and only note executed by Cantoto. Schroeder having retired from the contest, we have to deal only with the other two notes. The expert appointed by the district court found that the note held by Spiro is the genuine one, and that the others are forged, and we are satisfied that he was right in his finding. Upon the first trial of the case, however, Spiro testified positively that he got the note from Maloney on July 15th, and that he gave for it his check on the New Orleans National Bank for \$3,300. Counsel for plaintiff thereafter offered in evidence a copy of his account with the bank mentioned covering the period between June 8th and August 2d, and it shows that no check for \$3,300 was paid during that period, and neither then nor on the second trial of the case did Mr. Spiro make any satisfactory explanation. As the matter stands, therefore, it cannot be said that there is any evidence in the record which would enable a court to say that he acquired the note held by him for a valuable consideration. Beyond that he testified that he got the note from Maloney between 1:30 and 2:30 p. m., but Mrs. Cusimano testifies that the execution of the note and the act did not take place until about 5 o'clock p. m. Again, it appears that Mr. Spiro makes something of a business of buying and selling real estate, and is a frequent investor in mortgage notes; and yet, though the act with which the note in question is identified contains the provision:

"The purchaser hereby binds himself to keep the buildings on above described property constantly insured against the risk of loss by fire and to transfer such insurance to the present owner or any other holder or holders of above described note, up to the full amount of such note"—

and though a policy of insurance was delivered to Mrs. Christina, with the note that was given to her, Mr. Spiro testifies that he received no transfer of insurance, and at that time made no inquiry upon the subject. Further still, the act with which the notes in question are identified (for there is no question as to the genuineness of the paraph on either of them) makes no provision whatever for the mortgage resting on the property to secure the \$3,000 represented by the six notes held by plaintiff. To the contrary, the act contains the recital:

"By reference to the certificates of the register of conveyances and recorder of mortgages in and for the parish of Orleans, annexed hereto,

and from the United States District and Circuit Courts of this district, it does not appear that said property has been heretofore alienated by the said vendor herein or that it is subject to any incumbrances whatever."

The fact is that the property was then incumbered by the mortgage in favor of the plaintiff for \$3,000, with interest, etc., imposed by the notarial act of April 19, 1906, and that no attempt was made to release that mortgage until July 25, 1907, when an act of release, executed by Paul W. Maloney, notary (brother of Robert J. Maloney), was filed in the recorder's office. That act recites that J. Vic Le Clerc appeared before the subscribing notary as the last holder of the five notes that plaintiff had surrendered, and declared that they had been paid in full; that he exhibited them to the notary, duly canceled and erased, and authorized the release of the mortgage by which they were secured. On the other hand, Le Clerc testifies that while he signed the act of release he never was the owner of the notes; that he got them from Robert J. Maloney; and (being shown the notes) that they were never paid while in his possession and were never, at any time, canceled or marked paid, and he is corroborated by the notes themselves which are in the record uncanceled.

On January 7, 1910, which was within 10 days from the signing of the judgment rendered on the first trial of the case, Schroeder and Christina each obtained an order granting him a suspensive and devolutive appeal on furnishing a bond for \$500, and the bonds were duly furnished and the appeals duly lodged here, under the number 18,098. On January 28th Spiro caused a writ of *fi. fa.* to be issued under the judgment thus appealed from, and the sheriff by virtue of said writ seized the property here in question, and advertised it for sale. On March 9th a devolutive appeal was granted to "defendant," on motion of counsel for "defendants," for which a bond was furnished by Mrs. Cusimano, and the appeal was duly brought up. On March 10th the sheriff adjudicated the property which he had seized and advertised to Jules S. Dreyfous for \$4,950, of which amount \$495 was paid on account. On March 31st a motion was filed in this court by counsel representing the Cusimanos and Cantloto, to which was attached a written instrument, signed by the counsel for all the other litigants, embodying an agreement to the effect that the Cusimanos and Cantloto "be and they are hereby made parties to the appeal." Thereafter a motion was filed on behalf of Spiro to dismiss the appeal which had been granted on motion of counsel for "defendants," and on April 11th the motion was denied; the court saying, with reference to the agreement above mentioned:

"This agreement, though filed as before stated, was entered into, as shown by the date on the face of the paper, on March 18, 1910. In

the presence of such an agreement, we will not stop to consider the objections urged to the appeal. We must give effect to this agreement. It evidences a consent that parties be made parties to the appeal among counsel that is conclusive and binding."

In the record which was last brought up we find some testimony given by Mr. Ricker, the chief deputy of the civil sheriff, upon the subject of the course that has been pursued by the appellant, Mr. Dreyfous, since the adjudication to him of the property. Mr. Ricker testifies that the counsel for Christina and for Schroeder objected to his proceeding to sell the property; that the adjudicatee paid \$495 on the day of the sale, and has paid nothing since; and that he has not complied with the adjudication. Being asked, "Has he ever offered to comply with the adjudication?" the witness answered:

"Well, I don't know. The title has been referred to Mr. Danziger, and he has not reported on it. They have not complied with the adjudication."

He is then cross-examined by Mr. Danziger (counsel for Dreyfous) as follows:

"Q. Has any demand been made by you for us to comply, as it has been termed; in other words, to pay the balance of the purchase price? A. I asked you, several times, whether you intended to comply. That was before the Supreme Court passed on the question. You said you were going to wait to see how this came out. Q. Have any steps been taken by your officer to enforce the compliance by demanding the balance of the purchase price? A. No, sir. Q. As a matter of fact, the sheriff's office doesn't require the purchaser to comply—don't you wait upon the action of the plaintiffs? A. Once in a while I call and see the lawyer, and ask him how he is getting along with it. Q. That is what you did in this case? A. Yes, sir; never made any personal demand on Mr. Danziger. The question in dispute in this appeal was pending then, and Mr. Danziger said he preferred to wait. By the Court: For the Supreme Court to decide the case? A. Yes, sir. By Mr. Paterno: Since the Supreme Court decided the case has there been no (any) attempt on the part of Mr. Danziger to comply for his client? A. He has not complied. By Mr. Danziger: Has any one of the attorneys for any party to this suit asked you to take proceedings of any kind to force the adjudicatee, or to have the adjudicatee, to pay the balance of the purchase price? A. No, sir."

Opinion.

[1] Counsel for the appellant Spiro renew the discussion of the question of the appeal as between Rocco Cusimano and their client, and argue that the former judgment of the district court could only have been reversed to the extent that it affected the claims of Christina and Schroeder. We are, however, of opinion that the matter is closed by the judgment rendered, which held that the agreement of the counsel to the effect that the Cusimano and Cantloto "be and they are hereby made parties to the appeal" was binding.

[2] It is further argued on the basis of objections that were made on the trial that

plaintiff and defendants were improperly allowed to amend their pleadings. We do not concur in that view. Plaintiff brought suit on a mortgage note which he assumed, and had a right to assume, was genuine, and which he alleged, not only in his petition, but in his original answers to the interventions, had been accepted by him in exchange for other notes, which he knew to be genuine, which (with the accrued interest) called for a like amount, and which were secured by mortgage and vendor's lien on the same property. The developments on the first trial showed that a fraud had been perpetrated, and that the note upon which he had sued was one of three, two of which must necessarily have been forged. When, therefore, the case was remanded, in order that the fraud should be thoroughly investigated, he amended his pleadings by setting up the notes originally held by him, and praying that he have judgment on them in the alternative, and in the event that it should be found that the note that he had received in exchange for them was not what it had been represented to be. There has been no change either in the substance of his demand or in the relief sought; for the original demand was for \$3,000 money loaned, with interest and with recognition of mortgage rights on certain property, and the same \$3,000, with interest and mortgage rights are now demanded. The defendants the Cusimanos alleged originally that the notarial act executed before Maloney evidenced no real sale, but was a mere sham, and that they had been tricked into a position where they found their property standing in the name of Cantloto, with the six notes which they had issued and the note which Cantloto had issued outstanding against it, and they prayed that the pretended sale to Cantloto be "decree'd a simulation and no sale at all, and that the note given in connection therewith and claimed to be owned by plaintiff (note for \$3,300 July 15, 1907) be decree'd to have no force and effect, and not to bear against the property of defendants."

Cantloto, through a curator ad hoc, filed a general denial; but neither he nor the other defendants appear to have answered the interventions at all, nor do we find that on the original trial any judgment by default was rendered against them. The answers to the interventions filed by them when the case was remanded were not amended answers therefore, but were original answers, in which the Cusimanos allege that the pretended sale to Cantloto is null and void for the reasons (1) that the act was not signed by Rocco Cusimano, and was signed by no one in the presence of two witnesses; (2) that Theresa Cusimano never heard it read, in its present form, and was unable to read it herself; (3) that it was a fraud, because no sale was intended; (4) that material alterations have been made in the act, without their knowledge or consent; (5) that the

notes held by the interveners are not secured by mortgage under said act; (6) that interveners paid nothing to appearers for their notes and acquired them, if at all, from one not the owner; (7) that interveners never acquired said notes at all, and in which Cantloto denies that he bought the property in question or paid anything for it, alleges that it belongs to the Cusimanos, and further alleges that he signed one note for \$3,300, for which he received no consideration, and the holder of which he does not know.

[3] The intervener, Spiro, denied under oath that the counsel who appeared for the Cusimanos and Cantloto on the second trial was authorized to represent them. So far as the Cusimanos are concerned, they, or rather Mrs. Cusimano and her daughter, were present and testified during the trial, and, as Mrs. Cusimano is shown to have been acting for her husband throughout, we think the authority of the counsel by whom they were examined was sufficiently apparent. As to Cantloto, there is some testimony concerning a power of attorney said to have been sent by him to Cusimano's son-in-law, by whom it seems likely that the counsel was employed. The testimony is not very definite, however, and, if it were at all material, we should perhaps hold that the authority has not been sufficiently proved. As matters stand, the evidence is conclusive to the effect that as between the plaintiff and the defendants, and as between the defendants inter sese, the whole purpose of the transaction originated and carried through by Maloney was to enable the Cusimanos to obtain delay for the payment of the notes held by plaintiff, and, to that end, to substitute for those notes a single note, secured in the same way, for an amount equal to the aggregate of the others, with the accrued interest, less what had been paid on account. The genuine note executed by Cantloto (who had no interest in the matter) was left with Maloney, in trust, to be delivered to plaintiff, upon his surrendering the notes held by him, and plaintiff's notes were delivered to Maloney on condition that he, plaintiff, should receive the genuine Cantloto note in exchange for them. When, therefore, Maloney delivered the genuine Cantloto note to Spiro, he did so in fraud, and the disclosure of the fraud imposed on Spiro as a prerequisite to his right to recover against the maker the burden of proving that he acquired the note in good faith before maturity and for a valuable consideration, and even that proof would not entitle him to any preference quoad the mortgaged property, over the plaintiff, because, when the note was issued, and when Spiro says that he acquired it, plaintiff mortgage was of record, valid, and subsisting, and the condition upon which it might have been canceled, to wit; that he should receive the genuine Cantloto note, secured by a like mortgage, was not complied with. Spiro has not discharged the burden

to which we have thus referred. He went on the stand, upon the first trial, as a witness in his own behalf, and swore, not casually or uncertainly, but specifically, emphatically, and with repetition, that he had acquired the Cantloto note from Maloney on July 15, 1907, between 1:30 and 2:30 o'clock p. m., and that he had paid for it on that day with his check on the New Orleans National Bank for \$3,300, whereas his account taken from the books of the bank shows that no such check was paid, and from other evidence it appears that the Cantloto note was not made until about 5 o'clock in the afternoon. We conclude, therefore, that he did not get the note as he says he did, and as there is no other evidence on the subject, that he has failed to show that he acquired it in good faith before maturity, or for value, and hence is not entitled to recover on it. We may add that, according to the evidence in the record, the property in question belonged to the community, presumed to exist, between Rocco Cusimano and his wife, from which it follows that Mrs. Cusimano had no power to alienate it, and, as her husband took no part in the act, that the pretended sale is void on that account. [4] We have seen that plaintiff and Schroeder, each asserting a claim superior to that of Spiro against the property here in dispute, obtained orders granting them appeals, suspensive and devolutive, from the judgment rendered in favor of Spiro, that they perfected those appeals, and that whilst they were pending Spiro caused execution to issue on his judgment, under which the property was seized and adjudicated to Dreyfous; and we have also seen that Dreyfous has never complied with the adjudication, but, speaking through his attorney, has informed the sheriff that he preferred to await the result of the present litigation. We are of opinion that Spiro had no capacity to ignore the order of the court whereby the execution of his judgment was suspended. Where an appellant gives an insufficient bond, the remedy of the appellee lies in an application to the court. Whether Mrs. Cusimano should be held liable, with her husband, on the notes held by the plaintiff, is a question which has not been raised.

Judgment affirmed.

(129 La.)

No. 18,739.

BRITT et al. v. CALDWELL-NORTON
LUMBER CO. et al. (D. G. PETTY
LUMBER CO. et al., Warrantors).
(Supreme Court of Louisiana. Jan. 2, 1912.)

(Syllabus by the Court.)

COURTS (§ 224*)—JURISDICTION—AMOUNT.

Where a judgment has been rendered decreeing plaintiff the owner of land, and giving her a judgment for \$935.68, and a judgment has been rendered in favor of defendant

against the warrantor for \$935.68, this court is without jurisdiction in an appeal by the warrantor from the judgment in favor of the defendant, as the amount involved is below the jurisdictional limit of this court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 608-618; Dec. Dig. § 224.*]

Appeal from Eleventh Judicial District Court, Parish of Natchitoches; S. J. Henry, Judge.

Action by Martha Britt and others against the Caldwell-Norton Lumber Company or the Boleyn Lumber Company, D. G. Petty Lumber Company and others, warrantors. Judgment for plaintiffs against defendant the Boleyn Lumber Company, and the warrantors appeal. Dismissed.

C. W. Elam, Norwood T. Smith, and M. L. Dismukes, for appellant D. G. Petty Lumber Co. Breazeale & Breazeale, for appellee Boleyn Lumber Co. Scarborough & Carver, for other appellees.

BREAUX, C. J. This is the second appeal to this court, and, in addition, an application was made for a writ of certiorari.

In the first appeal the question of the extent of the right of the Britt heirs was considered and decided.

As to Mrs. Britt, who also claimed an interest in the property, there was failure in the proof, and, for that reason, her action was dismissed as in a nonsuit.

Britt v. Caldwell Lumber Co., 126 La. 155, and 52 South. 251.

The questions presented in the certiorari proceedings have no bearing. They relate to the time within which a judgment should be signed in the district court.

Britt v. Caldwell Lumber Co., 129 La. 243, 55 South. 779.

In the present suit, plaintiff, Mrs. Britt, seeks to recover the value of timber cut on the land, of which she claimed ownership and part of which land the heirs recovered in the first suit.

In the present action, Mrs. Britt recovered judgment against the defendant the Boleyn Lumber Company in the sum of \$935.68, with all costs, and she was decreed the owner of the land for which she sued, and judgment was also rendered in favor of defendant over and against the D. G. Petty Lumber Company for an amount as above, with all costs of suit except the sum of \$7.

Only the warrantors have appealed.

The defendant admits that plaintiff is not a party to this suit, but contends that he can maintain his appeal as between him and defendant.

Be that as it may, we will not pass upon the point, as there is another point which we will consider, as it disposes of the case in this court.

The judge of the district court decided in favor of plaintiff, and ordered that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

land be delivered to the plaintiff to the extent of her interest, and further condemned defendant to pay plaintiff the sum of \$935.68. To the defendant the court gave judgment for the sum of \$935.38 against warrantor. Not a word was said about the land, so that, as between defendant and warrantor, the only amount in controversy is \$935.38, and that is all that defendant could ever recover. The question about the land is entirely eliminated.

It would be useless for defendant to ask for more than the said amount. He is entirely barred from and out of this court as to anything else.

We therefore conclude to dismiss the appeal, and reserve to warrantor, upon the required oath, the right to have the case transferred to the Court of Appeal, in whose jurisdiction is the parish of Natchitoches.

For reasons stated, the appeal is dismissed.

(129 La.)

No. 18,827.

POLICE JURY OF PARISH OF IBERVILLE
v. TEXAS & P. RY. CO. et al.

(Supreme Court of Louisiana. Jan. 2, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1212*)—REMAND—PROCEEDINGS BELOW.

As the decree, remanding this case, stated that it was to enable parties to introduce evidence on the quantum of damages, the trial court was correct in ruling that only evidence on the question of damages could be introduced, and that the whole case should not be reopened.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4713; Dec. Dig. § 1212.*]

2. APPEAL AND ERROR (§ 1013*)—REVIEW—CONFLICTING EVIDENCE.

As the trial judge heard the varying testimony of all the witnesses, and as there is no manifest error in the amount of damages which he allowed plaintiff, his judgment will not be interfered with.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3993-3995; Dec. Dig. § 1013.*]

Appeal from Twenty-First Judicial District Court, Parish of Iberville; Calvin K. Schwing, Judge.

Action by the Police Jury of Parish of Iberville against the Texas & Pacific Railway Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Edward N. Pugh & Son and Walter Lemann, for appellant. Albin Provosty, L. De Poorter, and Howe, Fenner, Spencer & Cocke, for appellees.

BREAUX, C. J. This is the second appeal. The case was remanded for the purpose, as stated in the decree, of enabling parties to introduce evidence on the question of damages and for further proceedings according

to law. See same title, 122 La. 888, 47 South. 692.

[1] Upon calling the case for trial, counsel for defendant urged that under the decree before referred to the whole case should be tried, while counsel for plaintiff opposed the application to reopen the whole case, and contended that the question for decision was one of damages.

The court did not grant the application, but ordered that the quantum of damages be fixed. To the court's ruling, there was objection by counsel for defendant. They gave notice to the court of defendant's intention to sue and apply for relief from this court through a writ of mandamus.

There was no writ applied for, and, at a subsequent date, the case was tried before a jury. The jury found a verdict for plaintiff in the sum of \$8,947.70.

A motion for a new trial was filed. The court deemed the amount too large, and sustained the motion, and granted a new trial.

The cause was then taken up for trial by the court, without a jury, and, on the evidence adduced by plaintiff and defendant on the trial, before the jury (under the provisions of the act numbered 247 of the General Assembly of the year 1908, relative to trials in civil cases), the court rendered judgment condemning defendant to pay plaintiff the sum of \$6,800.

From this judgment the defendant appealed.

On Application to Reopen the Case.

The district court properly denied this application.

In regard to the writ of mandamus, on second thought, counsel for defendant inform us in the brief that all thought of suing for that writ was abandoned after he had notified the court, because it was deemed inadvisable in view of the fact that recently in Pratt v. McCoy, 123 La. 917, 49 South. 640, this court held that mandamus proceedings will not lie to compel the trial judge to receive evidence.

In our view of the cause, the question has lost all importance and can be passed without special comment, save to state that writs, under the supervisory jurisdiction of this court, are largely within the court's discretion, and, while it is quite true, as stated in the last-cited case, that the court will not interpose its authority in matter of the mere admission of evidence during the course of the trial, the question is not entirely similar.

Inasmuch as this court is not bound by hard and fast rules, it may well be that in the matter of interpreting one of our judgments the court would exert its jurisdiction in order to prevent a serious error, which might result in useless protracted litigation and the incurring of costs uselessly.

The ruling was entirely correct, as made evident by our decision heretofore rendered, which resulted in remanding the cause, and there was not the least necessity for reopening the whole case.

Plaintiff answered the appeal, and asked the court to increase the amount of damages, to the sum allowed by the jury, which the district court did not think should be allowed.

In our decision, heretofore handed down, cited above, the court stated that the bridge across the bayou at Plaquemine was damaged by destruction of at least one-half of the structure. It was in good condition before the fire. It had recently been repaired and painted.

There is a photograph before us (taken after the fire) representing the bridge. It shows that one leaf of the bridge had fallen down, and part of the bridge was entirely destroyed. There is also a blue print showing the part destroyed and the part damaged by fire.

The cost to replace each item of the bridge destroyed or damaged is given. Laymen in matter of constructing bridges testified; but their estimates of the loss and damage occasioned by the fire vary very much. Bridge building being an important branch of the architectural science and art, it is natural to consult the testimony of those who have made a special study of such work. Several witnesses, who were architects, bridge builders, civil engineers, and very well informed upon the subject, testified. Their estimates also vary.

[2] The judge of the district court must have been well informed. He must have had exceptionally favorable opportunity to arrive at a conclusion. He appears to have been conservative in his estimates. It appears to us that justice has been done. We therefore decline to interfere with this judgment, it appearing correct.

The judgment is affirmed.

(129 La.)

No. 18,861.

BREAUX v. ROYER et al.

(Supreme Court of Louisiana. Jan. 2, 1912.)

(Syllabus by the Court.)

1. MORTGAGES (§ 37*)—PAROL EVIDENCE—ADMISSIBILITY.

In the absence of allegations that the execution of an authentic act of sale of immovable property was induced by error, misrepresentation, or fraud, parol evidence, to show that a contract of mortgage was intended, is properly excluded.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 97-107; Dec. Dig. § 37.*]

2. VENDOR AND PURCHASER (§ 239*)—BONA FIDE PURCHASER.

One who, upon faith in the public records, purchases real estate, the recorded title to

which stands in the name of his vendor, is entitled to be protected in his purchase against any claims or equities arising out of the previously existing relations between his vendor and the latter's author or other persons.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 583-600; Dec. Dig. § 239.*]

Appeal from Eighteenth Judicial District Court, Parish of Acadia; Wm. Campbell, Judge.

Action by Drozin Breaux against Joseph Royer and others. Judgment for defendants, and plaintiff appeals. Reversed, and judgment rendered.

Chappuis & Holt, for appellant. Goudeau & Barbe and Taylor & Gremillion, for appellees.

MONROE, J. [1] This is a petitory action for the recovery of certain land in the parish of Acadia, which plaintiff alleges that he acquired, by purchase, from the widow and heirs of A. S. Chappuis, and which, with the exception of 27 arpents, was acquired by said Chappuis apparently by purchase from Joseph Royer; the 27 arpents mentioned having been similarly acquired from Charles Cudin. The defense set up is that the apparent sale from Royer to Chappuis was intended as a mortgage, and that plaintiff and his apparent vendors have fraudulently conspired to put the title in his name, and have him bring this suit in order to shut off inquiry and prevent defendant from establishing that fact. It is not alleged that defendant was induced, by error, fraud, or misrepresentation, to execute an act of sale, when an act of mortgage was intended; the charge of fraud being leveled exclusively at the dealings between plaintiff and his alleged vendors, and the idea conveyed being that he is without interest, and is merely a person interposed for the fraudulent purpose above stated. Upon the trial, however, defendant offered parol testimony to show that the conveyance from Royer to A. S. Chappuis, which, upon its face, is an ordinary, notarial act of sale, duly recorded, was intended to operate as a mortgage, but, in the absence of any allegation that defendant was induced to execute it by reason of error, misrepresentation, or fraud, the testimony was properly excluded. C. C. 1901, 2236; *Mather v. Knox*, 34 La. Ann. 410; *Chaffe v. Ludeling*, 34 La. Ann. 967; *Jackson v. Lemle*, 35 La. Ann. 855; *Mulhaupt v. Youree*, 35 La. Ann. 1052; *Johnson v. Flanner et al.*, 42 La. Ann. 522, 7 South. 455; *Godwin v. Neustadt*, 42 La. Ann. 738, 7 South. 744; *Keough v. Meyers & Co.*, 43 La. Ann. 952, 9 South. 913; *Wilkins v. Durio et al.*, 45 La. Ann. 1119, 13 South. 740; *Bagley v. Bourque*, 107 La. 395, 31 South. 860; *Franklin v. Sewall*, 110 La. 292, 34 South. 448; *Maskrey v. Johnson*, 122 La. 791, 48 South. 266.

There being no effective attack upon the

title of plaintiff's authors, their reason for conveying the property to plaintiff would appear to be a matter of no concern to defendant. The charge that plaintiff and his authors fraudulently conspired for the purpose alleged was, however, inquired into and is unsustained by the proof, from which it appears: That A. S. Chappuis bought the main body of the land in dispute from the defendant Joseph Royer by an ordinary act of purchase and sale, as hereinabove stated, of date November 13, 1907, which contained no suggestion that it was intended to be other than as it appeared, and which was duly recorded. That he thereafter leased the property, first, to Royer himself, then, at his request, to his son, and then to Oniel Cormier, a third person, and that he paid all the taxes and expended something like \$3,000 in improvements. When the term of his lease (which was for one year from November 13, 1907) expired, or, possibly, before, Royer left the property and went to another part of the parish, where he bought lots, built a house, and engaged in farming. He says, in his testimony in this case:

"I went there with the intention of staying there permanently. I thought I had no more rights here [the word 'here' referring to the place which is here in dispute]."

A. S. Chappuis died probably in 1910, and in September of that year plaintiff, who is shown to be a farmer of good standing—worth some \$30,000 or \$40,000—called upon Abner Chappuis (who appears to have been attending to the business of his father's succession) with a view of buying a tract of land which he thought belonged to the succession. He was told that the succession did not own it, but that the widow and heirs of Chappuis would sell him the Royer place. He accordingly went off and looked at the Royer place, and after a few days came back and agreed to take it, at a valuation of \$11,000, in payment of which price he agreed to convey to the Chappuises certain real estate in the town of Rayne, for which he had a short time before paid \$4,000, and to give his notes for the balance of \$7,000. It appears that the wife of Joseph Royer had not moved away with him, but her son, Emile, being the lessee of the old place for the year 1908-09, that she had remained there; and she still remained after Cormier became the lessee for the year 1909-10; and it also appears that another son, Adolph, had stayed on the old place, working as a laborer, first, for his brother, Emile, and then for Cormier. About the time that Cormier's lease was to expire and when plaintiff was negotiating for the purchase of the place, there were rumors to the effect that Mrs. Royer would refuse to leave; that she was asserting some sort of an interest in the property, though precisely upon what basis no one seemed to know, the probability, as we infer from the testimony, being that she conceived the idea that she had some rights growing out of the

community which existed between her husband and herself, or growing out of the fact that the place had been for many years the homestead of the family. Neither the Chappuises nor the plaintiff attached much importance to what they heard; and, whilst the latter employed a lawyer to examine the title for him, he suggested that in the meanwhile they should take advantage of the presence in Rayne of one of the Chappuis family, who lived in New Orleans, to have the deeds, the one, from him to them, of his Rayne property, and the other from them to him, of their Royer property, executed, with the understanding that both deeds should be deposited in bank until the lawyer whom he had employed made his report, and with the further understanding that in the event that the report should prove satisfactory, and that Mrs. Royer should really refuse to move out, the Chappuises should assume the burden of putting him in possession. Thereafter, when the lawyer reported that the title was good, as it had already been vested in plaintiff, and as Cormier's lease had expired and he was leaving, it was thought advisable to bring the present action in plaintiff's name, and it was so brought; the petition alleging that Joseph Royer and his wife and son are in possession, although, as it proved, the parties who were, and are, holding possession, are the wife and son, the husband and father and former owner having permanently removed therefrom in the belief that he "had no more rights there."

We find nothing in the facts thus recited or in any other facts disclosed by the record to implicate plaintiff in any conspiracy. He is a plain farmer, and, though illiterate, is apparently very intelligent. There is nothing in the record to indicate that he knew anything about the business relations which may have existed between Royer and the Chappuises, or had any reason to conspire with the one family against the other. Royer had put the title to his property in the name of Chappuis, and it so appeared upon the public record; and, when the attorney employed by plaintiff to examine the title entered upon the discharge of that duty, he so found it, and he reported that the title was vested in the Chappuises, and that plaintiff could safely buy the property from them. It is true that plaintiff knew, and so stated, after the deeds had been executed, that in any event he could not lose, as the Chappuises were behind the title, as warrantors, and had ample means, but that does not authorize the inference, which defendant's counsel draws, that he was relying entirely upon the solvency of the Chappuises, and not at all upon the public records or the report of the attorney whom he had employed, and presumably paid to examine those records.

[2] Our conclusion, then, is that plaintiff is not a conspirator, or a party interposed, but is a purchaser, for a valuable consideration, of property, the recorded title to which

stood in the name of his vendors, and that he is entitled to be protected in his purchase against any claims or equities arising out of the previously existing relations between his vendors and their authors or other persons. *Levy v. Ward, Ad.*, 33 La. Ann. 1033; *Thibodaux v. Anderson*, 34 La. Ann. 797; *Boyer v. Joffrion, Sheriff, et al.*, 40 La. Ann. 657, 4 South. 872; *Broussard v. Broussard*, 45 La. Ann. 1085, 13 South. 699; *Broussard v. West, et al.*, 47 La. Ann. 1033, 17 South. 476; *Adams et al. v. Drew et al.*, 110 La. 456, 34 South. 602; *Adams et al. v. Brownell-Drews Lumber Co.*, 115 La. 179, 38 South. 957; *Bordelon v. Gumbel*, 118 La. 645, 43 South. 284; *Vital v. Andrus*, 121 La. 221, 46 South. 217; *Rudolf v. Gerdy*, 121 La. 477, 46 South. 598; *McDuffie v. Walker*, 125 La. 153, 51 South. 100; *Jolivet v. Chaves*, 125 La. 923, 52 South. 99, 32 L. R. A. (N. S.) 1046; *John T. Moore Planting Co. v. Morgan's, etc., Co.*, 126 La. 866, 53 South. 22; *Riggs Cypress Co. v. Albert Hanson Lumber Co.*, 127 La. 455, 53 South. 700; *Riggs v. Eicholz*, 127 La. 750, 53 South. 977; *Sorrel v. Hardy*, 127 La. 847, 54 South. 122.

Whilst the defendant Joseph Royer had himself moved off the land in dispute, he seems to have countenanced his wife and son in remaining in possession, and, as the matter is one that concerns the community, we think that he and the son should be held responsible for the costs.

It is therefore ordered, adjudged, and decreed that the verdict and judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of plaintiff and against the defendants, decreeing plaintiff to be the owner of the property here claimed by him and entitled to the possession thereof, and decreeing that defendants forthwith vacate said property and surrender possession of the same. It is further decreed that the defendants Joseph Royer and Adolph Royer pay all costs.

(129 La.)

No. 18,323.

ROGERS v. HIRAM J. ALLEN LUMBER CO., Limited.

(Supreme Court of Louisiana. May 8, 1911.
On Rehearing, Jan. 2, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§§ 279, 217*)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—CONTRIBUTORY NEGLIGENCE.

A mill hand, operating a cut-off saw, was struck upon the arm by a strip of wood carelessly thrown by another hand, who was working with another machine, with the result that his arm was knocked against the saw and his hand cut off; and this court finds that, save for the blow upon plaintiff's arm, there would have been no accident, and, even with the blow,

there would probably have been none, if the saw had been provided with its usual and proper equipment. *Held*, the millowner was guilty of negligence in employing a careless or incompetent hand and in failing to provide plaintiff with a reasonably safe place and reasonably safe appliance in and with which to do the work to which he was assigned, and plaintiff was not guilty of contributory negligence and did not assume the risk of defendant's negligence, or of that of its careless or incompetent hand, who was not plaintiff's fellow servant, within any rule that has been recognized by this court, since he and plaintiff were not engaged in the same work, and plaintiff had not seen enough of his carelessness to warrant the belief that he realized the danger therefrom to himself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. §§ 279, 217.*]

2. DAMAGES (§ 132*)—PERSONAL INJURIES—LOSS OF HAND.

Where a young man, 19 years of age, who is dependent upon his physical labor for his livelihood, loses his right hand through the negligence of his employer, this court feels justified in allowing him \$7,500 as damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 872-385; Dec. Dig. § 132.*]

3. DAMAGES (§ 128*)—PERSONAL INJURIES—AMOUNT.

The amount to be awarded plaintiff in an action for damages for personal injury cannot be affected by the suggestion or consideration that the defendant company has been placed in the hands of a receiver, and is paying but 10 cents on the dollar to its creditors.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 128.*]

Appeal from Third Judicial District Court, Parish of Bienville; Ben. P. Edwards, Judge.

Action by Glenn G. Rogers against the Hiram J. Allen Lumber Company, Limited. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Barksdale & Barksdale and Hall & Jack, for appellant. Richardson & Richardson, for appellee.

PROVOSTY, J. Appellee has moved to dismiss the appeal on the ground that no bond for appeal has been filed. There is none in the record.

Appeal dismissed.

On Rehearing.

Statement of the Case.

MONROE, J. [1] Plaintiff, being a little more than 19 years of age, had his right hand severed from his arm by a cut-off saw, which he was operating whilst in defendant's employ, and he attributes his injury to defendant's negligence, and prays for damages. Defendant pleads contributory negligence, assumption of risk, and fault on the part of a fellow servant; and it has appealed from an adverse judgment for \$10,000. The story of the accident, as told by the witnesses, is substantially as follows: Plaintiff was operating a cut-off saw, his position being in front

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of, and facing, the saw, to which he fed the slab that he was cutting, with his left hand, whilst he pulled the saw towards him, and against the slab, with his right hand, by means of a lever, which was attached to the frame to which the saw was fastened and which projected through the table, or roller bed, upon the right and above the level of the upper edge of the saw. When the slab was cut through, he would push the lever from him, and the saw would be carried into a box, or casing, which ordinarily served as a protection to the operator and to passers-by; but it appears that at the time of the accident an iron lever, which belonged to the machine and which was curved in such a way as to furnish a convenient handle whereby the operator could move the saw backward and forward, and yet keep his hand and arm in a comparatively safe position, had been broken, and that there had been substituted for it a straight piece of scantling (say 2x2 or 2x4), the hold upon which was less secure and placed the hand and arm of the operator in a position where, in the event of an accident such as happened, they were more likely to be injured. The accident consisted of plaintiff's being struck upon his right arm by a strip (of wood) which a young man by the name of Upshur had pulled from a nearby "edger" table, and which it was his business to throw into a conveyer trough, behind him, but which he carelessly threw against plaintiff's arm, knocking it against the saw, just as plaintiff was in the act of pulling the saw forward, with the result that plaintiff's right hand was cut off. Another unusual condition was that, for the accommodation of the substitute wooden lever, the top of the box or casing, from which plaintiff was pulling the saw, had been knocked off, so that the saw was more exposed than it would have been if the iron lever had been in use.

It is shown that Upshur had been employed by defendant for three days (or nights, as he and plaintiff were working on the night shifts), and that plaintiff had seen him at work on the night before that upon which the accident occurred, and had observed that he handled the strips that it was his business to remove from the edger table rather carelessly. It is also shown that immediately after the accident defendant caused the iron lever to be replaced and the casing of the saw to be repaired.

Opinion.

Our conclusions from the whole testimony are that save for the blow upon plaintiff's arm from the strip thrown by Upshur there

would have been no accident, and that even with the blow there would probably have been none, if the equipment of the saw had been in its usual and proper condition. We find that defendant was negligent in employing Upshur and in allowing the saw to be operated whilst the equipment was out of repair. We fail to find that Upshur was the fellow servant of plaintiff within any rule that has been recognized by this court, since the work that he was doing had no connection with that which plaintiff was doing. And we fail to find that plaintiff was guilty of any negligence that contributed to the accident, or that he assumed the risk of Upshur's negligence, or of the negligence of defendant in failing to furnish him with reasonably safe appliances and a reasonably safe place with and in which to do the work for which he was employed.

[2] We are given to understand through the briefs of the counsel (and there is some evidence to that effect in other proceedings before this court) that the defendant company has been placed in the hands of a receiver; that it is paying 10 cents on the dollar to its creditors; and that \$1,020 has been set aside to meet this claim—from which it is argued that the judgment for \$10,000 in favor of plaintiff should be affirmed, even though in itself it should be considered excessive, as he will, in no event, realize more than the \$1,020, and will get less than that in proportion as the amount allowed by the district court may be reduced. The situation is deplorable, but we cannot meet the difficulty in the manner suggested. All that we are authorized to do in this case is to determine the amount to which plaintiff is entitled. Whether he will be able to realize that amount upon the execution of his judgment is altogether another matter. We are of opinion that the amount awarded by the district court should be reduced, but we think, in view of the decrease within the past few years in the purchasing power of money, that we are justified in allowing in a case of this kind as much as \$7,500. *Summers v. Crescent City R. R. Co.*, 34 La. Ann. 139, 44 Am. Rep. 419; *Peniston v. Railroad Co.*, 34 La. Ann. 777, 44 Am. Rep. 444; *Davis v. Railway Co.*, 106 La. 81, 30 South. 250; *Dyer v. Relley & Leathers*, 28 La. Ann. 6; *Nelson v. Railway Co.*, 49 La. Ann. 491, 21 South. 635; *Ketchum v. Railway Co.*, 38 La. Ann. 777.

It is therefore ordered, adjudged, and decreed that the amount awarded by the district court be reduced to \$7,500, and that, as thus amended, the judgment appealed from be affirmed, the costs of the appeal to be paid by plaintiff.

(129 La.)

No. 18,471.

MARKS v. NATIONAL FIRE INS. CO. et al.
(Supreme Court of Louisiana. Nov. 27, 1911.
Rehearing Denied Jan. 15, 1912.)

(Syllabus by the Court.)

1. LIBEL AND SLANDER (§ 56*)—AVERMENTS IN PLEADING—WITHDRAWAL.

Where alleged libelous averments are made in an answer, and, upon a compromise of the suit, they are withdrawn, with the consent, or assent, of the one against whom they are made, an action for the libelous averments cannot be subsequently maintained.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 156; Dec. Dig. § 56.*]

2. LIBEL AND SLANDER (§ 4*)—STATEMENT IN PLEADING—LEGAL MALICE.

Where, from the circumstances of a case, a defendant has probable cause to believe that the allegations of an answer are true, and no legal malice can be imputed, no action will lie for damages caused by the allegations.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 111; Dec. Dig. § 4.*]

Appeal from Eighteenth Judicial District Court, Parish of Acadia; William Campbell, Judge.

Action by J. D. Marks against the National Fire Insurance Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Caffery, Quintero, Gidlere & Brumby, Foster, Milling, Brian & Saal, J. Zach. Spearing, J. C. Hollingsworth, Smith & Carmouche, and W. S. Parkerson, for appellants. Chapuis & Holt, Taylor & Gremillion, and E. D. Saunders, for appellee.

BREAUX, C. J. This is an action sounding in damages on the ground that defendant's charges, in a suit brought by plaintiff to recover an amount due him on a number of policies, were untrue, libelous and injurious to the amount of \$250,000.

The "Ida Rice Mill," owned by plaintiff, insured for the sum of \$35,000, was destroyed by fire on the 22d day of December, 1908.

Plaintiff sought to recover his losses by fire. He had a number of interviews with persons authorized to represent the companies, the agents, the adjusters, and accountants. He submitted his books to them; his written statements, and an account of the business.

In a number of conferences had, the differences that had arisen were considered. The defendant offered amounts in satisfaction of the claim, which plaintiff refused to accept.

The attempt at settlement arrived at a point rendering it evident that nothing could be accomplished by further delay.

Plaintiff brought suit on his policies in which he made the allegations generally made to recover on policies.

He had previously submitted a proof of

loss to his insurers, which they in the end declined to accept as satisfactory.

The defense severed in their defense, although it was very similar in each case, and filed separate answers, in which they denied all indebtedness to plaintiff on the ground, stated in these answers, because he had not complied with the iron-safe clause as required by the terms of the statute and the clauses of the policies; that he had not kept a set of books such as persons in business generally keep; a complete record of the amount of the stock and its grade; of rice deposited on the premises; nor of the amount of stock and grade of stock removed from the premises.

That the fire was of incendiary origin; and that, after insurance, there were several attempts to burn the mill of plaintiff to the knowledge of plaintiff, which were concealed by him from defendants, thereby violating the clause of the policy which declares the policy void if the hazard be increased by any means within the knowledge of the assured, and that had defendants known of these attempts to burn the property they would have canceled the policies.

The defendants in their answers alleged fraud and false swearing in the proof of loss furnished; in this, that he inflated the amount of clean rice produced from rough rice by the milling; that this was based on an impossible average of clean rice from rough rice. The claimed average, as stated by plaintiff in the proof of loss, was 105.81 pounds per barrel, or 2,497 barrels of Honduras rice, when such average could not and did not exceed 981 pounds per barrel.

The amount of this claim was \$7,500.

That an exaggerated claim for 27,100.11 pounds over the number of pounds on hand was fraudulent.

Another alleged fraudulent claim consisted, as alleged, in claiming a much larger number of rice bran than there was on hand. That the value of the rice was increased to an amount which is characterized as fraudulent; and similar complaint was made of sales, and regarding other items stated on the proof of loss.

There was a detailed statement regarding checks made to show inconsistency of claims by plaintiff.

Defendant particularly denied liability in the sum of \$1,990 covering 436 packets of clean rice sold to the Rayne Rice Mill.

The case, having been put at issue by the several answers of the different companies, was tried.

During the trial much evidence had been introduced when a proposition of compromise was discussed and it was finally adopted, and a compromise agreement signed.

Therein defendant admitted liability in the sum of \$31,000, with 8 per cent. interest per annum to begin to run 10 days from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the date of the judgment; and costs were to be paid, one-half by plaintiff and the other one-half by defendant.

It was agreed that the settlement did not cover the item of \$1,000 above mentioned, as claimed by the Rayne Rice Mill.

Article 4 of the agreement of compromise is as follows:

"The plaintiff abandons all claims for damages and attorney's fee."

And the following is also an excerpt from the agreement of compromise:

"And now come the defendants voluntarily, and not as part of the compromise settlement, and withdraw therein their charges of fraud and false swearing made in their answers and admit that the plaintiff has satisfactorily explained these items in his books and proofs of loss on which the charges of the defendants were based and has shown that these items were unintentional errors and omissions on his part."

This withdrawal of charges of fraud and false swearing was accepted and judgment was entered in the district court on the compromise settlement. This judgment was signed on the 29th day of July, 1909.

On the 19th day of April, 1910, plaintiff brought the present suit.

In his petition he states at length all that he had done to recover an amount due by the defendant companies and the wrongs inflicted upon him by the different companies during the time that he was seeking his own, and he specially complains of the answers of which we have made a synopsis, which we inserted above. He recites in his petition the different averments in which he is charged with fraud, deception, and false swearing as constituting a libel upon his good name.

He avers that by innuendo, defendants charged him with having intentionally burned or procured the burning of his rice mill.

He further avers that defendants, in making these malicious charges, were aided and abetted by adjustment companies and other parties named.

He represents that the charges are false and untrue; that they were given general publicity, and he (plaintiff) held up to public hatred and scorn, and this without probable cause.

He alleged that he had introduced all his evidence in chief, and before the defense was taken up in the original suit, a compromise was sought by defendants and an agreement was arrived at.

He copied in his petition the last article of the agreement, numbered four, to which we have referred in our foregoing statement.

He reiterates that there was not the least foundation for the alleged libel.

Plaintiff refers to himself and says that there was nothing in his reputation to justify the answers; that he enjoys the esteem and good will of the community in which he resides and of business men everywhere with

whom he has been brought in contact either socially or from a business point of view.

The defendants answered at length and detailed the different acts of plaintiff which had prompted them to defend the suit which plaintiff had brought. They averred that they employed a detective in order if possible to discover the cause of the fire; that, in order, if possible to discover the character and extent of the rice industry owned and conducted by plaintiff, they employed an expert accountant; that they referred the state of affairs to experienced counsel, who, after having acquired information, prepared the answer which was filed; they deny all conspiracy.

Thereafter, they filed an exception of no cause of action; and therein averred that the original suit was settled by compromise agreement; all differences were adjusted and that it amounted to *res judicata*, and, that, by its express terms plaintiff should be held to have abandoned all claims against them.

They also pleaded that plaintiff was barred by estoppel from recovering anything from them as their apology and withdrawal, as before mentioned, was thereby stated and understood and the suit terminated.

The case was tried before a jury and the damages assessed at \$25,000.

Defendants appealed.

[1] Plaintiff has failed to sustain his cause on two grounds:

He accepted the withdrawal by the defendants of the offending words.

He had part of his business in such a shape as to create the impression on the part of defendant that his losses were not as great as he thought.

Taking up the first proposition: Beyond question, defendants withdrew the objectionable averments of the answer with the consent of the plaintiff in as delicate a manner as the occasion required. They did not propose to make it a matter of barter and include it as part of the agreement and compromise.

Without preagreement or understanding, as it appears of record, they had the entry made in the deed to which we have before referred.

If ever at any time the character of plaintiff was touched it was intended to, and did, have a reinstating effect.

Defendants at all times during the trial disclaimed that they had the intention of proving that plaintiff had sought to destroy his property to the end thereby of enriching himself.

They also from the first did not seek to make it appear that they were attacking the character of plaintiff. During the examination of witnesses, it was expressly said that his character was not at issue.

In order, as we take it, to remove the sting caused by the allegations of the answer, voluntarily they were withdrawn in words

showing that it was not in the spirit of the least malice that they had been used.

Under the circumstances, it was a joint agreement in its effect, binding upon defendants, and which necessarily extended to plaintiff, although no part of the compromise proper.

If it were held not to bind to some extent both parties, then one would be bound by the withdrawal of the charges, and the other would remain free.

By the withdrawal and apology, by implication, at least, the defendants acknowledged that they uttered something in pleading which they should withdraw.

If this were construed as one sided, then they would have rendered themselves more liable in damages than they could otherwise have been.

An act inspired by the best of motives would operate against them.

There is abundant authority on the subject. It is a well-settled rule where prosecution is terminated by compromise or withdrawal, to which there was consent or even only assent, an action for malicious prosecution cannot be maintained.

This is amply sustained by the doctrine of *Craig v. Ginn* decision (1901) 3 Pennewill (Del.) 117, 48 Atl. 192, 53 L. R. A. 715, 94 Am. St. Rep. 77, Supreme Court of Delaware.

The court refers to numerous decisions upon the subject rendered in different jurisdictions.

[2] The second proposition is:

The suit was not brought in malice. There was the appearance of a cause.

It has been before stated that, in this decision, investigation was instituted through agent and examination made into plaintiff's business.

The result was that the learned counsel who wrote the answer arrived at the conclusion that there was ground for the defense which was tendered.

It is stated that the facts were not all imparted to him. That is true; but he did not intimate for an instant that any fact was purposely withheld.

Counsel, who wrote the answer, who is not now of counsel (it was stated in oral argument, for the reason very properly, we think, that he declined to be of counsel in a case in which his testimony is of record), with great fairness and a high sense of justice, testified, in substance, after he had heard the evidence that had he known all that the evidence disclosed some of the expressions deemed necessary at the time would not have been used.

It was stated, in substance, in oral argument, for plaintiff, that all the facts were not given to able counsel by the agents of defendants.

That is true, but it was not intimated in

the evidence of distinguished counsel that any fact was intentionally withheld.

This is referred to only to add that defendants acted on advice of counsel, who stated with proper emphasis that he felt persuaded that defendants were not actuated by malice in defending the original suit.

There is no necessity, as we conceive, to review all the testimony.

We leave the case convinced that defendants had probable cause to think that plaintiff was claiming a larger amount than that to which he was really entitled.

From that point of view, we have concluded to reverse the judgment.

In the light of several decisions, particularly *Dunn v. Southern Insurance Co.*, 116 La. 431, 40 South. 786, it must be reversed.

The law and the evidence being in favor of defendants, it is ordered, adjudged, and decreed that the judgment appealed from is avoided, annulled, and reversed, and the demand of plaintiff is rejected at his costs in both courts.

(129 La.)

No. 18,631.

WERMUTH v. MINDEN LUMBER CO.

(Supreme Court of Louisiana. Nov. 27, 1911.

Rehearing Denied Jan. 15, 1912.)

(Syllabus by the Court.)

1. INSURANCE (§ 70*)—MUTUAL ACCIDENT COMPANY—POWERS OF LIQUIDATOR.

The liquidator of a solvent mutual accident insurance company has no standing in court to question the power of the board of directors to grant rebates to policy holders, or to distribute dividends, especially where such board was vested by the charter with every corporate power which might be exercised by the members of the corporation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 93; Dec. Dig. § 70.*]

2. INSURANCE (§ 55*)—MUTUAL INSURANCE COMPANIES—MEMBERSHIP.

Policy holders in a mutual accident insurance company are practically stockholders therein; and the fact that they are also trustees for their employes, who may receive bodily injuries, does not affect their membership.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 67-69; Dec. Dig. § 55.*]

Appeal from Second Judicial District Court, Parish of Webster; R. C. Drew, Judge.

Action by Charles E. Wermuth against the Minden Lumber Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank E. Rainold, James C. Henriques, and Roberts & Roberts, for appellant. Henry Moore, H. H. White, and White, Thornton & Holloman, for appellee.

LAND, J. The plaintiff, as liquidator of the Lumbermen's Mutual Accident Company, sued the defendant to recover the sum

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of \$2,217.04, representing the total of rebates or dividends paid by order of the board of directors to the defendant, as a policy holder, during the years 1905, 1906, and 1907. Plaintiff alleged that the defendant was a mere trustee for its insured workmen, who paid the premiums, and had no legal right to receive rebates or dividends from the company. Plaintiff further alleged that the resolutions of the board of directors directing the payment of said rebates or dividends were illegal, null, and void, because:

(1) The distribution of said rebates or dividends was restricted to certain policies that had been in force for the past year on plants that had remained insured for the full year, and where all the employes of the plant had been insured in the company.

(2) The defendant company and others similarly situated were not members of the Lumbermen's Mutual Accident Company, and therefore had no right to receive or appropriate the assets of said insurance company.

(3) The giving of said rebates or dividends to the defendant and others was ultra vires of the board of directors of said corporation.

The petition further alleged that the charter of said insurance company was annulled, at the suit of the state, by judgment of the civil district court for the parish of Orleans rendered in November, 1909; and that the petitioner was thereupon duly appointed and qualified as liquidator of said corporation.

Defendant pleaded the prescription of three years, no cause or right of action, and estopped to deny that defendant was a policy holder and member of said insurance company by reason of the allegations and judgment in said suit.

These pleas and exceptions were referred to the merits without prejudice. The defendant for answer pleaded the general issue, and averred that the policies referred to in the petition were issued to the Minden Lumber Company as the assured, and that said corporation paid the premiums, and was entitled to the dividends which it received.

[2] In the suit of the state to annul the charter of the Lumbermen's Mutual Accident Company, the principal ground of alleged nullity was that corporation was "a mutual company with a membership composed largely, if not entirely, of corporations." The evidence in this case shows that the company was organized in the interest of lumbermen, as indicated by its corporate name, and that its policy holders were for the most part corporations engaged in the lumber industry. As the insurance corporation was organized on the mutual plan, all who insured in it became ipso facto members of the corporation, and constituted the whole membership, as no one can become a member of a mutual insurance company who has not been insured in it, unless he is the

assignee of a policy. 21 A. & E. Ency. Law (2d Ed.) p. 264.

Policies were issued to the defendant as the "assured," in which the insurance company agreed to indemnify the defendant against bodily injuries sustained by its employes in the course of their employment. Each policy also contained a stipulation to indemnify the "assured" as trustee for the benefit exclusively of such of its employes as might sustain any bodily injury during the period covered by the insurance. The premiums were payable in monthly installment (the first in advance) as collected from the employes. The defendant as the assured became a member of the insurance company; and any other construction would result in leaving the corporation without members. Under such a duplex scheme of accident insurance, the employes contributed the premiums, and received the benefit of the insurance, but were unknown to the insurance company, and had no direct relations or dealings with the corporation. The contracts of insurance were made by the defendant with the accident company, and the provisions in the policies for the benefit of employes were in the nature of a stipulations pour autrui. We therefore conclude that the defendant company was a member of the Lumbermen's Mutual Accident Company.

On January 26, 1905, the board of directors of the company adopted the following resolution:

"On motion duly seconded, it was resolved that a rebate of twenty per cent. on the premiums of the past year be paid, as the 1905 premiums fall due and are paid, on all policies that have been in force for the past year, in plants that have remained insured for the full year, and where all the employes, of the plant have been insured in the company."

Similar resolutions were adopted on February 24, 1906, and February 18, 1907; and the defendant received the benefit of the rebates during said years. The "rebates" so called were really a bonus or premium for reinsurance, and were intended to operate a reduction pro tanto of the amount of the premium payments for the current year. In practice, the full amount of the annual premium was paid, and the insurance company during the year returned the percentage fixed by the resolutions of the board of directors.

[1] The charter of the insurance company contains the following provisions:

"Every power of this corporation which might be exercised by the members is hereby vested in the board of directors to be exercised by said board without the necessity of referring to the members for their approval, authority or ratification, in any matters whatsoever."

The resolutions referred to above, therefore, must be given the same force and effect as if they had been approved by all the members of the corporation. The board of

directors under said charter provision represented, not only the corporation, but all the members thereof. We think that the resolutions were within the legitimate powers of the board of directors, as representing the corporation. But there can be no question that said board, as the agent of the members, had the power to dispose of the funds of the corporation as the board deemed best in the interest of all the members. As the members were bound by the action of the board of directors, and as it is not alleged that the corporation had any creditors in 1905, 1906, or 1907, or at the date of its dissolution in 1909, we see no legal grounds on which the present action can be predicated. The liquidator in this suit is attempting to avoid and revoke executed contracts made by the board of directors in good faith, and acquiesced in by all the members of the corporation, and by all other parties in interest. The question of rebates as between the defendant and its employes does not concern the plaintiff. The authorities cited by counsel for the liquidator have no application to the facts of this case.

Judgment affirmed.

(129 La.)

No. 18,776.

BRANNON v. YAZOO & M. V. R. CO.
(Supreme Court of Louisiana. Jan. 2, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 318*)—INJURY TO PASSENGERS—UNAVOIDABLE ACCIDENT—DAMAGES.

Action by passenger for personal injuries. Evidence held insufficient to prove unavoidable accident. Award of damages held excessive, and reduced.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 318.*]

(Additional Syllabus by Editorial Staff.)

2. DAMAGES (§ 130*)—PERSONAL INJURIES—"SCIATICA."

In an action for injuries to a passenger, where plaintiff's evidence tended to show that he was afflicted with sciatica, which is defined as neuralgia of the sciatic nerve, and, in a popular sense, any affection of the hip or adjoining parts, a verdict for \$1,000 held excessive, and reduced to \$250.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 130.*]

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; Thomas M. Burns, Judge.

Action by D. A. Brannon against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Ellis & White, for appellant. R. C. & S. Reid, for appellee.

LAND, J. This is an action for \$6,000 as damages for personal injuries sustained by the plaintiff while a passenger on one of the

defendant's freight trains. The petition alleges that the train, with the exception of the locomotive, was derailed, and the caboose in which petitioner was riding was violently thrown forward, and then turned across the track at right angles. The petition further alleges that the accident was occasioned by bad equipment, poor track, defective rails and trestles, and the negligence of the defendant, its officers and employes.

The petition further alleges that the petitioner was thrown violently forward against the locker of the caboose; that other passengers therein were hurled with great force against him, thereby severely bruising petitioner about the head, shoulders, hip, and thigh, and permanently injuring the sciatic nerve of his left leg.

Defendant, after pleading the general issue, further answered as follows:

"Defendant admits that the plaintiff was a passenger on the caboose of a freight train belonging to the defendant company, which was derailed and overturned near Goodbee Station, La., on the 24th day of February, 1910, but defendant avers that the plaintiff suffered no material damage or injury by said accident; that such injuries as he received were very slight and inconsequential; and that the plaintiff has entirely recovered therefrom."

The case was tried without a jury, and judgment was rendered in favor of the plaintiff for \$1,000 and costs.

As the answer admitted the contract of carriage and a violation of the contract on the part of the defendant, the only question before the court was the quantum of damages to be awarded to the plaintiff for the breach of the contract. The burden is on the defendant to show that the inexecution of the contract on his part was occasioned "by a fortuitous event or irresistible force." C. C. art. 1933, No. 2.

"Those accidents are said to be caused by superior force, which human prudence can neither foresee nor prevent." C. C. art. 3556, No. 14.

"Fortuitous event is that which happens by a cause which we cannot resist." Id. No. 15.

[1] The defense adduced evidence to prove that the accident was unavoidable. The conductor and the engineer testified that the track and equipment were apparently in good condition, but they did not know the cause of the wreck. The section foreman testified that the track was in first-class condition, and that he surfaced it a few days before the accident, but made no rail inspection. Such evidence is wholly insufficient to prove an unavoidable accident, or one which human prudence can neither foresee nor prevent.

The real issue in this case is the extent of the injuries sustained by the plaintiff.

[2] Dr. Singleterry, witness for the plaintiff, deposed as follows:

"I visited Mr. A. D. Brannon in his home in Denham Springs, La., by request of Mr. Wha-

ley, on March 24 or 25, 1910. He was suffering from sciatica of the left leg."

In answer to a question as to the nature and extent of plaintiff's injuries, the witness replied, "No injuries."

Dr. Fridge, another witness for the plaintiff, deposed that he examined D. A. Brannon on November 1, 1910, and found his trouble to be chronic sciatica in the left hip joint; and there was considerable adhesion of the muscles surrounding this joint, movement of the joint being limited thereby, and upon flexing the joint forcibly it gave him great pain.

Plaintiff testified that his physical condition before the accident was good, and that since he has continually suffered pain in his left hip joint. Another witness corroborated the plaintiff as to his physical condition before the accident.

Dr. Gauthreaux, witness for the defense, testified that he carefully examined D. A. Brannon in September, 1910, and found nothing wrong with his sciatic nerve, and no adhesion around the hip, but an adhesion in the knee, which prevented the extension of the leg straight out. The witness attributed the adhesion in the knee to the fact that Brannon (as he said) was in the habit of holding his right knee rigid. Dr. Kostmayer testified that he assisted Dr. Gauthreaux in the examination of Brannon, and that they found no injury of any kind to the left leg; no adhesion of the muscles around the hip joint. The witness could not answer as to the knee joint, but said that pain might be caused by adhesion there. On cross-examination, the witness admitted that he could not state absolutely if there was any suffering from or injury to the sciatic nerve.

Dr. Minden, another witness for the defense, testified that he had treated Brannon for eight days for injuries supposed to be due to the railroad accident; that he saw no external bruises, but Brannon complained of pains in his thigh, leg, and shoulder; that Brannon seemed to have got well, but complained of pain in his thigh, and seemed every day to get worse. Dr. Minden could not find any condition in the thigh that would account for the pain complained of by the plaintiff.

The conductor testified that a few minutes after the accident the plaintiff said that his hurts amounted to nothing.

Dr. Gauthreaux examined Brannon on the day of the accident. Brannon, using a pine board as a stick, walked about a block and a half, and then upstairs to Dr. Gauthreaux's office. He complained of his shoulder, back, and thigh. The surgeon examined him, but found no bruises, and prescribed a local application.

Dr. Gauthreaux again examined Brannon in September, 1910, as above stated, and found nothing the matter with him, except a slight stiffness of the knee joint.

Brannon testified in rebuttal that he suffered pain during the last examination made by Dr. Gauthreaux, and that under the advice of Dr. Singleterry he had used his left leg as much as possible.

Sciatica is defined as neuralgia of the sciatic nerve, and, in a popular sense, any painful affection of the hip or adjoining parts. Webster's Int. Dict. Verb.

Dr. Singleterry found no physical injury, and does not inform us whether the sciatica referred to by him was neuralgic or otherwise. Dr. Fridge found considerable adhesion of the muscles surrounding the hip joint, and was of opinion that the trouble was *chronic* sciatica. Neither witness stated that the conditions found by them could have been produced by the railroad accident. On the other hand, the defendant's two medical experts found no adhesion of the muscles around the hip joint, and seem to have demonstrated this fact by the experiments they made. The lay mind can understand that such an adhesion would cause rigidity of the leg; and two surgeons found that the left leg was as flexible at the hip joint as the right leg. The chief surgeon, however, found a slight adhesion around the knee joint, which he did not attribute to the accident, but to the fact that Brannon had, in walking, constantly held his knee rigidly. The surgeon testified that such was the statement made to him by Brannon, and the latter does not contradict him on this point.

We think it probable from all the facts and circumstances of the case that the plaintiff received some physical injury as the result of the accident in question, but are of opinion that the damages awarded are excessive.

It is therefore ordered that the judgment below be amended by reducing the amount from \$1,000 to \$250, and that, as thus amended, said judgment be affirmed; plaintiff and appellee to pay costs of appeal.

MONROE, J., concurs in the decree on the ground that, under defendant's contract, as a common carrier, it was bound to carry plaintiff safely, or show a reason, sufficient in law, for failing so to do.

(129 La.)

No. 18,771.

WILLIAMS v. WILLIAMS.

(Supreme Court of Louisiana. Jan. 2, 1912.)

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge. Action by Lonie Williams against J. E. Williams. Judgment for plaintiff, and defendant appeals. Affirmed.

Mitchell & Young, for appellant. Stewart & Stewart, for appellee.

MONROE, J. This is a suit for divorce by the wife on the ground of adultery, and for the possession of a minor child, issue of the marriage. There was judgment for plaintiff, in the district court, from which defendant has appeal-

ed. The case has been submitted in this court without argument, oral or written. The evidence sustains the charges contained in the petition, and the judgment appealed from is affirmed.

WOODSON v. STATE.

(Supreme Court of Florida, Division B. Nov. 27, 1911. Headnotes Filed Jan. 3, 1912.)

(*Syllabus by the Court.*)

LEWDNESS (§ 9*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

Where there was no evidence of a living in an open state of adultery within the limited period charged, the single act of intercourse between the parties anterior to such time is not admissible to convict of a substantive offense committed between such periods.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. § 14; Dec. Dig. § 9.*]

Error to Criminal Court of Record, Dade County; H. F. Atkinson, Judge.

E. E. Woodson was convicted of living in an open state of adultery, and brings error. Reversed.

Price & Railey, for plaintiff in error. Park Trammell, Atty. Gen., and C. O. Andrews, for the State.

PARKHILL, J. The plaintiff in error was convicted, in the criminal court of record for Dade county, upon an information charging that he "on the 10th day of May, in the year of our Lord one thousand nine hundred and eleven, in the county and state aforesaid. Being then and there a widower, and one Alice English, being then and there a married woman, having a husband living, to wit, one B. T. English, late of the county of Dade aforesaid, on the 10th day of May, in the year of our Lord one thousand nine hundred and eleven, and thence until the 20th day of May, A. D. 1911, with force and arms, at and in the county of Dade aforesaid, did live together in an open state of adultery, contrary," etc.

From the sentence and judgment in said case he sues out writ of error.

The defendant entered a plea of not guilty. Although no attack is made on the information, we deem it well to say, in order that it may not serve as a precedent or form to be followed, while it sufficiently appears from the allegations that the defendant was a widower and Alice English was a married woman on the 10th day of May, 1911, the information does not allege they continued so to be until the 20th day of May, 1911, at which time they are charged as having lived in an open state of adultery. *Brevaldo v. State*, 21 Fla. 789. We see no reason for placing a period after the word "aforesaid," and then making a new sentence and commencing the same with a capital "B" where the information alleges, "Being then and there a widower," etc. Passing these matters by, however, we think the evidence is sufficient to support the verdict.

The information charges that, between the 10th and 20th days of May, 1911, the defendant and Alice English did live together in an open state of adultery. There was no evidence of a living in an open state of adultery within the limited period charged, and the single act of intercourse between the defendant and Mrs. English, testified to by one witness, anterior to such time, is not admissible to convict of a substantive offense committed between such periods.

The judgment is reversed.

TAYLOR and HOCKER, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

FLORIDA CIGAR & TOBACCO CO. v. BAKER & HOLMES CO.

(Supreme Court of Florida, Division A. Dec. 5, 1911. Rehearing Denied Jan. 16, 1912.)

(*Syllabus by the Court.*)

1. FRAUD (§ 13*)—ELEMENTS—STATEMENTS OF OPINION.

Representations that are mere guesswork are not proper bases for fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 3-5; Dec. Dig. § 13.*]

2. CORPORATIONS (§ 117*)—STOCK—SALES—RESCISSON.

An equity to rescind a purchase of stock in a corporation upon the ground of fraud may be lost by accepting benefits after discovery of the fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 506; Dec. Dig. § 117.*]

Appeal from Circuit Court, Duval County; R. M. Call, Judge.

Suit by the Baker & Holmes Company against the Florida Cigar & Tobacco Company. From a decree for complainant, defendant appeals. Reversed, with directions to dismiss the bill.

Baker & Baker and Toomer & Reynolds, for appellant. Geo. M. Powell, for appellee.

COCKRELL, J. The Baker & Holmes Company obtained a decree rescinding a contract, whereby it purchased stock in the Florida Cigar & Tobacco Company, and awarding a return of the consideration paid therefor, or its equivalent in money, at the agreed value of \$5,340, with interest from January 29, 1907, when the return was demanded.

[1] The theory of the bill is that there was fraud in the financial statement of the condition of the Tobacco Company, and also certain representations made by that company's agent, upon the truth of which the Baker & Holmes Company relied in making the purchase of stock. We may lay aside the representations, inasmuch as they were considered "guesswork."

[2] Any equity that might ordinarily arise from a knowingly false statement of a corporation's financial standing as an inducement to a purchase of stock is not only weakened by the lack of any reason why in this case an independent investigation of the corporation's books might not have been first made by the intending purchaser, but also by the peculiar nature of the business in which the corporation was engaged. It was not organized primarily to yield dividends directly to its stockholders, but was more in the nature of a combination, whereby various wholesale dealers in Jacksonville in the cigar and tobacco business organized a stock company to purchase supplies in large quantities, from which its members, relieving themselves from carrying such supplies, could obtain immediately and from time to time, as orders came in, the stock from the common source; that there was an advantage in the way of discount in purchasing in large quantities, of which discount the complainant received the benefits. It further appears that, before joining the corporation, the complainant itself carried a \$30,000 stock of these commodities, from which load the corporation gave relief, thus releasing say \$25,000 to be used in other lines of activity.

It will thus be seen how attenuated the equity became, and we find it completely blotted out by a later estoppel. The shares of stock were purchased in the spring of 1906; in October following, the purchaser heard rumors that the corporation contemplated liquidating, and on the 16th of that month wrote that it had made the purchase on the strength of this statement (that is, the financial statement referred to above), and being desirous of co-operating with the tobacco industry in this city, but having ascertained that the statement was not correct, requested a return of the amount paid for the stock with interest. Yet after the knowledge was admittedly brought home to the purchaser that the statement upon which it relied was incorrect, it continued participating in the rights belonging only to stockholders—that of securing its supplies from the common source at a discount—to the value of about \$4,000 and not until January 29, 1907, as found in the decree, and after the corporation had gone into liquidation, did it finally repudiate its contract.

We are of the opinion that whatever of equity may have existed in October, 1906, when the supposed fraud was actually discovered, it had ceased to exist when the final demand was made.

The decree is reversed, with directions to dismiss the bill.

WHITFIELD, C. J., and SHACKLEFORD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

STATE ex rel. RAILROAD COM'RS v.
LOUISVILLE & N. R. CO. et al.

(Supreme Court of Florida. Division A. Nov. 28, 1911. Headnotes Filed Jan. 8, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 9*)—REGULATION—AUTHORITY OF RAILROAD COMMISSIONERS.

When acting within the authority conferred upon them, a wide discretion is accorded to the Railroad Commissioners; and an alleged abuse of discretion by them must be affirmatively and sufficiently shown by admissions or proofs before the courts will interfere. Valid regulations of the Railroad Commission should be made effective as contemplated by the Constitution and statutes.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9.*]

2. CARRIERS (§ 11*)—REGULATION—SCOPE IN GENERAL.

A railroad common carrier may, in addition to the facilities and accommodations already furnished, be required to render a particular service that it is essentially the duty of the carrier to do for the reasonable convenience of its patrons among the public, and to meet the reasonable requirements of the public service undertaken.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

3. CARRIERS (§ 11*)—REGULATION—COMPENSATION FOR SERVICES.

Even though a particular duty of a railroad company if enforced would be in itself unremunerative and burdensome, such a result would be an incident to the service voluntarily undertaken, in consideration of the franchises permitted to be used for the public good, and the property rights of the carrier would not thereby be unlawfully invaded, if the particular service is reasonably necessary for the public convenience, and the burden to the carrier has some fair relation to the benefits accruing to the public, and the burden of the particular service, considered with reference to the entire business of the carrier, does not in reality amount to a denial to the carrier of a reasonable compensation for the service rendered by it as an entirety.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

4. CARRIERS (§ 11*)—REGULATION—COMPENSATION FOR SERVICES.

Where it appears that a particular service is a duty vitally necessary to the public, and its performance is essential in adequately rendering a general public service as a common carrier, the fact that the performance of the particular duty will be unremunerative will not in view of the nature of the duty to the public excuse nonperformance.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

5. CARRIERS (§ 11*)—REGULATION—COMPENSATION FOR SERVICES.

If the performance of a particular useful but nonessential duty will as a part of a general public service contribute to the public convenience, the fact that the particular service must be rendered at a loss does not, in view of the nature of the duty required, excuse nonperformance; but the loss occasioned by the performance of a particular duty may be considered in determining the reasonableness of the order requiring the particular service to be rendered.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 11.*]

6. RAILROADS (§ 227*)—REGULATION—FACILITIES FOR TRAVEL.

The general and special powers conferred by the statutes of the state upon the Railroad Commissioners are ample to authorize them to make and enforce just and reasonable orders, rules, and regulations for the furnishing of reasonably adequate facilities and accommodations to the traveling public by the operation of passenger trains separate from freight cars, and for establishing schedules to be observed in operating such passenger trains between points within this state; and all such orders, rules, and regulations when made are by the statute declared to be prima facie reasonable and just.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.*]

7. CARRIERS (§ 11*)—REGULATION—COMPENSATION FOR SERVICES.

If particular regulations are reasonably useful and expedient for the just requirements of the public service being performed by a common carrier, thereby making it a duty of the carrier to render the service, the regulations, if not illegal, may be enforced, even though the service required is not remunerative, unless it is made to clearly appear that the particular regulations are so unreasonable and arbitrary that their enforcement will operate to deny to the respondents a reasonable compensation for the entire service rendered by the carrier.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 11.*]

8. CARRIERS (§ 10*)—REGULATION—AUTHORITY OF RAILROAD COMMISSION.

In determining whether a rate, rule, regulation, or order of the Railroad Commission upon a subject within its authority is so unreasonable and arbitrary as to be illegal and unenforceable, the court, in deference to the governmental functions conferred by law upon the Commissioners, will not only require the prima facies of reasonableness impressed by the statute upon the rate, rule, regulation, or order to be overcome by admissions or proofs, but will require the admissions or proofs of facts tending to show unreasonableness to be clear and convincing; every reasonable doubt being yielded in favor of the rate, rule, regulation, or order.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 14-20; Dec. Dig. § 10.*]

9. CARRIERS (§ 10*)—REGULATION—AUTHORITY OF RAILROAD COMMISSION.

The reasonableness of a rate, rule, regulation, or order of the Railroad Commissioners is to be determined by a consideration of the rights of all parties directly and materially affected by the rate, rule, regulation, or order. This involves a consideration of all the facts and circumstances by such appropriate processes and standards of reasoning and computation as are afforded by law or by common experience and the dictates of right and justice.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 14-20; Dec. Dig. § 10.*]

10. CARRIERS (§ 11*)—REGULATION—REASONABLENESS.

In determining whether the burden of a particular regulation enforced by state authority is confiscatory and unlawful because it prevents a railroad company from receiving a reasonable compensation for the service rendered taken as an entirety, the fair actual value of all the property and labor and management rightly used in rendering the service should be considered. The cost of reproduction of the property may be an element to be considered in ascertaining the real value of the property used, but it is not the value that is to be arbitrarily

considered in determining what is a reasonable compensation for the service rendered as a whole by a common carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

11. CARRIERS (§ 12*)—REGULATION—APPORTIONMENT OF PROPERTY.

Where the same property, labor, and management are used at the same time by a common carrier in interstate and intrastate commerce, the value of the property and labor and management used should be properly apportioned in determining the reasonableness of the compensation for service rendered by the carrier in the intrastate business taken separately and as an entirety, or in connection with the interstate business concurrently done.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-20; Dec. Dig. § 12.*]

12. COMMERCE (§ 58*)—RAILROADS—REGULATION.

The state may enforce regulations to be observed by a railroad common carrier in intrastate transportation for the safety and convenience of the public who are affected by the regulation, even though interstate commerce is thereby indirectly and incidentally affected, without violating the interstate commerce clause of the federal Constitution, where such regulations are in aid of, or do not in fact impose substantial burden upon, lawful interstate commerce, or do not conflict with regulations of the subject that are legally prescribed or authorized by Congress.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 77-86; Dec. Dig. § 58.*]

13. CONSTITUTIONAL LAW (§ 70*)—DISTRIBUTION OF GOVERNMENTAL POWERS—JUDICIAL POWER—ENCROACHMENT ON LEGISLATURE.

Where a governmental regulation is directly prescribed by valid legislative enactment its expediency and reasonableness, when no violation of organic law is involved, will not be inquired into by the courts, since the Legislature and the judiciary are co-ordinate branches of the state government, and legislative action is subject only to the organic law, and is reviewable by the courts only when the supreme law of the land is violated.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. § 70.*]

14. CONSTITUTIONAL LAW (§ 72*)—DISTRIBUTION OF GOVERNMENTAL POWERS—JUDICIAL POWER—ENCROACHMENT ON LEGISLATURE.

Action taken by an administrative officer or board must not only be in accordance with organic law, but it must conform to applicable valid statutes, and must be reasonable in its operation. Such administrative action is also subject to judicial review as to matters that are not concluded by the exercise of administrative discretion and action.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 133; Dec. Dig. § 72.*]

15. RAILROADS (§ 227*)—REGULATION—AUTHORITY OF COMMISSIONERS—OPERATION OF TRAINS.

The Railroad Commissioners may by reasonable and just rules and regulations require the running of passenger trains separate from freight trains, and such reasonable regulations will be enforced by the courts.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.*]

16. CARRIERS (§ 11*)—DUTY TO FURNISH FACILITIES.

It is the duty of the carrier to render a service that is reasonably adequate and of most

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

convenience to the greatest number of the public affected by the service.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 11.*]

17. CARRIERS (§ 10*)—REGULATION—AUTHORITY OF RAILROAD COMMISSIONERS.

The Railroad Commissioners are authorized to make and enforce only reasonable and just rules and regulations for intrastate transportation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 14–20; Dec. Dig. § 10.*]

18. RAILROADS (§ 227*)—REGULATION—TRAIN SCHEDULES.

In determining the reasonableness of a regulation authorized by the statute "for the establishing of such schedules for the arrival and departure of trains at depots as public comfort and convenience may require," the necessities and convenience of the public to be affected by the regulation should be considered as a whole and severally, regard being had for the number and reasonable requirements of patrons at different points on the line, and from connecting lines, as well as the rights of the carrier.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.*]

19. RAILROADS (§ 227*) — REGULATION—ENFORCEMENT BY COURTS.

Where it clearly appears that a schedule prescribed by the Railroad Commissioners for the operation of particular trains is not reasonable or just or practical with reference to all the interests directly affected thereby, such schedule will not be enforced by the courts.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.*]

20. RAILROADS (§ 227*) — REGULATION — AUTHORITY OF RAILROAD COMMISSIONERS — TRAIN SCHEDULES.

The power to make reasonable rules and regulations for establishing schedules does not contemplate that the Commissioners shall arbitrarily assume the actual control and management of the physical property of the carrier, so as to unlawfully deprive the carrier of its right to manage its own property; but such grant of power does contemplate that the Railroad Commissioners by making and enforcing just and reasonable rules and orders shall supervise and regulate "the establishing" of proper schedules as in all other matters affecting the service within the authority conferred by statute.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.*]

21. RAILROADS (§ 9*)—REGULATION—AUTHORITY OF RAILROAD COMMISSIONERS.

The Railroad Commissioners may perform their duties conferred by statute without awaiting a specific complaint to be made to them.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 9.*]

(Additional Syllabus by Editorial Staff.)

22. MANDAMUS (§ 165*)—PROCEEDINGS—DEMURRER TO RETURN—ADMISSIONS.

A demurrer to the return to an alternative writ of mandamus admits as true all well-pleaded averments of fact and all fair and pertinent inferences or conclusions of fact in the return that are not inconsistent with, or repugnant to, accompanying specified detailed averments of facts and circumstances, but it does not admit conclusions of law stated in the return.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 360½–364; Dec. Dig. § 165.*]

23. CONSTITUTIONAL LAW (§ 241*)—EQUAL PROTECTION OF LAWS—REGULATION OF CARRIERS.

If a governmental regulation of a common carrier does not unreasonably discriminate against it, there is no denial of the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 241.*]

24. CONSTITUTIONAL LAW (§ 297*)—DUE PROCESS OF LAW—REGULATION OF CARRIERS.

If a governmental regulation of a common carrier is not so unreasonable, unjust, and arbitrary as to prevent the carrier from receiving a just compensation for services rendered, there is no deprivation of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 832–834; Dec. Dig. § 297.*]

Mandamus by the State on the relation of the Railroad Commissioners to the Louisville & Nashville Railroad Company and another. Demurrer to return to alternative writ sustained in part, and overruled in part.

The following alternative writ of mandamus was issued by this court:

"The State of Florida to the Louisville & Nashville Railroad Company and the Seaboard Air Line Railway—Greeting:

"Whereas, by a petition filed by our Railroad Commissioners in our Supreme Court in the name of the state of Florida, through F. M. Hudson as special counsel for our said Railroad Commissioners, designated by them, it has been made to appear:

"(1) That the Louisville & Nashville Railroad Company is a railroad corporation created and organized under the laws of the state of Kentucky, and the said company owns and operates, and for more than five years last past has owned and operated, a line of railway lying partly within the state of Florida and extending therein from River Junction in a westerly direction to Pensacola, and thence in a northerly direction to the line of the state of Alabama, and thence into the state of Alabama.

"(2) That the said company transports persons and property over its said line of railroad as a common carrier for hire, and over that portion of its said line of railroad which lies within the state of Florida it transports persons and property from points in this state to other points in this state as such common carrier for hire as aforesaid.

"(3) That the Seaboard Air Line Railway is a railroad corporation created and organized under the laws of the state of Virginia, and the said company owns and operates, and for more than one year last past has owned and operated, divers lines of railway within the state of Florida and in other states, and owns and operates, and for more than one year last past has owned and operated, a line of railway extending from Jacksonville in a westerly direction to River Junction, both points in the state of Florida.

"(4) That the said Seaboard Air Line Railway transports persons and property over its said line of railway as a common carrier for hire, and over that portion of its said line of railway which lies within the state of Florida it transports persons and property from points in this state to other points in this state as such common carrier for hire as aforesaid.

"(5) That the said Louisville & Nashville Railroad Company and the said Seaboard Air Line Railway have heretofore provided and maintained, and do now maintain, physical connection between their said lines of railroad and ample facilities for the transfer of engines and cars from one to the other of said lines of railroad.

"(6) That the said Louisville & Nashville Railroad Company and the said Seaboard Air Line Railway have heretofore operated and are now operating a train leaving Jacksonville at, to wit, 5 o'clock p. m., and arriving at Pensacola at, to wit, 11:15 a. m., and known on the Seaboard Air Line Railway as train No. 79 and on the Louisville & Nashville Railroad as train No. 4, and a train leaving Pensacola at, to wit, 5 o'clock p. m. and arriving at Jacksonville at, to wit, 10:50 a. m., and known on the Louisville & Nashville Railroad as train No. 1 and on the Seaboard Air Line Railway as train No. 78.

"(7) That the said trains have been, and are now, operated as mixed passenger and freight trains carrying passenger coaches, sleepers, and freight cars.

"(8) That the schedule time of the said trains between Jacksonville and Pensacola is approximately 18 hours.

"(9) That on the 23d day of August, 1911, the said Railroad Commissioners did give notice to the said Louisville & Nashville Railroad Company and the said Seaboard Air Line Railway and each of them that there would be a meeting of the said Railroad Commissioners in their office in the city of Tallahassee on the 12th day of September, 1911, at 11 o'clock a. m., to consider whether the said Commissioners should issue an order directing the said companies and each of them to discontinue the hauling of freight cars on the said trains, and also to consider whether the said Commissioners should make and fix a schedule shortening the time of the run between the said points.

"(10) And that thereafter, on the said 12th day of September, 1911, at their office in the city of Tallahassee, the said Railroad Commissioners being then and there duly in session pursuant to the said notice, the said Louisville & Nashville Railroad Company and the said Seaboard Air Line Railway then and there appeared, and were fully heard in the premises, and thereupon the said Commissioners did make and enter their certain order, No. 346, in words and figures following, to wit:

"'Order No. 346. File No. 3125.

"'Before the Railroad Commissioners of the State of Florida.

"'In the Matter of the Operation by the Louisville & Nashville Railroad Company and the Seaboard Air Line Railway of Mixed Passenger and Freight Trains Between Pensacola and Jacksonville.

"'After due notice to the Louisville & Nashville Railroad Company and the Seaboard Air Line Railway, dated August 23, 1911, this matter came on for hearing on the 12th day of September, 1911, at the office of the Railroad Commissioners in the city of Tallahassee, the said Louisville & Nashville Railroad Company being present by C. B. Phelps, superintendent of transportation, Mr. E. O. Saltmarsh, superintendent, and Mr. Milton Smith, assistant general freight agent, the Seaboard Air Line Railway being present by Hon. W. J. Oven, division counsel, and Mr. W. A. Witt, superintendent, and they were fully heard, and thereupon the matter was taken under advisement.

"'And now, on this the 16th day of September, 1911, we, the Railroad Commissioners of the state of Florida, being fully advised in the premises, do find:

"'That the Seaboard Air Line Railway and the Louisville & Nashville Railroad Company have heretofore operated, and are now operating, a train leaving Jacksonville at 5 o'clock p. m., and arriving at Pensacola at 11:15 a. m., and known on the Seaboard Air Line Railway as train No. 79 and on the Louisville & Nashville Railroad as train No. 4, and a train leaving Pensacola at 5 p. m. and arriving at Jacksonville at 10:50 a. m., and known on the Louisville & Nashville Railroad as train No. 1 and on the Seaboard Air Line Railway as train No. 78, and

"'That said trains have been and are now operating as mixed passenger and freight trains, carrying passenger coaches, sleepers, and freight cars, and

"'That the schedule time of the said trains between Jacksonville and Pensacola is approximately 18 hours,

"'And that the said Louisville & Nashville Railroad Company and the said Seaboard Air Line Railway have heretofore had under consideration the discontinuation of the hauling of freight cars on the said trains and the shortening of the schedule time of the said trains and the adoption of a schedule providing that the said east-bound train should leave Pensacola at 7:30 p. m. and arrive in Jacksonville at 9:15 a. m., and that the train running west should leave Jacksonville at 5:10 p. m. and arrive in Pensacola at 6:30 a. m., but that the said proposed schedule was not acceptable to the said Louisville & Nashville Railroad Company because of the fact that it provided that the west-bound train

should arrive in Pensacola at an hour too early to suit the convenience and comfort of passengers between Crestview and Pensacola, and that, for these reasons and other reasons, the said companies have been unable to reach an agreement as to the discontinuation of the said freight cars and the adoption of a shorter schedule.

"Wherefore, the said Railroad Commissioners, in view of the premises, do adjudge and order the said Louisville & Nashville Railroad Company and the said Seaboard Air Line Railway to discontinue the hauling of freight cars on the said train leaving Jacksonville at 5 o'clock p. m. and arriving at Pensacola at 11:15 a. m., and known on the Seaboard Air Line Railway as train No. 79 and on the Louisville & Nashville Railroad as train No. 4.

"And that they also discontinue the hauling of freight cars on their said train leaving Pensacola at 5 p. m., and arriving at Jacksonville at 10:50 a. m., and known on the Louisville & Nashville Railroad as train No. 1 and on the Seaboard Air Line Railway as train No. 78.

"And the said Commissioners do further order that the schedule time for the operation of the said trains be shortened, and that the said companies shall operate the said east-bound train as a passenger train, and provide a schedule for the said train to leave Pensacola at 7 o'clock p. m. and arrive at Jacksonville at 8:45 a. m.

"And that the said companies shall operate the said west-bound train as a passenger train and provide a schedule therefor to leave Jacksonville at 5:40 p. m. to meet the passenger train now known as train No. 66 Seaboard Air Line from Tampa to Jacksonville, at Whitehouse at 6:05 p. m., to arrive at Lake City at 7:49 p. m., and to arrive at Pensacola at 7:30 a. m.

"And that this order shall be in force and of full effect on and after the 1st day of October, 1911.

"Done and ordered by the Railroad Commissioners of the state of Florida in session at their office in the city of Tallahassee, this 16th day of September, A. D. 1911.

"R. Hudson Burr, Chairman."

"(11) That the said Louisville & Nashville Railroad Company and the said Seaboard Air Line Railway have each of them ignored, disregarded, and refused to obey the said Order No. 346 above set out, in that they have failed and refused to discontinue the hauling the freight cars on the said train leaving Jacksonville at 5 o'clock p. m. and arriving at Pensacola at 11:15 a. m., and known on the Seaboard Air Line Railway as train No. 79 and on the Louisville & Nashville Railroad as train No. 4, and in that they have failed and refused to discontinue the hauling of freight cars on the other said train leaving Pensacola at 5 o'clock p. m. and arriving at Jacksonville at 10:50 a. m.

and known on the Louisville & Nashville Railroad as train No. 1 and on the Seaboard Air Line Railway as train No. 78, and in that they have failed and refused to shorten the schedule time for the operation of the said trains, and have failed and refused to operate the said east-bound train as a passenger train, or to provide a schedule for the said train to leave Pensacola at 7 o'clock p. m. and to arrive at Jacksonville at 8:45 a. m., or to operate the said west-bound train as a passenger train or to provide a schedule therefor to leave Jacksonville at 5:40 p. m. to meet the passenger train now known as train No. 66 Seaboard Air Line from Tampa to Jacksonville at Whitehouse at 6:05 p. m. to arrive at Lake City at 7:49 p. m., and to arrive at Pensacola at 7:30 a. m., but, on the contrary, the said companies have continued, and now continue, to haul freight cars on each of the said trains, and have continued and are now continuing to operate the said trains upon schedule time of approximately 18 hours, leaving Pensacola and arriving at Jacksonville and leaving Jacksonville and arriving at Pensacola at approximately the same time as before the issuance of the said order.

"(12) And that the said Railroad Commissioners of the state of Florida and the people of this state are entirely without adequate remedy in the premises unless it be afforded by the interposition of this court through a writ of mandamus.

"Now, therefore, we, being willing that full and speedy justice be done in the premises, do command you, the Louisville & Nashville Railroad Company and the Seaboard Air Line Railway, forthwith.

"To discontinue the hauling of freight cars on the said train leaving Jacksonville at 5 o'clock p. m. and arriving at Pensacola at 11:15 a. m., and known on the Seaboard Air Line Railway as train No. 79 and on the Louisville & Nashville Railroad as train No. 4,

"And to discontinue the hauling of freight cars on the said train leaving Pensacola at 5 p. m. and arriving at Jacksonville at 10:50 a. m., and known on the Louisville & Nashville Railroad as train No. 1 and on the Seaboard Air Line Railway as train No. 78,

"And to shorten the schedule time of the operation of the said trains.

"And to operate the said east-bound train as a passenger train, and to provide a schedule for the said train to leave Pensacola at 7 o'clock p. m. and to arrive at Jacksonville at 8:45 a. m.

"And to operate the said west-bound train as a passenger train, and to provide a schedule therefor to leave Jacksonville at 5:40 p. m. to meet the passenger train now known as train No. 66 Seaboard Air Line from Tampa to Jacksonville at Whitehouse at 6:05 p. m. to arrive at Lake City at 7:49 p. m., and to arrive at Pensacola at 7:30 a. m.

"Or that you appear before the justices of this our Supreme Court sitting within and for the state of Florida at the courtroom in the city of Tallahassee on the 24th day of October, 1911, at 10 o'clock in the morning of that day, and show cause why you refuse so to do, and have you then and there this writ.

"Witness the Honorable James B. Whitfield, Chief Justice of the Supreme Court of that state of Florida, and the seal of the said court at Tallahassee, the capital, this 3d day of October, 1911.

"[Seal.] M. H. Mabry,
"Clerk of the Supreme Court of Florida."

The respondents filed the following return:

"And now come the respondents, the Louisville & Nashville Railroad Company and the Seaboard Air Line Railway, by their attorneys, and for a return to the alternative writ of mandamus issued from this court on the petition of the relators in the name of the state of Florida say:

"(1) That these respondents admit all the facts set forth in the alternative writ.

"(2) These respondents, further answering, say: That they have not complied with the said Order No. 346 of the relators as the commissioners of the state of Florida mentioned in the said alternative writ, because the said order was, and is, unreasonable, unnecessary, arbitrary, and impracticable, and, if put into operation, would be unduly and unnecessarily burdensome and expensive to these respondents; would greatly and unnecessarily inconvenience by far the greater portion of the public traveling upon the lines of road mentioned in said writ operated by these respondents between Pensacola and Jacksonville; would greatly lessen the number of persons so traveling, and thus lessen the revenues of these respondents; would deprive persons shipping fast freight over said lines of the opportunity so to ship, and thus lessen the earnings of the respondents; would interfere, hinder, and delay the passage of through trains now running on said lines other than the trains mentioned in said order, and would be of advantage or convenience to but a small percentage of the persons traveling over said lines.

"(3) And these respondents, further answering more in detail, say, as to the effect of putting into operation the said proposed schedule on the line of railroad between Pensacola and River Junction,—

"(a) Train No. 4 of the Louisville & Nashville Railroad Company now passes Milton, a town 19 miles from Pensacola, at 10:10 a. m., and reaches Pensacola at 11:20 a. m. Train No. 1 of the Louisville & Nashville Railroad Company now leaves Pensacola at 5:15 p. m., and reaches Milton at 6:15 p. m. Those persons who desire to do business or shop in Pensacola have an opportunity to leave Milton at a reasonable daylight hour, remain in Pensacola for six hours, and re-

turn to Milton by or before dark. Under the schedule fixed in Order No. 346 train No. 4 would pass Milton at 6:45 a. m., and arrive at Pensacola at 7:30 a. m., while train No. 1 would leave Pensacola at 7 p. m. and arrive at Milton at 7:45 p. m., thus requiring passengers from Milton to Pensacola to arise early in the morning, to spend 11½ hours in Pensacola, a large part before and a large part after business hours, and to return home at night.

"Under the present schedule, many persons in Pensacola having business in Milton take train No. 3, leaving Pensacola at 6:45 a. m., and reach Milton at 7:24 a. m., transact business and return to Pensacola on train No. 4, passing Milton at 10:10 a. m., and arriving at Pensacola at 11:20 a. m., thus accomplishing business in Milton and having most of the business day left for Pensacola. Under the schedule proposed under Order No. 346, a person in Pensacola having business in Milton would have to remain there all day, because train No. 3 leaving Pensacola at 6:45 a. m. reaches Milton at 7:24 a. m., and train No. 4 would pass Milton at — a. m., and no other train passes Milton, going to Pensacola, until train No. 2, at 9 p. m., so that every person having business in Milton would have to remain from 7:24 a. m. until 9 p. m. or nearly 14 hours, a large portion of which would be before and after business hours.

"So, also, many persons at Pensacola having business in Milton take train No. 1, leaving Pensacola at 5:15 p. m., arrive at Milton at 6:15 p. m., transact their business and take train No. 2, leaving Milton at 9 p. m., thus having 2 hours and 45 minutes for the transaction of business. Under the proposed schedule, no such business could be transacted. Milton is a thriving town, of more than 1,500 inhabitants, is the county site of Santa Rosa county, and does by far the larger portion of its trading in Pensacola. Not only is it the point of entraining and detraining on and from the Louisville & Nashville Railroad of its own inhabitants, but is also such point for the inhabitants of thriving villages to the north of it in said county, and for the inhabitants of the milling towns of Bagdad, Bay Point, and Robinson Point, to the south of it, and all of said persons would be largely affected by and inconvenienced and burdened by said change of schedule.

"There are now in operation two lines of steamers, carrying passengers from Milton to Pensacola and return, in competition with the Louisville & Nashville Railroad Company, and furnishing a daylight schedule, with an opportunity to remain in Pensacola three or four hours in the middle of the day, and return to Milton in the daytime, and, if the proposed schedule be put into effect, a large portion of the passenger travel of the Louisville & Nashville Railroad Company between Milton and Pensacola will necessarily

be diverted to the said steamboats, thus largely decreasing the revenues of the Louisville & Nashville Railroad Company, without in any wise increasing the convenience of the public.

"(b) The village of Crestview is on the said Louisville & Nashville Railroad Company's line, about 50 miles east of Pensacola, and is the junction point of said line and the Yellow River Branch of said Railroad Company, said branch running from Crestview to Florala, in the state of Alabama, through the county of Walton, Fla., and the village of Laurel Hill; that large numbers of persons in Florala and adjacent territory, and at Laurel Hill, and adjacent territory, trade and transact business in Pensacola, and that said persons will, if the schedule proposed by Order No. 346 aforesaid be put into effect, be hindered and delayed and inconvenienced in the transaction of said business at Pensacola, and their return in the same day and to the same extent as persons in Milton and vicinity, as set forth in paragraph 2a above. That, in addition thereto, the inconvenience to said persons resulting from said schedule will be very great, in that train No. 4 will, under said schedule, pass Crestview going westward to Pensacola at 5:40 a. m., and passengers from Florala and vicinity will be obliged to leave Florala by the Yellow River Branch at not later than 3:40 a. m., thus necessitating both the entraining at Florala and the change at Crestview to be, during the most of the season, at night, whereas, under the present schedule, train No. 4 passes Crestview at 8:23 a. m., and passengers for the same train leave Florala at 6:30 a. m.

"That Florala has direct communication by rail with Andalusia and Montgomery, both important commercial centers and trading points, and in competition with Pensacola, and the imposition by the said schedule under Order No. 346 of the proposed burdens and inconveniences upon passengers to and from Pensacola will result in the diversion from Pensacola of much now existing travel, and of the trade incident thereto, and thus lessen the income of the Louisville & Nashville Railroad Company and the trade of Pensacola.

"(c) The town of De Funiak Springs is on the said line of the Louisville & Nashville Railroad Company, and has about 1,700 inhabitants, is the county site of Walton county, and is the point of entraining and detraining of a large portion of the inhabitants of the said county, and said inhabitants do the largest part of their business and trading in Pensacola, and by the schedule imposed by Order No. 346 will in the transaction of their business be hindered in the same way and to the same extent as persons in Milton and vicinity, as set forth in paragraph 2a above. That the inconvenience to them, however, will be greater than the inconvenience of those persons entraining at Milton, because under the proposed schedule

the said train No. 4 would pass De Funiak Springs at 4:30 a. m., while it would pass Milton at 6:45 a. m. Under the now existing schedule, the said train passes De Funiak Springs at 7:08 a. m.

"That, in addition to the effect of the proposed schedule upon normal travel to and from De Funiak Springs, it would greatly affect the large travel to said point during the season of the Florida Chautauqua, which has its exercises for two or three months at said point during each winter. A very large portion of the persons who attend the said exercises come from the line of the Louisville & Nashville Railroad Company east of the said point. Under the present schedule such persons can board train No. 4 at points as far east as Chipley, in Washington county, in daylight; while, if the proposed schedule be put in operation, such persons must take the said train at night, and get off at De Funiak at night at hours which will greatly deter persons from attending the said exercises, and thus greatly affect the business of the said Florida Chautauqua and the said town of De Funiak Springs, and the revenues of the said Louisville & Nashville Railroad Company. The comparative schedules of the said train No. 4 as at present existing and as it would be under the said Order No. 346 for points between River Junction and Pensacola are as follows:

	Present Schedule.	Proposed Schedule.
River Junction.....	3:20 a. m.	1:20 a. m.
De Funiak Springs....	7:08 a. m.	4:30 a. m.
Florala	6:30 a. m.	3:40 a. m.
Crestview	8:23 a. m.	5:40 a. m.
Milton	10:10 a. m.	6:45 a. m.
Pensacola (arrive)...	11:20 a. m.	7:30 a. m.

"(d) The station of Galliver, on the said Louisville & Nashville Railroad Company's line, about 40 miles east of Pensacola, is the junction point between the said railroad and the Florida, Alabama & Gulf Railroad, running through the county of Santa Rosa, Fla., northward into the county of Covington, Ala. The said latter railroad serves a large number of inhabitants of the said county of Santa Rosa, Fla., and the county of Covington, Ala., who do business and trade and shop at Pensacola, and reach the said latter point by the trains of the Louisville & Nashville Railroad Company. The schedule now in operation permits said persons to do such business, trading, and shopping at Pensacola in the hours mentioned in paragraph 2a heretofore set forth, as permitted to the inhabitants of Milton and neighboring towns, and the change of the schedule to that proposed by said Order No. 346 would embarrass, hinder, inconvenience, and prejudice the persons tributary to the said Florida, Alabama & Gulf Railroad in the same manner and to the same extent as the citizens of Milton and its vicinity are affected, as hereinbefore set forth. The inconvenience to them would be greater than to those mentioned in paragraph 2a, for the reason that train

No. 4 would under the proposed schedule pass Galliver, going towards Pensacola, at 6:05 a. m., while under the present schedule it passes said point at 8:55 a. m.

"(e) That the inconvenience, prejudice, embarrassment, and delay hereinbefore set forth, as applicable to the hereinbefore mentioned towns and junction points, will exist as to all of the towns lying on the Louisville & Nashville Railroad Company's line aforesaid, west of Jackson county, since the same time in Pensacola and the same hours would exist as to all other persons entraining on said train between said Jackson county and Pensacola. The inconvenience to them would be greater, because of the fact that the said train No. 4 will, if the said proposed schedule be put into effect, pass the said points to the east of De Funiak Springs at a very much earlier hour, and thereby produce the greater inconvenience referred to.

"(4) And these respondents, further answering more in detail, say, as to the effect of putting into operation the said schedule on the line of railroad between Jacksonville and River Junction:

"(a) The inconvenience of persons along the said line of the Seaboard Air Line Railway in being required by the said proposed schedule to get upon train No. 78 much earlier than they are now required to get upon said train by the existing schedule is in kind the same as the inconvenience heretofore set forth to persons taking train No. 4 of the Louisville & Nashville Railroad Company.

"The comparative schedules of train No. 79 of the Seaboard Air Line Railway as at present existing, and as it would be under said Order No. 346 for points between Jacksonville and River Junction, is as follows:

Leaves.	Present Schedule.	Proposed Schedule.
Jacksonville	5 p. m.	5:40 p. m.
West Jacksonville.....	5:12 p. m.	5:50 p. m.
Marietta	5:21 p. m.	5:57 p. m.
Whitehouse	5:28 p. m.	6:05 p. m.
Mililton	5:35 p. m.	6:14 p. m.
Baldwin	5:46 p. m.	6:25 p. m.
McClenny	6:25 p. m.	6:45 p. m.
Glen St. Mary.....	6:35 p. m.	6:50 p. m.
Sanderson	6:56 p. m.	7:04 p. m.
Oluatee	7:24 p. m.	7:24 p. m.
Mt. Carrie.....	7:33 p. m.	7:32 p. m.
Watertown	7:47 p. m.	7:43 p. m.
Lake City.....	7:54 p. m.	7:49 p. m.
Ogden	8:11 p. m.	7:59 p. m.
Welbourn	8:26 p. m.	8:10 p. m.
Houston	8:41 p. m.	8:20 p. m.
Live Oak.....	8:57 p. m.	8:32 p. m.
Falmouth	9:23 p. m.	8:52 p. m.
Ellaville	9:32 p. m.	8:59 p. m.
Lees	9:51 p. m.	9:15 p. m.
Madison	10:10 p. m.	9:32 p. m.
Greenville	10:43 p. m.	10:02 p. m.
Aucilla	11:03 p. m.	10:18 p. m.
Drifton	11:20 p. m.	10:34 p. m.
Lloyd	11:42 p. m.	10:52 p. m.
Capitola	11:52 p. m.	11:02 p. m.
Chaires	12:01 a. m.	11:07 p. m.
Tallahassee	12:35 a. m.	11:35 p. m.
Midway	1:05 a. m.	12:05 a. m.
Quincy	1:40 a. m.	12:35 a. m.
Gretna	2 a. m.	12:50 a. m.
Mt. Pleasant.....	2:15 a. m.	1 a. m.
River Junction.....	2:40 a. m.	1:29 a. m.

The comparative schedules of said train No. 78 of the Seaboard Air Line Railway, as at present existing and as it would be under said Order No. 346, for points between River Junction and Jacksonville, is as follows:

Leaves.	Present Schedule.	Proposed Schedule.
River Junction.....	1:50 a. m.	1 a. m.
Mt. Pleasant.....	2:15 a. m.	1:30 a. m.
Gretna	2:25 a. m.	1:38 a. m.
Quincy	2:40 a. m.	1:48 a. m.
Midway	3:10 a. m.	2:13 a. m.
Tallahassee	3:45 a. m.	2:43 a. m.
Chaires	4:20 a. m.	3:08 a. m.
Capitola	4:25 a. m.	3:13 a. m.
Lloyd	4:35 a. m.	3:23 a. m.
Drifton	4:55 a. m.	3:41 a. m.
Aucilla	5:10 a. m.	3:56 a. m.
Greenville	5:26 a. m.	4:16 a. m.
Madison	5:55 a. m.	4:46 a. m.
Lees	6:11 a. m.	5:02 a. m.
Ellaville	6:25 a. m.	5:17 a. m.
Falmouth	6:34 a. m.	5:25 a. m.
Live Oak.....	6:55 a. m.	5:47 a. m.
Houston	7:25 a. m.	5:59 a. m.
Welbourn	7:36 a. m.	6:10 a. m.
Ogden	7:47 a. m.	6:22 a. m.
Lake City.....	8 a. m.	6:33 a. m.
Watertown	8:10 a. m.	6:43 a. m.
Mt. Carrie.....	8:25 a. m.	6:54 a. m.
Oluatee	8:37 a. m.	7:02 a. m.
Sanderson	9:13 a. m.	7:22 a. m.
Glen St. Mary.....	9:29 a. m.	7:38 a. m.
McClenny	9:36 a. m.	7:43 a. m.
Baldwin	10:05 a. m.	8:05 a. m.
Millerton	10:15 a. m.	8:13 a. m.
Whitehouse	10:22 a. m.	8:20 a. m.
Marietta	10:30 a. m.	8:26 a. m.
West Jacksonville..	10:38 a. m.	8:33 a. m.
Jacksonville	10:50 a. m.	8:45 a. m.

"That under the present schedule of the Seaboard Air Line Railway's train No. 76, which leaves River Junction eastward bound at 12:05 p. m., for Jacksonville, and at that point makes close connection with north-bound trains of the Seaboard Air Line Railway, Atlantic Coast Line Railroad, and the Southern Railway, this train under the fastest schedule that can be made consistent with safety reaches McClenny at 6:25 p. m., Baldwin at 6:50 p. m., Millerton at 6:58 p. m., and Whitehouse at 7:05 p. m., and Jacksonville at 7:30 p. m. That there is a difference of $8\frac{2}{10}$ miles between Baldwin and McClenny. That it is a distance of 60 miles from Jacksonville to Lake City. That as will be seen by reference to the schedule of the Seaboard Air Line Railway's train No. 76, and the working out of the proposed schedule (which has been done by your respondent, the Seaboard Air Line Railway, with the utmost care and caution with the view of making for the purpose of this hearing the said proposed schedule in so far as it is consistent with safety to the lives of its passengers and train crew), the proposed schedule would place its said train No. 79 at Baldwin bound westward while its said train No. 76 would at the same time reach McClenny, the station on its line next from Baldwin westward going in an easterly direction, and with absolutely no station, trackage, or facilities between the two stated points to arrange for

their passage. That under the fast schedule proposed to hold 79 at Baldwin until train No. 76 reached that point would cause train No. 79 to miss a majority of times, if not invariably, its connection at Lake City with the Georgia Southern & Florida Railway going north, and for which connection this respondent handles a large number of passengers daily. That to hold train No. 76 at McClenny until train No. 79 passed it there would likewise result in the missing of a north-bound connection at Jacksonville by train No. 76, which daily hauls a large number of passengers from points on this respondent's line traveling northward via Jacksonville, which point is the quickest and most convenient route for travelers going north and east.

"That, to comply with the proposed schedule as to trains Nos. 78 and 79 after a most careful working out of the time table to meet such proposed schedule, this respondent the Seaboard Air Line Railway finds, as will be seen by reference to such proposed schedule, heretofore set forth, that train No. 78 going eastward would be compelled to leave River Junction at 1 a. m., while train No. 79 going westward would reach Mt. Pleasant, the nearest station next to and east of River Junction, at 1 a. m., leaving them—that is, train 78 and train 79—one at River Junction and one at Mt. Pleasant 10 miles apart, going in opposite directions with absolutely no station or facilities to pass each other between those two points.

"That the effect of the said order upon the respondent the Seaboard Air Line Railway will also require its fast passenger train known as No. 66 from Tampa to Jacksonville to meet its said train No. 79 at Whitehouse, which place is a nontelegraph station, and with no facilities to give the train orders to either of said trains. That it is an impracticable proposition from a railroad standpoint to require passenger trains to pass at a nontelegraph station; it being the rule, wherever possible, to pass them by each other at telegraph stations. That the operator can be given a copy of the orders to the respective train crews, and see that the train first arriving at such station is held until the arrival of the train from the opposite direction, and thereby require them to pass each other with safety to the passengers and crew thereon.

"That as will be seen by reference to the respective proposed schedules where the west-bound schedule may be an improvement as to some points the east-bound schedule is at such point more inconvenient than at present. That it will also be seen by reference to the schedules proposed that, where some particular point on this respondent's line is benefited by the change proposed, yet another point of equal importance receives a more inconvenient schedule.

"That to make the proposed schedule for this respondent's train No. 79, and leave

Jacksonville at the time proposed in said order, this respondent cannot serve its patrons and place its train in River Junction prior to 1:29 a. m., the following morning; while the respondent the Louisville & Nashville Railroad Company finds that it cannot place its train No. 4 in Pensacola and serve its patrons with safety unless such train leaves River Junction at 1:20 a. m. That it takes at least 20 minutes at River Junction to change engines and make transfers, which makes a discrepancy of 29 minutes in the through schedule.

"(5) That if the said Order 346 be put into effect, and the freight cars now carried on trains Nos. 1 and 4 are eliminated from said trains it will prevent the existence of a fast freight train on the said Louisville & Nashville Railroad Company's line. The said fast freight is now carried in four or five cars, never exceeding five, which are sufficient to do the fast freight business over the said line. But the said business is not sufficient to warrant or justify the putting on of an exclusively fast freight train, and the expense of operating said train would much exceed the revenues which would be derived therefrom.

"The delivery of fast freight by the Seaboard Air Line at Quincy and River Junction will be entirely prevented by the discontinuance of the freight cars attached to train No. 79 of the said Seaboard Air Line Railway, and as hereinbefore set forth, with reference to the Louisville Railroad Company, the expenses of conducting a distinctive and exclusively fast freight train will be prohibitive of the operation of such train for the reasons hereinbefore given.

"That a large amount of through freight, requiring rapid transportation, from Eastern points, is brought to Jacksonville by the Clyde Line, and carried over the Seaboard Air Line Railway and the Louisville & Nashville Railroad Company's railroad from Jacksonville to Pensacola, and to points between said cities, and through Pensacola to Mobile and New Orleans, and, if the said proposed schedule be made effective, the said freight cannot be carried as fast freight, but must be carried upon local freight trains, and thereby the time of delivery increased by several days. Not only thus will the consignees be greatly inconvenienced because of the increase of the time required for transportation, but much of said freight must be transported rapidly, in order that it may reach its destination before perishing, and in time for market.

"Conversely, though, fast freights are now carried upon the said trains Nos. 1 and 4 from Pensacola to Jacksonville, and to points between said cities, such freights consisting of packing house products from Ft. Worth, Tex., and bananas from Mobile, and other products from points west of Pensacola. Much of such freight passes through Pensacola over the lines hereinbefore mentioned

to Jacksonville, and thence northward and southward. They require quick transportation, and, if speed cannot be furnished over the lines of the respondents hereto, the said through trade will be diverted to other railroad lines.

"The Louisville & Nashville Railroad Company has also conducted by use of freight cars on its mixed trains Nos. 1 and 4 the business of carrying package freights to various points on its line aforesaid, in which business packages from Pensacola are carried to such points for distribution at such points, and thus reach the consignees within a day or a fraction of a day after leaving Pensacola. If the said packages were carried by local freights, they would require for transportation several days longer than is required for transportation on the trains aforesaid.

"The said Seaboard Air Line Railway carried upon its train No. 79 freight cars for the delivery of package freight at Quincy and River Junction, from which latter point the said freight is conveyed to Apalachicola and intermediate stations and Port St. Joe, by which arrangement the said packages are delivered within 24 hours from the time of leaving Jacksonville. If the said rapid package delivery be discontinued, the time of delivery of said package to the consignees thereof will be postponed for several days. The said business is of considerable amount and of large practical value to the citizens of the points mentioned.

"That the respondents are informed and believe that the fast freight service made possible by the said mixed trains is the fastest freight service in the South, and enables these respondents to compete with and gain trade from other lines of railroad, which would acquire and hold the said trade if the said fast freight trains were abolished.

"That it would be impracticable, if the fast freight trains were made longer, by including more cars therein, to make the same time as is now made by the said mixed trains, to which the number of freight cars is rarely exceeding five.

"(6) That the average time required by Order No. 346 for the running of trains Nos. 1 and 4 on the Louisville & Nashville Railroad Company's line, and Nos. 78 and 79 on the Seaboard Air Line Railway's line, is about 27 miles an hour. This is practically the rate of speed now used by trains Nos. 2 and 3 on the line of the former railroad company, and by trains Nos. 76 and 77 on the line of the latter railway, between Pensacola and Jacksonville. That the said trains 2, 3, 76, and 77 do not stop at, and thereby accommodate the inhabitants of, several points on the said lines at which the mixed trains now operated upon the said lines stop, and, if the said trains Nos. 1, 4, 78, and 79 become exclusive passenger trains, they will still be required to serve the said points as the said mixed trains now serve, and thereby would be required to stop at many more

places than the said trains Nos. 2, 3, 76, and 77. The points at which additional stops would be required on the Louisville & Nashville Railroad Company's line are Inwood, Valle, Bearhead, Claroy, Harold, Galt City, Harp, Behemia, and Escambia, and the additional stops which would be required on the Seaboard Air Line Railway will be Drake, Woodstock, Champagne, Braswell, Jamison, Ocklocknee, and Lawrence Switch, and also (though shown on the proposed schedule) Ogden and Mt. Carrie, stops at some of which points have been ordered by relators, and these respondents aver that it would be impracticable to maintain the said schedule fixed by the said Order No. 346, and make the said additional stops.

"(7) These respondents were present at the hearing mentioned in the alternative writ before the Railroad Commissioners of the state of Florida, and were able to ascertain, from the expressions of the said Commissioners, only two reasons why the said new schedule should be made, to wit: That it would accommodate through passengers traveling between Pensacola and Jacksonville, and thus stimulate such travel, and that it would enable persons going upon said lines to Jacksonville by train No. 1 of the Louisville & Nashville Railroad Company and by train No. 78 of the Seaboard Air Line Railway to reach Jacksonville in time to make the south-bound connection with the Florida East Coast Railway.

"These respondents aver: That the through passenger travel from Pensacola to Jacksonville and from Jacksonville to Pensacola, and from points through Jacksonville to Pensacola, is but a very small percentage of the passenger travel upon the lines of railway of these respondents between the said two mentioned points. That the Louisville & Nashville Railroad Company, respondent, has not heretofore kept its record in such shape as to show the number of through passengers between said points separate and apart from the way passengers, and, being aware of that fact, asked the Florida Railroad Commissioners, relators, for permission to postpone the taking effect of the order for 30 days, so that it might ascertain the relative proportions of said through and way passengers as a basis for the action of the commissioners, but that the said request was refused.

"Nevertheless, the said respondent has since the making of the said order taken steps to ascertain the number of passengers from Pensacola, and from points beyond Pensacola, passing over its line to the Seaboard Air Line Railway at River Junction, and the reverse, although it has not been able to ascertain the number of passengers passing over its line going through Pensacola to Jacksonville, or from points beyond Jacksonville to Pensacola, or beyond. It has also ascertained the number of passengers from stations on the Pensacola & Atlantic Division of its line to points upon said division,

and to points on the Seaboard Air Line Railway, and from points on the Seaboard Air Line Railway to points on the said Pensacola & Atlantic Division. This information has been gained accurately by taking account of all tickets and passengers upon its trains Nos. 1 and 4 for seven days in the month of October instant. The result of such investigation is, as the said respondent avers, for the said seven days (excluding train No. 1 October 14th, which had not reported when the tabulation of said date was made) that the ratio of passengers going through from Pensacola and points beyond Pensacola over the Pensacola & Atlantic Division of the said respondent's line to River Junction, and to points on the Seaboard Air Line Railway, to the number of way passengers going from point to point on the said Pensacola & Atlantic Division, or from points on the said division to points on the Seaboard Air Line Railway, and the reverse is as $2\frac{1}{2}$ to 100; that is to say, only about $2\frac{1}{2}$ per cent.

"The number of passengers going through from Pensacola and points beyond Pensacola over the said Pensacola & Atlantic Division of the said respondent's line to River Junction, and to points on the Seaboard Air Line Railway, and the reverse, during the said seven days, was 151, and the number of way passengers going from point to point on the said Pensacola & Atlantic Division or from points on the said division to points on the Seaboard Air Line Railway and the reverse was during the said seven days 4,216.

"The ratio of the passengers going through from Pensacola and points beyond Pensacola over the Seaboard Air Line Railway to River Junction, and to points on the Louisville & Nashville Railroad, and the reverse, to the number of way passengers going from point to point on the Seaboard Air Line Railway, or from points on the said line to points on the Louisville & Nashville Railroad, and the reverse, has been during the past 12 months prior to October 1, 1911, as $8\frac{1}{2}$ to 100; that is to say, only about $8\frac{1}{2}$ per cent. That the number of passengers constituting the former class during the said months was 9,410, and the number of passengers constituting the latter class during the said months was 112,099. That of the 9,410 through passengers 3,235 were from points beyond Pensacola to Jacksonville and to reverse.

"That these respondents admit that by having train No. 78 of the Seaboard Air Line Railway reach Jacksonville at 8:45 a. m., as it would under the said proposed schedule, the passengers by said train would be enabled to connect with the south-bound morning Florida East Coast Railway's train; whereas, under the present schedule, the said passengers have to remain in Jacksonville from 10:50 a. m., until 12:15 p. m. These respondents, however, aver that any convenience to the said passengers desiring to take the said south-bound train of the Florida East Coast Railway is more than counterbalanced by the

inconvenience to the through passengers arriving by train No. 4 of the Louisville & Nashville Railroad Company and to those departing by train No. 1 of the said company. By the said new schedule, passengers arriving by train No. 4 of the Louisville & Nashville Railroad Company will reach Pensacola at 7:30 a. m., and be required to lie over for four hours before taking the 11:30 train northward, and passengers arriving in Pensacola by the present train from the north at 4:10 p. m. will be required to lie over from that time until 7 p. m., whereas, by the present schedule, through passengers by the former train wait at Pensacola only 15 minutes, and by the latter train, only one hour and five minutes.

"(8) That the Louisville & Nashville Railroad Company has operated and managed its roads lying in the state of Florida, including the line between Pensacola and River Junction, with the utmost economy, consistent with the safety and dispatch of its passengers, and with the safe and prompt handling of its freights. That it has purchased supplies and equipments of the class and character required as cheaply as it could get them. That its employes are paid as low wages as they would be employed at, taking into consideration their efficiency and ability to handle the trains of the said Louisville & Nashville Railroad Company, with dispatch and safety. That all expenditures made in connection with and upon the said lines of railroad have been made as cheaply as possible. Yet that by and from the operation of the said road conducted in the best manner known to the respondent, and, as it believes, in the most economical manner possible, the said respondent has not been able by the operation of its said lines in Florida to receive from its business on said roads, and thereby to realize, a sum sufficient to pay its operating expenses and interest exceeding 3 per cent. upon the cost of reproduction of said road. That money cannot be borrowed in the state of Florida for ordinary purposes for use in industrial enterprises at less than from 7 per cent. to 8 per cent. and for use in large enterprises, like the construction and improvement of railroads, for less than 5 per cent. to 6 per cent., and that the profits ordinarily made by industrial enterprises in Florida usually exceed 8 per cent. That the legal rate of interest in the state of Florida allowed upon judgments and decrees and upon contracts where no rate is stipulated thereon is 8 per cent.; and that if the said schedule directed by Order No. 346 be put into operation, and the said freight cars eliminated from trains Nos. 1 and 4 the cost of operating under said schedule, and the loss of the fast freight business, or the cost of operating a special fast freight train, would reduce the net receipts of the said respondent from the operation of its said lines, and would render it still more unable to realize from said operation sufficient to pay the cost

of operation of said lines, and any interest exceeding 3 per cent. upon the cost of reproduction of the same.

"And the said respondent says that the putting into effect of the said Order 346 producing the said result would be a deprivation by the state of Florida of the respondent of its property without due process of law, and in violation of the provisions of the fourteenth amendment of the Constitution of the United States, and would deny to the said respondent the equal protection of the law, and thereby violate the provisions of the said constitutional amendment.

"(9) That the passengers who travel upon trains Nos. 1 and 4 of said respondent between Pensacola and River Junction are in part passengers who are destined to and come and go from and to points out of the state of Florida to and from points in the state of Florida. That the freight cars carried on said trains are in by far the largest part through cars between points in Florida and between points outside of Florida, and laden with through freight between said points. That said through passengers and freight traffic by said trains Nos. 1 and 4 is interstate commerce, and that the regulation of the schedules of said trains by the relators, in the manner and to the extent which would be effected by the operation of said order and the prohibition of pulling fast freight cars upon the said trains, as hereinbefore set forth, would constitute an unnecessary, arbitrary, and unreasonable interference with, delay of, and injury to, interstate commerce, and be in violation of the exclusive power conferred upon Congress by the Constitution of the United States, and especially by section 8 of article 1 of said Constitution.

"(10) That the Seaboard Air Line Railway Company has operated and managed its roads lying in the state of Florida, including the line between Jacksonville and Pensacola, with the utmost economy, consistent with the safety and dispatch of its passengers, and with the safe and prompt handling of its freights. That it has purchased supplies and equipment of the class and character required as cheaply as it could get them. That its employes are paid as low wages as they would be employed at, taking into consideration their efficiency and ability to handle the trains of the said railway with dispatch and safety. That all expenditures made in connection with and upon the said lines of railroad have been made as cheaply as possible. Yet that by and from the operation of the said road, conducted in the best manner known to this respondent, and, as it believes, in the most economical manner possible, the said respondent has not been able by the operation of its said lines in Florida to receive from its business on said roads, and thereby to realize, a sum sufficient to pay its operating expenses, and over a reasonable rate of interest upon the cost of re-

production of the said road, and that if the said schedule directed by Order No. 346 were put into operation, and the said freight cars eliminated from trains Nos. 78 and 79, the cost of operating under said schedule, and the loss arising from the loss of the fast freight business, or the cost of operating a special fast freight train, would reduce the net receipts of the said respondent from the operation of its said lines, and would render it still more unable to realize from said operation sufficient to pay the cost of operation of said lines, and any interest upon the cost of reproduction of the same.

"And the said respondent says that the putting into effect of the said Order No. 346 producing the said result would be a deprivation by the state of Florida of the said respondent of its property, without due process of law, and in violation of the provisions of the fourteenth amendment of the Constitution of the United States, and would deny to the said respondent the equal protection of the law, and thereby violate the provisions of the said constitutional amendment.

"(11) That the passengers who travel upon the trains 78 and 79 of the said respondent between Jacksonville and River Junction are in part passengers who are destined to and come and go from and to points out of the state of Florida to and from points in the state of Florida. That the freight cars carried on said trains are in by far the largest part through cars between points in Florida and points outside of Florida, and laden with through freight between said points. That the said passenger and freight traffic is interstate commerce, and that the regulation of the schedules of said trains by the relators, in the manner and to the extent which would be effected by said order, and the prohibition of carrying said freight cars on said trains, as hereinbefore set forth, would constitute an unnecessary, arbitrary, and unreasonable interference with, delay of, and injury to, interstate commerce, and would be in violation of the exclusive power conferred upon Congress by the Constitution of the United States, and especially by section 8 of article 1 of the said Constitution.

"(12) These respondents aver that they are informed by the Railroad Commissioners of the state of Florida, and believe, that the Order No. 346 was based upon no specific complaint filed with the said commissioners of the now existing schedule, except one filed about a year prior to the order of the said Commissioners to these respondents to show cause why the said schedule should not be changed, but that the said order was based upon general complaints heard by the individual Railroad Commissioners while traveling on said trains.

"(13) That the number of passengers shown in paragraph 7 to have traveled on the line of the Louisville & Nashville Railroad Company between Pensacola and River Junction during the week mentioned in said paragraph

was approximately the average number of passengers traveling per week over said line during the year next preceding said week.

"That the passenger travel over the lines of the respondents between Jacksonville and Pensacola is not large, and that the respondents now operate on said lines between said points two fast trains, one each daily, which afford adequate facilities for fast travel for all passengers traveling over and through either of said points to the other, and for all passengers traveling on said lines requiring fast travel.

"That the inconvenience to the way passengers on the lines of the respondents and the injury to them and to the communities and to the respondents as hereinbefore set forth will result from the change of schedule proposed by Order 346, unless respondents put into operation local trains on the said lines with schedules the same, or substantially the same, as those now in force as to trains 1 and 4 on the Louisville & Nashville Railroad Company's line and 78 and 79 on the Seaboard Air Line Railway's line. That the addition of said local trains would not add to the number of passengers traveling on said lines, but would transfer to said additional trains by far the largest part of the passenger travel now using trains 1 and 4 and 78 and 79. That the addition of said trains would double the large expense of the passenger service now rendered by respondents to the public by the said trains 1 and 4 and 78 and 79, and thus still further lessen the income of the respondents, and render them more unable to earn from the operation of their lines in Florida operating expenses and interest exceeding 3 per cent. on the cost of reproduction on their lines in Florida, and that the putting into effect of Order No. 346 producing such result would deprive respondents of their property without due process of law and the equal protection of the laws, and thus violate the fourteenth amendment of the Constitution of the United States.

"The respondents aver that the said Order No. 346 is so arbitrary and unreasonable, as hereinbefore set forth, and so interferes with the management of the respondents of their said lines of railroad, that, if put into effect, it would deprive respondents of the protection of the fourteenth amendment to the Constitution of the United States, in that it would take their property without due process of law, and would deprive them of the equal protection of the laws.

"W. A. Blount,

"Attorney for the Louisville & Nashville Railroad Company.

"W. J. Oven,

"Attorney for the Seaboard Air Line Railway."

To this return the following demurrer was interposed:

"The relators say that the amended return of the respondents to the alternative writ is bad in substance.

"And the relators further say that each of the paragraphs of the said amended return, numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, is bad in substance.

"And the relators further say that each of the subdivisions 'a,' 'b,' 'c,' 'd,' 'e,' of paragraph 3 of the amended return is bad in substance.

"And for cause of demurrer the relators show:

"(1) The order of the Railroad Commissioners set out in the alternative writ is presumed to be reasonable and just, and the said amended return does not set up facts sufficient to rebut this presumption.

"(2) The said amended return does not set up facts sufficient to show that the said order is either unreasonable, unnecessary, arbitrary, or impracticable as alleged in the return.

"(3) The amended return is in the nature of a plea in confession and avoidance, and as such it fails to comply with the rule in mandamus proceedings requiring great strictness in setting up matter in confession and avoidance.

"(4) Paragraphs numbered 2 to 7, inclusive, only question the expediency of the order of the Railroad Commissioners set up in the alternative writ, and therefore refer to matters addressed to the discretion and judgment of the Railroad Commissioners.

"(5) The matters set up in the said paragraphs 2 to 7, inclusive, are not sufficiently shown to be matters subject to judicial review.

"(6) Even if the matters set up in the said paragraphs 2 to 7, inclusive, are subject to judicial review, under any circumstances, they are not subject to such review in the absence of a showing that application has been first made to the Railroad Commissioners for proper action upon the matters therein set forth.

"(7) The facts alleged in the eighth paragraph of the said return are not such as to show that the order set up in the alternative writ would amount to deprivation of the respondent the Louisville & Nashville Railroad Company of its property without due process of law.

"(8) The facts set up in the ninth paragraph of the said return are not sufficient to show that the order of the Railroad Commissioners would constitute any interference with, or delay of, or injury to, interstate commerce.

"(9) The facts set up in the ninth paragraph of the said return are not sufficient to show that the order of the Railroad Commissioners in question amounts to a regulation of interstate commerce.

"(10) The facts set out in the tenth paragraph of the said return are not sufficient to show that the said order of the Railroad Commissioners would have the effect of depriving the respondent the Seaboard Air Line

Railway of its property without due process of law. *

"(11) The facts set up in the eleventh paragraph of the said return are not sufficient to show that the order in question would constitute any interference with, delay of, or injury to, interstate commerce.

"(12) The facts set out in the eleventh paragraph of the said return are not sufficient to show that the order in question amounts to a regulation of interstate commerce.

"(13) The allegations of the eighth, ninth, tenth, and eleventh paragraphs of the said return are not sufficiently specific, and do not comply with the rule in mandamus requiring great strictness in setting up matters in confession and avoidance.

"(14) The order in question undertakes to enforce the obligations of the respondent companies to provide adequate facilities for the proper operation of their roads and the proper accommodation of their patrons, and is therefore not violative of the fourteenth amendment to the Constitution of the United States, and therefore the effect of the said order cannot be to deprive said respondents of property without due process of law or to deny the equal protection of the law.

"(15) The twelfth paragraph of the said return is bad because the relators have the right to act upon their own initiative.

"F. M. Hudson,

"Attorney for Relators."

F. M. Hudson, for relators. W. A. Blount and W. J. Oven, for respondents.

WHITFIELD, C. J. (after stating the facts as above). The purpose of this proceeding is to enforce the order of the Railroad Commissioners set out in the statement requiring the respondents to cease carrying freight cars in certain designated trains between Jacksonville and Pensacola, points within this state, and to observe a prescribed schedule in the operation of such trains.

It is not contended that the order the relators seek to have enforced is illegal on its face. The questions presented are whether the averments of the return to the alternative writ that are admitted by the demurrer show that the enforcement of the order as made (1) will deny to the respondents in their property rights due process and equal protection of the laws; (2) will unlawfully burden or regulate interstate commerce; (3) will be unreasonable, unnecessary, arbitrary, and impracticable with reference to the respondents and the public who are affected by the order.

[22] The demurrer admits as true all well-pleaded averments of fact, and also all fair and pertinent inferences or conclusions of fact contained in the return that are not inconsistent with or repugnant to the accompanying specific detailed averments of facts and circumstances. But the demurrer does not admit conclusions of law stated in the

return. If the facts stated in the return and admitted by the demurrer do not amount to a defense to the writ, the demurrer is well taken. But, if the detailed specific facts and circumstances that are well pleaded justify the conclusions of fact and of law that are asserted, and constitute a defense to the alternative writ, the demurrer should be overruled.

[23, 24] Railroad companies are by the state permitted to use franchises and to render the public service of common carriers primarily to meet the reasonable requirements of transportation for the public. For such service the carrier is under the law entitled to only a reasonable compensation to be ascertained by a proper consideration of all the facts and circumstances affecting the service, both as to the carrier and as to the public severably and collectively who are to be served. Property, labor, and management are under the law devoted to the public service voluntarily engaged in, subject to the burden of lawful governmental regulation in the interest of the public to be served, as well as subject to the requirement of law that reasonably adequate facilities shall be afforded, and that only reasonable compensation is allowed. Remuneration for the property and labor used depends upon the result of a reasonable compensation for service rendered. The amount and reasonableness of the return for property used in the service resulting from compensation for service rendered depends upon circumstances in the absence of valid legislation on the subject. If a governmental regulation does not unreasonably discriminate against a carrier, there is no denial of the equal protection of the laws. If a regulation is not so unreasonable, unjust, and arbitrary as to prevent the carrier from receiving a just compensation for service rendered, there is no deprivation of property without due process of law. If a regulation does not directly and materially burden interstate commerce or conflict with regulations prescribed or lawfully authorized by Congress, the interstate commerce clause of the federal Constitution is not violated. If a regulation within the authority conferred is not in its terms or in its operation unjust and unreasonable as to the carrier or as to the persons, localities, or commodities affected by it, the authority given by the statute to the Railroad Commissioners to make just and reasonable rules and regulations as to intrastate transportation is not exceeded or violated.

[1] The Railroad Commissioners are statutory officers authorized by the Constitution. Their power and duties are only such as are expressly or impliedly conferred by statutes. When acting within the authority conferred upon them, a wide discretion is accorded to the Railroad Commissioners; and an alleged abuse of discretion by them must be affirmatively and sufficiently shown by admissions or proofs before the courts will interfere. Valid

regulations of the Railroad Commission should be made effective as contemplated by the Constitution and statutes. The Railroad Commission is a branch of the state governmental authority, and the statute expressly provides that rates, rules, and regulations made by them shall be regarded as *prima facie* reasonable and just. If the admissions or proofs in judicial proceedings clearly show a regulation of the Railroad Commissioners to be a violation of law or an abuse of discretion that in effect confiscates property, or unreasonably and illegally imposes burdens affecting property rights, it operates as or amounts to a deprivation by the state of private property rights without due process of law or to a denial by the state of the equal protection of the laws, and the courts will afford appropriate relief. Likewise, if a regulation is shown by admissions or proofs to be an unlawful burden upon interstate commerce or to be a violation of any provision of law, the courts will in appropriate proceedings interfere and enforce the law.

[2, 3] A railroad common carrier may, in addition to the facilities and accommodations already furnished, be required to render a particular service that it is essentially the duty of the carrier to do for the reasonable convenience of its patrons among the public, and to meet the reasonable requirements of the public service undertaken. Even though such a particular duty if enforced would be in itself unremunerative and burdensome, such a result would be an incident to the service voluntarily undertaken, in consideration of the franchises permitted to be used for the public good, and the property rights of the carrier would not thereby be unlawfully invaded, if the particular service is reasonably necessary for the public convenience, and the burden to the carrier has some fair relation to the benefits accruing to the public, and the burden of the particular service, considered with reference to the entire business of the carrier, does not in reality amount to a denial to the carrier of a reasonable compensation for the service rendered by it as an entirety. See *State ex rel. Railroad Com'rs v. Florida East Coast R. Co.*, 57 Fla. 522, 49 South. 43; *Corporation Commission v. Atlantic Coast Line R. Co.*, 137 N. C. 1, 49 S. E. 191, 115 Am. St. Rep. 636, affirmed in 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933; 11 Ann. Cas. 398.

[4] Where it appears that a particular service is a duty vitally necessary to the public, and its performance is essential in adequately rendering a general public service as common carrier, the fact that the performance of the particular duty will be unremunerative will not in view of the nature of the duty to the public excuse nonperformance. See *New York v. Barker*, 179 U. S. 287, 21 Sup. Ct. 124, 45 L. Ed. 190; *Missouri Pac. Ry. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472. [5] And if the

performance of a particular, useful, but non-essential, duty will as part of a general public service contribute to the public convenience, the fact that the particular service must be rendered at a loss does not, in view of the nature of the duty required, excuse nonperformance; but the loss occasioned by the performance of the particular duty may be considered in determining the reasonableness of the order requiring the particular service to be rendered. *Atlantic Coast Line Railroad Company v. North Carolina Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933.

[6] The general and special powers conferred by the statutes of the state upon the Railroad Commissioners are ample to authorize them to make and enforce just and reasonable orders, rules, and regulations for the furnishing by the respondents of reasonably adequate facilities and accommodations to the traveling public by the operation of the two passenger trains mentioned in the order, separate from freight cars, and for establishing schedules to be observed in operating such passenger trains between points within this state; and all such orders, rules, and regulations when made are by the statute declared to be *prima facie* reasonable and just.

[7] If such particular regulations are reasonably useful and expedient for the just requirements of the public service being performed by the respondents, thereby making it a duty of the carrier to render the service, the regulations, if not illegal, may be enforced, even though the service required is not remunerative, unless it is made to clearly appear that the particular regulations are so unreasonable and arbitrary that their enforcement will operate to deny to the respondents a reasonable compensation for the entire service rendered by the carrier.

[8] In determining whether a rate, rule, regulation, or order of the Railroad Commission upon a subject within its authority is so unreasonable and arbitrary as to be illegal and unenforceable, the court, in deference to the governmental functions conferred by law upon the Commissioners, will not only require the *prima facie* of reasonableness impressed by the statute upon the rate, rule, regulation, or order to be overcome by admissions or proofs, but will require the admissions or proofs of facts tending to show unreasonableness to be clear and convincing, every reasonable doubt being yielded in favor of the rate, rule, regulation, or order.

[9] The reasonableness of a rate, rule, regulation, or order of the Railroad Commissioners is to be determined by a consideration of the rights of all parties directly and materially affected by the rate, rule, regulation, or order. This involves a consideration of all the facts and circumstances by such appropriate processes and standards of rea-

soning and computation as are afforded by law or by common experience and the dictates of right and justice.

[10] In determining whether the burden of a particular regulation enforced by state authority is confiscatory and unlawful because it prevents a railroad company from receiving a reasonable compensation for the service rendered taken as an entirety, the fair actual value of all the property and labor and management rightly used in rendering the service should be considered. The cost of reproduction of the property may be an element to be considered in ascertaining the real value of the property used, but it is not the value that is to be arbitrarily considered in determining what is a reasonable compensation for the service rendered as a whole by a common carrier. *Willcox v. Consolidated Gas Company*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382.

[11] Where the same property, labor, and management are used at the same time by a common carrier in interstate and intrastate commerce, the value of the property and labor and management used should be properly apportioned in determining the reasonableness of the compensation for service rendered by the carrier in the intrastate business taken separately and as an entirety, or in connection with the interstate business concurrently done. See *State ex rel. Atty. Gen. v. Atlantic Coast Line R. Co.*, 48 Fla. 146, 37 South. 657; *State ex rel. Railroad Com'rs v. S. A. L. Ry.*, 48 Fla. 129, 37 South. 314.

The averments of the return as to the enforcement of the order being a denial of due process and equal protection of the laws are as follows:

"That the Louisville & Nashville Railroad Company has operated and managed its roads lying in the state of Florida, including the line between Pensacola and River Junction, with the utmost economy, consistent with the safety and dispatch of its passengers, and with the safe and prompt handling of its freights. That it has purchased supplies and equipments of the class and character required as cheaply as it could get them. That its employes are paid as low wages as they would be employed at, taking into consideration their efficiency and ability to handle the trains of the said Louisville & Nashville Railroad Company with dispatch and safety. That all expenditures made in connection with and upon the said lines of railroad have been made as cheaply as possible. Yet that by and from the operation of the said road conducted in the best manner known to the respondent, and, as it believes, in the most economical manner possible, the said respondent has not been able, by the operation of its said lines in Florida, to receive from its business on said roads, and thereby to realize a sum sufficient to pay its operating expenses, and interest exceeding 3 per cent. upon the cost of reproduction of said

road. That money cannot be borrowed in the state of Florida for ordinary purposes for use in industrial enterprises at less than from 7 per cent. to 8 per cent., and for use in large enterprises, like the construction and improvements of railroads, for less than 5 per cent. to 6 per cent. and that the profits ordinarily made by industrial enterprises in Florida usually exceed 8 per cent. That the legal rate of interest in the state of Florida allowed upon judgments and decrees and upon contracts where no rate is stipulated thereon, is 8 per cent.; and that if the said schedule directed by Order No. 346 be put into operation, and the said freight cars eliminated from trains Nos. 1 and 4, the cost of operating under said schedule, and the loss of the fast freight business, or the cost of operating a special fast freight train, would reduce the net receipts of the said respondent from the operation of its said lines, and would render it still more unable to realize from said operation sufficient to pay the cost of operation of said lines, and any interest exceeding 3 per cent. upon the cost of reproduction of the same.

"And the said respondent says: That the putting into effect of the said Order 346 producing the said result would be a deprivation by the state of Florida of the respondent of its property without due process of law, and in violation of the provisions of the fourteenth amendment of the Constitution of the United States, and would deny to the said respondent the equal protection of the law, and thereby violate the provisions of the said constitutional amendment.

"That the Seaboard Air Line Railway Company has operated and managed its roads lying in the state of Florida, including the line between Jacksonville and Pensacola, with the utmost economy, consistent with the safety and dispatch of its passengers, and with the safe and prompt handling of its freights. That it has purchased supplies and equipment of the class and character required as cheaply as it could get them. That its employes are paid as low wages as they would be employed at, taking into consideration their efficiency and ability to handle the trains of the said railway with dispatch and safety. That all expenditures made in connection with and upon the said lines of railroad have been made as cheaply as possible. Yet that by and from the operation of the said road, conducted in the best manner known to this respondent, and, as it believes, in the most economical manner possible, the said respondent has not been able by the operation of its said lines in Florida to receive from its business on said roads, and thereby to realize, a sum sufficient to pay its operating expenses, and over a reasonable rate of interest upon the cost of reproduction of the said road, and that if the said schedule directed by Order No. 346 were put into operation, and the said freight cars eliminated from trains Nos. 78

and 79, the cost of operating under said schedule and the loss arising from the loss of the fast freight business, or the cost of operating a special fast freight train, would reduce the net receipts of the said respondent from the operation of its said lines, and would render it still more unable to realize from said operation sufficient to pay the cost of operation of said lines, and any interest upon the cost of reproduction of the same.

"And the said respondent says that the putting into effect of the said Order No. 346 producing the said result would be a deprivation by the state of Florida of the said respondent of its property, without due process of law, and in violation of the provisions of the fourteenth amendment of the Constitution of the United States, and would deny to the said respondent the equal protection of the law, and thereby violate the provisions of the said constitutional amendment."

These averments, considered separately or in connection with other averments, do not show that the enforcement of the order will illegally deprive the respondents of property rights without due process or equal protection of law, because the regulation requires the performance of a duty of respondents, useful and expedient, if not necessary, to the public good, and it does not appear that the regulation will deprive the respondents of a reasonable compensation for the entire service that is rendered by the carrier. There is, besides, no averment that the conclusion of illegality asserted will result if the real value of the property and labor used in rendering the entire intrastate service is considered in ascertaining whether the regulation will deny to the respondent a reasonable compensation for the intrastate service considered as an entirety, or that the proportion of the same property and labor that is also used for interstate commerce has not been included in the estimate upon which the conclusion of confiscation is asserted. No such unjust discrimination or unfair classification of persons affected by the regulation appears from the facts alleged as will justify the asserted conclusion that the respondents will in substantial reality be denied the equal protection of the laws if the order is enforced.

[12] The state may enforce regulations to be observed by a railroad common carrier in intrastate transportation for the safety and convenience of the public who are affected by the regulation, even though interstate commerce is thereby indirectly and incidentally affected, without violating the interstate commerce clause of the federal Constitution, where such regulations are in aid of, or do not in fact impose substantial burden upon, lawful interstate commerce, or do not conflict with regulations of the subject that are legally prescribed or authorized by Congress. *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 South. 909, 32 L. R. A. (N. S.)

689; *People v. Chicago, I. & L. R. Co.*, 223 Ill. 581, 79 N. E. 144, 7 Ann. Cas. 5, and notes; *Gladson v. State of Minnesota*, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064; *Lake Shore & M. S. Ry. Co. v. State of Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; *Chicago, R. I. & Pac. Ry. Co. v. Arkansas*, 219 U. S. 453, 31 Sup. Ct. 275, 55 L. Ed. 290; *Missouri Pac. Ry. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472.

The averments of the return as to the order being an unlawful regulation of interstate commerce are as follows:

"That the passengers who travel upon trains Nos. 1 and 4 of said respondent between Pensacola and River Junction are in part passengers who are destined to and come and go from and to points out of the state of Florida to and from points in the state of Florida. That the freight cars carried on said trains are in by far the largest part through cars between points in Florida and between points outside of Florida, and laden with through freight between said points. That said through passenger and freight traffic by said trains Nos. 1 and 4 is interstate commerce, and that the regulation of the schedules of said trains by the relators in the manner and to the extent which would be effected by the operation of said order, and the prohibition of pulling fast freight cars upon the said trains, as hereinbefore set forth, would constitute an unnecessary, arbitrary, and unreasonable interference with, delay of, and injury to, interstate commerce, and be in violation of the exclusive power conferred upon Congress by the Constitution of the United States, and especially by section 8 of article 1 of said Constitution.

"That the passengers who travel upon the trains 78 and 79 of the said respondent between Jacksonville and River Junction are in part passengers who are destined to and come and go from and to points out of the state of Florida to and from points in the state of Florida. That the freight cars carried on said trains are in by far the largest part through cars between points in Florida and points outside of Florida, and laden with through freight between said points. That the said passenger and freight traffic is interstate commerce, and that the regulation of the schedules of said trains by the relators in the manner and to the extent which would be effected by said order, and the prohibition of carrying said freight cars on said trains, as hereinbefore set forth, would constitute an unnecessary, arbitrary, and unreasonable interference with, delay of, and injury to, interstate commerce, and would be in violation of the exclusive power conferred upon Congress by the Constitution of the United States, and especially by section 8 of article 1, of the said Constitution."

While upon the facts admitted by the demurrer the regulation if enforced may inci-

dentally and to some appreciable extent affect interstate commerce, it is not clearly shown that any substantial burden would thereby be imposed upon interstate commerce; nor does it appear that the regulation would conflict with any regulation of the subject by authority of Congress. The presumptions are in favor of the order, and the regulation may result in an aid to interstate commerce that is consistent with congressional regulations and best subserve the interests of the public and the carrier. Respondents are not forbidden to operate a separate fast freight train for interstate freight. Interstate passengers will be benefited by the order. The reasonable requirements of passengers should not be subordinated to freight.

The order requiring passenger trains, instead of mixed passenger and freight trains, to be operated, is *prima facie* reasonable and just. It apparently would be a convenience to interstate passengers and to all others, and it does not clearly appear from the averments of the return admitted by the demurrer that the enforcement of the order in this severable particular will deny to the respondents due process or equal protection of the laws or unlawfully burden interstate commerce, or that such regulation will operate unreasonably or unjustly on the respondents so as to make it beyond the authority of the Commissioners to make and enforce. The expediency of, if not the necessity for, the regulation to subserve the public convenience, is shown by the order. In so far as the order requires the operation of separate passenger trains, it may be enforced by appropriate mandatory writ.

[13] Where a governmental regulation is directly prescribed by valid legislative enactment, its expediency and reasonableness, when no violation of organic law is involved, will not be inquired into by the courts, since the Legislature and the judiciary are co-ordinate branches of the state government, and legislative action is subject only to the organic law, and is reviewable by the courts only when the supreme law of the land is violated.

[14] But action taken by an administrative officer or board must not only be in accordance with organic law, but it must conform to applicable valid statutes, and must be reasonable in its operation. Such administrative action is also subject to judicial review as to matters that are not concluded by the exercise of administrative discretion and action. Even though the law gives to administrative action the effect of *prima facie* reasonableness, the courts may inquire into the reasonableness of the action. If in appropriate judicial proceedings it clearly appears that the administrative action complained of is an abuse of discretion and is not in fact reasonable, it will not be enforced, and it may be annulled or checked. Administrative discretion and action involving matters of mere expediency not amounting

to unreasonableness or illegality will in general not be interfered with by the courts.

[16] It is the duty of the carrier to render a service that is reasonably adequate and of most convenience to the greatest number of the public affected by the service.

[17, 18] The Railroad Commissioners are authorized to make and enforce only reasonable and just rules and regulations for intrastate transportation. In determining the reasonableness of a regulation authorized by the statute "for the establishing of such schedules for the arrival and departure of trains at depots as public comfort and convenience may require," the necessities and convenience of the public to be affected by the regulation should be considered as a whole and severably, regard being had for the number and reasonable requirements of patrons at different points on the line, and from connecting lines as well as the rights of the carrier. See *State ex rel. Railroad Com'rs v. Florida East Coast R. Co.*, 58 Fla. 524, 50 South. 425.

It clearly appears from the averments and the fair inferences of fact contained in the return and admitted by the demurrer that the enforcement of the schedule set out in the order will make the trains reach each terminus at such an early hour of the day as to result in great inconvenience to the large number of passengers on the line and from connecting lines who daily patronize these trains to and from the termini and points on the line some distance from each terminus, while it would add correspondingly little to the convenience of the limited number of through passengers and to those from the more central points on the line, besides the loss that would result to the carrier by a decrease of the number of passengers from and to points on the line nearer to each terminus, and the admittedly impracticability in important respects of the schedule prescribed.

[19] The status of *prima facie* reasonableness given to the order by the statute and the presumptions in favor of the action of the Commissioners indulged in by the court are manifestly overcome by the facts and the fair inferences therefrom that are admitted by the demurrer. While the order indicates the expediency for a schedule more suitable than the present one in furnishing reasonably adequate facilities and accommodations to meet the just requirement of the patrons of the line, considered as a whole and by reasonable classifications, it is apparent from the admission of the demurrer that the schedule as prescribed in the order sought to be enforced is not reasonable and just in its effect upon the carriers and the patrons. It thus clearly appears that the order in so far as it prescribes the particular schedule for the arrival and departure of the designated trains is an unjust and unreasonable regulation not authorized nor contemplated, but impliedly forbidden by the statute in express-

ly authorizing only just and reasonable regulations.

[20] The power to make reasonable rules and regulations for establishing schedules does not contemplate that the Commissioners shall arbitrarily assume the actual control and management of the physical property of the carrier, so as to unlawfully deprive the carrier of its right to manage its own property; but such grant of power does contemplate that the Railroad Commissioners by making and enforcing just and reasonable rules and orders shall supervise and regulate "the establishing" of proper schedules, as in all other matters affecting the service within the authority conferred by statute.

[21] The Railroad Commissioners may perform their duties conferred by statute without awaiting a specific complaint to be made to them. Therefore a motion of the relators is granted to strike the paragraph of the return numbered 12, averring in effect that no sufficient or appropriate specific complaint has been made to the Commissioners upon which to base their order.

[15] The mandatory parts of the alternative writ being admittedly severable, the demurrer to the return is sustained in so far as the return relates to the portion of the writ requiring the respondents to discontinue the hauling of freight cars on Louisville & Nashville trains No. 1 and No. 4, and on Seaboard Air Line trains No. 78 and No. 79, as stated in the writ; and the demurrer to the return is overruled in so far as the return relates to the portion of the writ requiring the respondents to observe the prescribed schedule in the operation of the mentioned trains.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

COLVIN v. STATE.

(Supreme Court of Florida, Division B. Nov. 14, 1911. Headnotes Filed Jan. 19, 1912.)

(Syllabus by the Court.)

ANIMALS (§ 13*)—MARKS—ALTERATION—PROSECUTION.

In the trial of a party for the crime of fraudulently altering the marks of an animal with intent to claim the same, where the animal is found in the unexplained possession of such party with its marks recently altered from its owner's mark into the mark owned or controlled by such party, the jury may presume as a matter of fact that such party committed such alteration of the marks.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 13-25; Dec. Dig. § 13.*]

Error to Criminal Court of Record, Walton County; C. O. Andrews, Judge.

John Colvin was convicted of altering marks on a hog, and brings error. Affirmed.

J. W. Kehoe, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error, on an information charging him with fraudulently altering the marks of a hog the property of another, was tried and convicted in the criminal court of record for Walton county, and to review the judgment and sentence imposed comes here by writ of error. The only assignment of error presented here is that the verdict of the jury is not sustained or justified by the evidence. It was proven without dispute that the hog of one Daughtery, as alleged in the information, that was upwards of a year old, was found in a pen to itself, back of the crib on the place where the defendant lived, and when found in this pen that its earmarks had recently, within about 10 days, been changed from the mark of Daughtery, that it formerly bore, into the mark of Mrs. Colvin, and the hog, that was a boar formerly, had, at about the same time, been recently castrated. No witness testified as to who did the alteration of these marks, or as to who put the hog in the pen there at Mrs. Colvin's place, where the defendant resided with her as his wife. And none of the witnesses saw the defendant about the place when they went there at the request of Daughtery to identify the hog as his property, and none of them saw him about the place when Daughtery removed the hog to his own place. The proofs showed that no other man besides the defendant resided at Mrs. Colvin's place, she having been a widow when he married her, and she owned the place at which they lived together as man and wife. And the proofs further showed that he had before that time sold some of his wife's hogs to raise money with which to buy horse feed, and that she had gotten these hogs back by returning to the purchaser the money that he had paid the defendant for them. The defendant offered no evidence at the trial.

In larceny, burglary, and kindred crimes from the unexplained possession of identified goods recently stolen, the guilt of such possessor may be inferred as a matter of fact by the jury, and so with the crime under discussion here, where an animal is found in the unexplained possession of a party with its marks recently altered from its owner's mark into the mark controlled by such party, the jury may presume as a matter of fact that such party committed such alteration of the marks. The proofs showed that the defendant lived alone with his wife at the place where this hog was found in a pen concealed behind his corn crib; that the hog was of such size and age, and the alterations of its marks were such, that no woman, unless she was of Amazonian stature

and physique, could have accomplished them. It became fair, then, for the jury to indulge the presumption as one of fact that he committed the alterations in the marks found on the animal that had been recently done. We think the evidence justified the verdict returned by the jury, and as the trial judge approved of it, also, in denying the motion for new trial, we do not feel justified in disturbing their finding on the facts.

Finding no error, the judgment of the court below in said cause is hereby affirmed, at the cost of Walton county; the defendant having been adjudged to be insolvent.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

NICKELSON, Justice of the Peace, v.
STATE ex rel. BLITCH.

(Supreme Court of Florida, Division B. Dec. 19, 1911.)

(Syllabus by the Court.)

MANDAMUS (§ 148*)—WHO MAY MAINTAIN—
ISSUE OF WARRANT.

An individual as such is not authorized to prosecute mandamus proceedings to compel a justice of the peace to issue a warrant in a criminal case.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 289; Dec. Dig. § 148.*]

Error to Court of Record, Escambia County; E. D. Beggs, Judge.

Application by the State, on the relation of B. Blitch, for a writ of mandamus against R. L. Nickelson, justice of the peace. From a judgment granting the writ, defendant brings error. Reversed.

Blount & Blount & Carter, Kirke Monroe, and Reeves & Watson, for plaintiff in error. M. E. Morey and R. P. Reese, for defendant in error.

PER CURIAM. On the 8th day of July, 1911, an alternative writ of mandamus, on the amended petition of B. Blitch, was issued to the plaintiff in error from the court of record of Escambia county, Fla.

The amended alternative writ of mandamus set up that Blitch applied to the plaintiff in error and made affidavit before him charging that on the 25th day of June, 1911, one John G. Oliver engaged in a game of baseball, and demanding the issuance of a warrant for the arrest of the said John G. Oliver. The amended writ alleged that the plaintiff in error gave as his reason for refusing to issue the warrant that the act of the Legislature of June 3, 1911, had delegated to the mayor and city council of Pensacola the power to pass ordinances superseding or repealing existing laws licensing, regulating,

or prohibiting baseball playing, and that the mayor and city council of Pensacola had, by ordinance, repealed or superseded chapter 5436 of the Laws of Florida of 1905, prohibiting baseball playing on Sunday, in this state, and had licensed such baseball playing in said city on Sunday, and that, inasmuch as John G. Oliver had procured a license under such ordinance, no offense had been committed by him in playing baseball as charged in the affidavit. The amended writ further set up that both the county judge and the solicitor of the court of record had refused to take cognizance of the charge, but did not set up any reasons that were assigned by them for so doing. The writ then charges that the act of June 3d is unconstitutional, without pointing out what particular sections in the Constitution are infringed by it.

The command of the alternative writ directed the plaintiff in error upon the prepayment of costs to issue a warrant for the arrest and apprehension of John G. Oliver, commanding the executive officer of his court to bring the said Oliver before the plaintiff in error as justice of the peace, to be dealt with according to law.

To this amended alternative writ of mandamus was interposed a motion to quash, which on the same day was overruled. The respondent then made return to the amended alternative writ of mandamus, setting up as reasons why he had not issued the writ the following:

(1) That Blitch at the time of making the affidavit had not paid or offered to pay costs, and had not made or offered to make the insolvency affidavit required by the statute.

(2) That the act of the Legislature of June 3, 1911, had conferred the power on the city of Pensacola to pass ordinances superseding or repealing existing laws in regard to baseball playing, and that the mayor and council of the city of Pensacola had afterward passed an ordinance authorizing the playing of baseball on Sunday after the procuring of license, and setting up that Oliver held license under such ordinance, and played baseball only at the time and place authorized in such ordinance, and that at the time of demand of the issuance of the warrant the relator had admitted that the game of baseball had been played by the said Oliver only as set up in such return. A copy of the particular ordinance was attached to the return.

The relator demurred to this return. The court sustained this demurrer, and proceeded to enter judgment awarding the peremptory writ and commanding Nickelson to issue his warrant for the apprehension of Oliver, commanding the executive officer of his court to produce the body of the said Oliver before Nickelson, to be dealt with according to law, and requiring return of obedience.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The plaintiff in error immediately sued out his writ of error and obtained an order of supersedeas, and made bond thereon.

He assigns as errors the denying of the motion to quash, the sustaining of the demurrer to the return, and the awarding of judgment and granting peremptory writ of mandamus.

The respondent moved to quash the amended alternative writ for the reasons, among others:

(1) Its recitations show no such injury to the relator as authorizes its issuance in his behalf.

(2) It seeks at the relation of a private person to compel the performance of a duty, which, if owing at all, is owing to the state as such in its governmental capacity, and which can be compelled, if at all, on the relation only of an officer of the state.

(3) The writ seeks on the relation of a private person, who shows no injury in person or property, to have an act of the Legislature adjudged to be unconstitutional.

(4) The relator has not shown any such right in himself as warrants or authorizes an adjudication on his relation of the question of the constitutionality of the act of June 3, 1911, mention whereof is made in the said writ.

The purpose of this writ is not the enforcement of a private right, and the relator does not seek the writ for that purpose. This is a petition of the state of Florida upon the relation of B. Blitch, and its object is the enforcement of a public right or to compel the performance of a public duty. The authorities are not in harmony as to the right of an individual to proceed in such a case by mandamus; especially is this so in regard to the right of a private person to compel a magistrate to perform his duty in respect to criminal proceedings. See note to the case of *State ex rel. Romano v. Yak-ey*, 9 Am. & Eng. Ann. Cas. 1074, where it is said the weight of authority is against such right.

In *Florida C. & P. R. Co. v. State ex rel. Town of Tavares*, 31 Fla. 482, 13 South. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30, this court held: When mandamus is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced must be the relator. In such case the relator is considered the real party and his right to the relief must clearly appear. Where the object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed, and the duty in question enforced. As there said, he must, however, be interested as a citizen.

In *State ex rel. Young v. Osborn*, 60 Neb. 415, 83 N. W. 357, the court held "a private individual, not shown to be either a citizen

or to be beneficially interested in the enforcement of the laws, cannot invoke mandamus to compel an officer to perform a public duty."

If it be sufficient that a private person has only such an interest as other members of the community, he would have no such interest if he were not a member of the community. As Judge Caldwell said in *People ex. rel. Van Dyke v. Colorado Cent. R. Co.* (C. C.) 42 Fed. 638: "But, when a private person moves for a mandamus 'on behalf of the people of the state,' he must show that he is one of them, and that his interests as a citizen of the state are injuriously affected by the wrong complained of. In the petition, and in the alternative writ in this case, the relator's name alone is given. It is not stated that he is a citizen or inhabitant of the United States, or of this state, or that he personally has been injured by the alleged wrong, or that he has any interest whatever in the controversy he has set on foot."

Of course, our knowledge must be confined to the matters set up in the petition. The allegation in this case is: "The petition of the state of Florida on the relation of B. Blitch." It is nowhere alleged that Mr. Blitch is a citizen or inhabitant of the state, and it does not appear, therefore, that he has such an interest as entitles him to the writ in this case. But, even though it appeared that the relator herein were a citizen of this state, we think the proceedings for mandamus should have been instituted by the proper public officer. The true distinction seems to be that, if the general public as distinguished from the state in its sovereign capacity is affected, any member of the state may sue out the writ; yet, where the right or duty in question affects the state in its sovereign capacity as distinguished from the people at large, the proceedings must be instituted by the proper public officer. 26 Cyc. 402, and cases cited.

The question here affects the state in its sovereign capacity as distinguished from the public at large. The warrant sought to be issued in the court of Judge Nickelson runs in the name of the state. The respondent is an officer of the state. As was said in *Mitchell v. Boardman*, 79 Me. 469, 10 Atl. 452: "It is the refusal of a public officer to act in a public matter, an officer of the government in a matter which relates to the enforcement of a public law, and, if he has violated his duty or refuses to perform it, there is other remedy more appropriate and effective than this."

The case of *State ex rel. Romano v. Yak-ey*, 43 Wash. 15, 85 Pac. 990, 9 Am. & Eng. Ann. Cas. 1074, is the only case we have found that holds that a private citizen may be a relator to compel a public officer to issue a writ in a criminal proceeding.

In *Benners v. State*, 124 Ala. 97, 28 South. 942, the court, holding that mandamus will

lie against a justice of the peace to require him to issue a warrant of arrest for the violation of a criminal statute, said: "The solicitor, as the prosecuting officer of the state, was a proper relator in bringing the application for mandamus."

In *People v. Swift* (Prosecuting Attorney v. Judge of Recorder's Court,) 59 Mich. 529, 28 N. W. 694, the court said: "It is a general rule that the Attorney General should represent the people in this court; but, while we should require this in most cases, there is no rule of law that we are aware of which would prevent our considering an application by the prosecuting attorney to set a court in motion to proceed in a case which is under the control there of that officer."

Besides the county solicitor and the Attorney General, the state attorney and perhaps the Governor could properly be heard in this proceeding.

As the relator here is not authorized to represent the sovereignty of the state and has no such interest as makes him a proper individual relator, it is not proper for the court to consider the constitutional questions sought to be presented.

The judgment is reversed.

TAYLOR, HOCKER, and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

STANLEY et ux. v. THOMPSON.

(Supreme Court of Florida, Division B. Nov. 21, 1911. Headnotes Filed Jan. 19, 1912.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 1009*) — REVIEW IN EQUITY—QUESTION OF FACT.

In equity, as well as at law, every presumption is in favor of the correctness of the rulings of the trial judge, and a final decree rendered by him, based largely or solely upon questions of fact, will not be reversed, unless the evidence clearly shows it to be erroneous. Evidence examined, and found to greatly preponderate in favor of the correctness of the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Circuit Court, Duval County; R. M. Call, Judge.

Bill by Sumpter Thompson against James H. Stanley and Rayme B. Stanley, his wife. Decree for complainant, and defendants appeal. Affirmed.

I. L. Purcell, for appellants. Stephen B. Foster, for appellee.

TAYLOR, J. The appellee filed his bill in the circuit court of Duval county in chancery against the appellants for the foreclosure of

a mortgage. The appellants, as defendants below, answered the bill, alleging usury in the note to secure which the mortgage was given. The case was referred to a master to take and report the evidence. Upon the coming in of the master's report, finding that the defense of usury had not been sustained, the defendants excepted to such report. These exceptions were overruled by the chancellor, and a final decree of foreclosure was rendered for the full amount claimed by the complainant. This decree the defendants below bring here for review by appeal.

The sole question presented here is, Does the evidence sustain the findings of the master and the decree of the chancellor? In the case of *Brannon v. Blume*, 55 South. 549, it was held that in equity, as well as at law, every presumption is in favor of the correctness of the rulings of the trial judge, and a final decree rendered by him, based largely or solely upon questions of fact, will not be reversed, unless the evidence clearly shows it to be erroneous. Guided by this rule, we are of the opinion that the evidence in the record before us, so far from showing clearly that the chancellor's decree is erroneous, greatly preponderates in favor of the correctness of the decree. And, so finding, the decree of the court below in said cause is hereby affirmed, at the cost of the appellants.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

STATE ex rel. CHEYNEY v. SAMMONS, Justice of the Peace.

(Supreme Court of Florida, Division A. Dec. 6, 1911. Rehearing Denied Dec. 13, 1911.)

(*Syllabus by the Court.*)

1. COUNTIES (§ 12*)—CREATION—STATUTORY PROVISIONS.

Chapter 6247, Acts of 1911, provides for the establishment of Pinellas county upon the contingency of the casting of a stated affirmative vote in an election provided for within the territory designated, and also for the organization of the government of said county by the executive department as required by the statute.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 12.*]

2. COUNTIES (§ 62*)—CREATION—POWERS OF OFFICERS.

Pinellas county being formed from a part of the territory of Hillsborough county, the officers of Hillsborough county are required to perform their respective duties until the organization of the new county government is effected by the appointment and qualification of the officers of the new county, having jurisdiction over the entire county.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 62.*]

3. STATUTES (§ 60*)—ENACTMENT—EVIDENCE—JOURNALS.

As the Constitution does not require amendments of pending bills to be referred to in the journals, an act as approved by the Governor must be taken as the legislative act in the absence of an affirmative showing by the journals that a materially different act was in fact passed by the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 55; Dec. Dig. § 60.*]

4. COUNTIES (§ 12*)—CREATION—CONSTITUTIONALITY OF STATUTE.

Defects in the description of territory included in a new county do not render the statute creating the county unconstitutional.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 12.*]

5. COUNTIES (§ 12*)—CREATION—CONSTITUTIONALITY OF STATUTE.

A statute establishing a new county is not void because of alleged defects in the description of the territory to be included in the new county, unless the description is so defective that the legislative intent cannot be effectuated in its essential features.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 12.*]

6. COUNTIES (§ 12*)—CREATION—BOUNDARIES.

By requiring the county line of Pinellas county to run from the north "to the shore of Old Tampa Bay, thence in a southerly direction *through the waters* of Old Tampa and Tampa Bay to a point in Tampa Bay due east from the north shore of Mullet Key," the intent was that the line shall run in a southerly direction through the middle of Old Tampa and Tampa Bay to the given point in Tampa Bay.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 12.*]

7. CONSTITUTIONAL LAW (§ 65*)—DISTRIBUTION OF GOVERNMENTAL POWERS—LEGISLATIVE POWER—SUBMISSION OF QUESTION TO POPULAR VOTE.

The Legislature may enact a law complete in itself to take effect by its own terms upon the happening of the contingency of a stated affirmative vote at an election therein provided for.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 116; Dec. Dig. § 65.*]

8. COUNTIES (§ 28*)—COUNTY SEAT—DESIGNATION BY LEGISLATURE.

In establishing a new county, it is the duty of the Legislature to designate a county seat; and such designation is under the provisions of the Constitution (article 8, § 4) merely a temporary establishment of the county seat.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 28.*]

9. COUNTIES (§ 88*)—OFFICERS—STATUTORY PROVISIONS.

In a statute establishing a new county, the duties of officers that are incidental to such establishment may be regulated in the act.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 88.*]

(Additional Syllabus by Editorial Staff.)

10. CONSTITUTIONAL LAW (§ 197*)—COURTS (§ 42*)—EX POST FACTO LAW—DUTIES OF COUNTY OFFICERS.

Acts 1911, c. 6247, establishing Pinellas county and providing by section 7 that the court of such county shall have civil and criminal jurisdiction throughout the county over causes of action which shall have accrued and

over crimes and misdemeanors which shall have been committed within the territory embraced in the county prior to January 1, 1912, is not an ex post facto law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 197;* Courts, Dec. Dig. § 42.*]

Mandamus by the state, on the relation of John K. Cheyney, against R. H. Sammons, justice of the peace. Peremptory writ granted.

The Constitution in sections 3 and 4 of article 8, provides that "The Legislature shall have power to establish new counties, and to change county lines." "The Legislature shall have no power to remove the county seat of any county, but shall provide by general law for such removal: Provided, that in the formation of new counties the county seat may be temporarily established by law."

A statute was enacted to establish a new county to be called Pinellas as follows:

"Chapter 6247 (No. 128).

"An act, providing for the creation of Pinellas county, in the state of Florida, and for the organization and government thereof.

"Be it enacted by the Legislature of the state of Florida:

"Section 1. That the county of Pinellas be, and the same is hereby created and established. Such county shall comprise and include all that territory of the county of Hillsborough as heretofore existing, described as follows: Commencing on the Gulf of Mexico at the line, 'dividing townships twenty-six (26) and twenty-seven (27)' south, thence running east along said line to the northeast corner of section one '(1) in township twenty-seven (27) south, range sixteen (16) east, thence south' to the shore of Old Tampa Bay, thence in a southerly direction through the waters of Old Tampa and Tampa Bay, to a point in Tampa Bay due east of the north shore of Mullet Key, thence from said point in Tampa Bay, due west to the Gulf of Mexico, thence northward along the coast to the point of beginning.

"Sec. 2. That said county shall be a part of the First Congressional District, a part of the Eleventh Senatorial District, and a part of the Sixth judicial circuit, and said county shall have one member in the House of Representatives of the state of Florida.

"Sec. 3. The Town of Clearwater shall be the county seat of said county.

"Sec. 4. The Governor of the state shall, on or before the 15th day of December, 1911, appoint all of the officers to which said county may be entitled under the Constitution and laws of the state of Florida.

"Sec. 5. It shall be the duty of the board of county commissioners to hold their first meeting on the first Tuesday in January, 1912, and at said meeting they shall make

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

arrangements for temporarily carrying on the county government.

"Sec. 6. It shall be the duty of the board of public instruction of Pinellas county to hold their first meeting on the first Tuesday in January, 1912.

"Sec. 7. The courts of Pinellas county shall have civil and criminal jurisdiction throughout said county over causes of action which shall have accrued, and over crimes and misdemeanors which shall have been committed within the territory embraced in said county, as hereby constituted, prior to the first day of January, 1912, in the same manner and to the same extent as if said county had been in existence when such causes of action accrued or such crimes or misdemeanors were committed.

"Sec. 8. All actions and prosecutions and all proceedings in guardianship or administration, and any and all other actions, prosecutions or proceedings that may be pending in Hillsborough county, in the circuit court or county court, or any other court, or before any officer or board of Pinellas county would have had exclusive jurisdiction if said county had been in existence when such action or proceeding was instituted, shall be transferred to the corresponding court officer or board of Pinellas county having jurisdiction of such matters; and all pleadings, papers, and documents in any way pertaining to any such action, prosecution or proceeding shall be delivered by the clerk, or other officer of Hillsborough county having custody thereof, to the proper officer of Pinellas county.

"Sec. 9. The clerk of the circuit court of Pinellas county, or his authorized agent, or deputy, shall procure from the records in the office of the clerk of the circuit court of Hillsborough county, a transcript of all such deeds, transfers, mortgages or other conveyances of real or personal estates, and of all judgments, orders, decrees and wills, and any and all papers or documents in the custody of the clerk of the circuit court of Hillsborough county that may in any wise affect the interests of the citizens of Pinellas county as the county commissioners may, from time to time, direct and the clerk of the circuit court of Hillsborough county shall, without charge or fees, allow to the clerk of the circuit court of Pinellas county free access to all books and papers on file in his office that would in any wise facilitate the procuring of such transcriptions. The clerk of the circuit court of Pinellas county shall certify to the correctness of such transcription and thereupon such certified copies of the record, documents and other matters so transcribed and certified shall be of the same force and effect as the original records. #

"Sec. 10. As compensation for the service required of him in section 9 of this act, the clerk of the circuit court of Pinellas county shall be paid by said county the sum of one hundred and fifty dollars per month for such

time as he shall be actually engaged in such work.

"Sec. 11. The assessor of taxes for Hillsborough county shall continue to perform the duties of his office in relation to all property and persons within the territory of Pinellas county as hereby created, until the first day of January, 1912. Upon the completion of his assessment roll as provided by law he shall deliver to the assessor of taxes for Pinellas county a transcript of so much of said assessment roll as applies to the property and persons within the limits of Pinellas county as hereby created, and thereafter the assessor of taxes for Pinellas county shall perform all the duties of his office as now provided by law.

"Sec. 12. The assessor of taxes for Hillsborough county shall be paid as provided by law for assessing the taxes of Pinellas county for the year 1911, and the county commissioners of said county shall provide for reasonable compensation to be paid to said assessor for preparing a transcript of his assessment roll as herein provided, and for any and all other extraordinary services which said assessor may be required to perform and the county of Hillsborough shall not be required to pay for any services performed by said assessor during the year 1911 in relation to property and persons embraced in the territory of Pinellas county as hereby created.

"Sec. 13. The assessor of taxes for Pinellas county shall receive no compensation for the assessment of taxes of said county for the year 1911, but he shall receive for such services as he may perform after the first day of January, 1912, such reasonable compensation as may be agreed on by the county commissioners.

"Sec. 14. The collector of taxes of Hillsborough county shall be allowed or credited in his settlement for the amount of all the taxes due on property or from persons within said county of Pinellas as hereby created for the (year) 1911.

"Sec. 15. The collector of taxes of Hillsborough county shall proceed to collect the taxes which shall, on the first day of October, 1911, be unpaid and past due on the lands lying in the territory of Pinellas county as hereby created, and to enforce the payment thereof by sale of delinquent lands in the manner and with the same effect as if the county of Pinellas had not been created. And all sales made in pursuance of the provisions of this section shall be as valid as if the territory of Pinellas county had remained a part of Hillsborough county.

"Sec. 16. All tax certificates covering lands lying in Pinellas county which shall, on the first day of January, 1912, thereafter be owned by or issued to the state, shall be delivered to the clerk of the circuit court of Pinellas county, and all redemptions of lands heretofore or hereafter certified or

sold for taxes, whether certified or sold to the state or to individuals shall be made through the clerk of the circuit (court) of said county.

"Sec. 17. It shall be the duty of the board of county commissioners of Pinellas county, at as early a date as may be possible to hold a conference with the board of county commissioners of Hillsborough county and agree with said board upon a plan or plans for the assumption by Pinellas county of its pro rata share of the indebtedness of Hillsborough county in accordance with the provisions of the Constitution of the state of Florida; and also upon an equitable division of the surplus funds that Hillsborough county may have had on hand or that may be owing to Hillsborough county on the first day of January, 1912.

"Sec. 18. It shall be the duty of the board of public instruction of Pinellas county, at as early a date as may be possible, to hold a conference with the board of public instruction of Hillsborough county and agree with such board upon a plan for the assumption by Pinellas county of its pro rata share of the indebtedness of the board of public instruction of Hillsborough county, and also upon an equitable division of the surplus funds that said board may have on hand or that may be owing to said board on the first day of January, 1912.

"Sec. 19. The spring term of the circuit court of Pinellas county shall be held on the second Tuesday in February and the fall term of the circuit court of said county shall be held on the second Tuesday in September in each year.

"Sec. 20. The foregoing sections of this act shall take effect upon their ratification by the affirmative vote of three-fourths of the votes cast at an election to be held in the territory hereinbefore set forth as the county of Pinellas.

"Sec. 21. The election provided for in section 20 of this act shall be held on the second Tuesday of November, A. D. 1911. The county commissioners and the supervisor of registration of Hillsborough county shall discharge such duties in connection with the calling and holding of said election as are now required of them by law for general elections, and the said election shall be governed in all respects by the law for holding general elections, except as otherwise provided herein, or not inconsistent herewith. No notice of said election shall be necessary. Those who are duly qualified to vote within the territorial limits of said proposed county of Pinellas shall be qualified electors at said election.

"Approved May 23, 1911."

A justice of the peace in the territory covered by the new county declined to issue a writ of summons in an action sought to be instituted in his court upon the ground that after the above-quoted statute became effective

he doubted his authority to issue process. An alternative writ issued from this court to compel the issuance of the process.

James F. Glen, Geo. P. Rainey, and Thomas Palmer, for relator. H. S. Phillips, for respondent.

WHITFIELD, C. J. (after stating the facts as above). [1] The title of the act indicates a purpose to provide for the creation of a new county and also for the organization and government thereof. The statute is complete in itself, and it is expressly provided that the first 19 sections thereof shall take effect upon the contingency of an affirmative vote of three-fourths of the votes cast at an election to be held under the last two sections of the act in the territory set forth in the act as the county of Pinellas.

When the requisite vote was cast it afforded the contingency upon which the act by its terms became effective. Upon thus taking effect the county of Pinellas was thereby established. The organization and government of the county dependent upon the operation of the sections of the act designed for that purpose. Such organization and government are political matters to be made effective by the executive department in the manner and by the means prescribed in the act. In providing that the act shall become effective upon the casting of the requisite vote, and that the Governor shall, on or before December 15, 1911, appoint all the officers to which said county may be entitled under the Constitution and laws of the state, the clear legislative intent is that the county shall be established upon the happening of the contingency of the affirmative vote stated, and that within the time stated in the act the organization and government of the county shall be effected upon executive appointment and qualification of the chief administrative officers having jurisdiction over the entire territory embraced in the new county. [2] If for any reason justices of the peace and constables are not appointed when the general administrative officers of the county are appointed and the organization and government of the county thereby accomplished, such organization is not thereby effected. Even though there is no express provision to that effect, it clearly was the legislative intent to avoid a hiatus in the government by impliedly requiring the officers of the old county to perform their respective duties at least until the organization of the county government is effected by the appointment and qualification of the general officers of the new county. The justice of the peace should issue proper process in his former jurisdiction, at least in the absence of a showing that the county government has been established as contemplated by the act, the time limited for such organization not having expired. No serious inconvenience can result from the temporary lack of a justice of the peace in the county

after a county judge for the county is in commission and the government of the county is in operation, since the county judge has the jurisdiction of a justice of the peace for the entire county.

This conclusion would of itself require the writ to be made peremptory and dispose of the case, but counsel request that in the interest of the public welfare, the constitutional questions raised by the pleadings be determined.

The contention is that section 1 of the act is not the section that was passed by the Legislature, as the journals show an amendment that is different from the section as it appears in the statute.

[3] As the Constitution does not require amendments of pending bills to be referred to in the journals, the act as approved by the Governor must be taken as the legislative act in the absence of an affirmative showing by the journals that a materially different act was in fact passed by the Legislature. Here the journals do not affirmatively show that the bill when pending was not amended after the amendment above referred to, and such an amendment may reasonably be assumed since the first amendment as adopted is apparently defective and needed amendment. *West v. State*, 50 Fla. 154, 39 South. 412; *Goff v. Rickerson*, 61 Fla. 29, 54 South. 284.

[4] It is also contended that the description of the territory to be included in the new county is so indefinite as to render the act void, since the southern boundary is described as follows: Thence south to the shore of Old Tampa Bay, thence in a southerly direction through the waters of Old Tampa and Tampa Bay, to a point in Tampa Bay due east of the north shore of Mullet Key." A defect in the description of the territory included in the new county does not render the act unconstitutional or invalid. [5] The act is not void unless the legislative intent cannot be effectuated, because the description is so defective as not to include substantially all of the intended territory, or because the defective description will include or exclude territory not intended, so as to make it appear that the act would not have been passed if the defective description had been known, or because it is so entirely defective as to be unintelligible or to render the act unenforceable in its essential features. [6] The description contained in the act requires the line to run from the north "to the shore of Old Tampa Bay, thence in a southerly direction *through the waters of Old Tampa and Tampa Bay* to a point in Tampa Bay due east from the north shore of Mullet Key." It is clear the Legislature intended the boundary line from the point where it reaches, from the north, the shore of Old Tampa Bay, to run in a southerly direc-

tion through the middle of the waters of Old Tampa and Tampa Bay "to a point in Tampa Bay due east of the north shore of Mullet Key." Such a line through the waters would run in a general southerly direction, and would make the territorial limits of the two counties in a natural way and define with reasonable accuracy the jurisdiction over public and private rights in the waters. If an unequal division of the waters had been intended it would have been expressly defined. As thus construed, the description of the boundaries of the new county is sufficiently definite and certain.

[7] It is competent for the Legislature to enact a law complete in itself to take effect of its own force upon the happening of a contingency. *Cotten v. County Commissioners of Leon County*, 6 Fla. 610; *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 South. 969, 32 L. R. A. (N. S.) 639, and cases cited.

The purpose of the provision of this act that it shall take effect upon the casting a designated affirmative vote provided for in the act is to make the act complete in itself effective upon the happening of the stated contingency. This contingency is the affirmative vote of the electors in the territory to be affected, and there can be no valid objection to such selection by the law as the matter upon which its complete terms are to operate.

[8] The provision in the act for a county seat is subject to the constitutional provision that such establishment is only temporary or until a county seat is duly established under the law. It was the duty of the Legislature to designate a county seat for immediate purposes, and the political effect of the selection made cannot be considered by the court.

[10] Section 7 of the act is not an *ex post facto* law. [9] The provisions of this and other sections of the act are incident to authority and duty undoubtedly vested in the lawmaking power. *Kroegel v. Whyte*, 56 South. 498, decided this term. Any imperfections that may be in the statute do not affect the constitutionality of the act in establishing the county and its government.

A peremptory writ will issue in the absence of a showing that a county government has been established in Pinellas county under the authority of the political department of the state government, the time limited for such organization not having expired.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

GLOBE THEATRE & AMUSEMENT CO. v. WATT.
(Supreme Court of Florida, Division A. Dec. 5, 1911.)

(Syllabus by the Court.)

1. TRIAL (§ 1*)—TIME FOR TRIAL—JOINDER OF ISSUE.

It is irregular to allow a cause to go to trial in the absence of any reply to, or joinder of issue on, a plea which requires something more than a mere similitur to put it in issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

2. PLEADING (§ 100*)—ISSUES—JOINDER.

Where a plaintiff "takes and joins issue" on pleas containing new matter, the cause may be regarded as at issue, the addition of a similitur being immaterial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 206, 207; Dec. Dig. § 100.*]

3. PLEADING (§ 409*)—WAIVER OF OBJECTIONS—JOINDER OF ISSUE.

After a full trial of an action at law upon the merits, the mere absence of a similitur to a statutory joinder of issue on the pleas is not ground for a reversal of the judgment, the similitur not having been insisted on by the opposing party or required by the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1389; Dec. Dig. § 409.*]

Error to Circuit Court, Duval County; R. M. Call, Judge.

Action by George K. Watt against the Globe Theatre & Amusement Company. Judgment for plaintiff, and defendant brings error. Affirmed.

I. L. Purcell, for plaintiff in error. C. B. Peele, for defendant in error.

WHITFIELD, C. J. George K. Watt brought an action against the corporation on its contract under seal. The corporation pleaded as a bar to the action a concurrent parol contract, and also a want of consideration for the contract under seal sued on. No demurrer to these pleas was interposed, but by a paper filed in the cause the plaintiff "takes and joins issue" on the pleas. Judgment was rendered for the plaintiff, and the defendant took writ of error.

The only contention here is that the cause was erroneously tried when it "was not at issue, no replication having been filed to the pleas of defendant setting up new matter" as a defense to the action.

[1] Under the decisions of this court it is error to allow a cause to go to trial in the absence of any reply to, or joinder of issue on, a plea which requires something more than a mere similitur to put it in issue. *Muller v. Ocala Foundry & Machine Works*, 49 Fla. 189, 38 South. 64; *Asia v. Hiser*, 22 Fla. 378; *Livingston v. L'Engle*, 22 Fla. 427; *Livingston v. Anderson*, 30 Fla. 117, 11 South. 270. In the cited cases there was no response to or issue taken on pleas that required something more than a mere similitur.

[2] Section 1447, General Statutes of 1906

(section 1055, Revised Statutes), provides that "either party may plead in answer to the plea or subsequent pleading of his adversary, that he joins issue thereon, which joinder of issue may be as follows, or to the like effect: 'The plaintiff joins issue upon the defendant's plea,' * * * and such form of joinder of issue shall be deemed to be a denial of the substance of the plea, * * * and an issue thereon, and in all cases where plaintiff's pleading is in denial of the pleading of the defendant, or some part of it, the plaintiff may add a joinder of issue for the defendant."

In this case there was a taking or joinder of issue on the pleas tendering issues even though such pleas may have been insufficient in law as a defense to the action. Under the statute the joinder of issue filed operated as a denial of the averments of the pleas, and the plaintiff could have formally added, for the defendant, a similitur or acceptance of the issue taken or tendered by the plaintiff in his pleading, stating that "the plaintiff * * * for replication to the foregoing pleas of the defendant, says that he takes and joins issue thereon."

[3] After a full trial of an action at law upon the merits, the mere absence of a similitur to a plea or replication is not ground for a reversal of the judgment, the similitur not having been insisted on by the opposing party or required by the court. *Huling v. Florida Savings Bank*, 19 Fla. 695; *Wilson v. Hunter*, 25 Fla. 469, 6 South. 432; *Florida Ry. & Nav. Co. v. Webster*, 25 Fla. 894, 5 South. 714; *Barrs v. Brace*, 38 Fla. 265, 20 South. 991; *Frank v. Williams*, 36 Fla. 136, 18 South. 351; *St. Johns & H. R. Co. v. Shalley*, 33 Fla. 397, 14 South. 890.

As there was a joinder of issue on the pleas, and the filing of a similitur is a mere form that is immaterial after judgment on the merits, the error asserted does not appear and the judgment is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOOKER, and PARKHILL, JJ., concur in the opinion.

AMERICAN TIE & TIMBER CO. v. WASHINGTON.

(Supreme Court of Florida, Division A. Dec. 12, 1911. On Rehearing, Jan. 18, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1046*)—REVIEW—DISCRETION OF TRIAL COURT—TIME OF TRIAL.

Where pleas have been filed in an action at law and at a term of the court thereafter issue is joined on the pleas and the case is tried in the absence of defendant's counsel, the judgment will not be reversed on that ground, in the absence of a showing of abuse of discretion

in the court below in proceeding to a trial under the circumstances stated.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1046.*]

On Rehearing.

(Additional Syllabus by Editorial Staff.)

2. PLEADING (§ 166*)—REPLICATION—NECESSITY.

Under Gen. St. 1906, § 1447, providing that the joinder of issue shall be deemed a denial of the substance of the plea and an issue thereon, there was no error in submitting the cause to the jury, though the plaintiff had filed no replication to a plea containing new matter.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 821½; Dec. Dig. § 166.*]

Error to Circuit Court, Suwannee County; B. H. Palmer, Judge.

Action by Sherman Washington against the American Tie & Timber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

A. E. Leslie, for plaintiff in error. L. E. Roberson, for defendant in error.

WHITFIELD, C. J. The declaration filed December 5, 1910, by Sherman Washington in the Circuit Court for Suwannee County, was in the common counts for \$248. On February 6, 1911, the defendant corporation filed two pleas, one of never was indebted, and the other a special plea of set-off with a bill of particulars attached. On May 9, 1911, during a term of the court the plaintiff joined issue on the two pleas. Section 1447, Gen. Stats. A trial was had the same day in the absence of defendant's counsel, and judgment for the plaintiff in \$259.20 was rendered, to which the defendant took writ of error. The defendant in error is not represented in this court, but as the writ of error was duly recorded under the statutes this court has jurisdiction of the subject-matter and of the defendant in error for the purposes of this case.

[1] It is contended that the joinder of issue on the pleas during the term of the court and the trial of the cause on the same day in the absence of counsel for the defendant was such a surprise to counsel as to make the judgment erroneous and subject to reversal on writ of error.

This may be a hard case, but no such abuse of discretion is shown in the conduct of the trial as requires a reversal of the judgment. The pleas were filed February 6, 1911, and it was the duty of the plaintiff to reply thereto or join issue thereon, at least by the ensuing term of the court, and it was the duty of the defendant's counsel to be present in the court at the time the issues could have been joined and the trial of the action proceeded with under the law. See *Flournoy v. Munson Bros.*, 51 Fla. 198, 41 South. 898.

It is stated in the brief that counsel for the defendant below was absent in Tal-

hassee as an attaché of the Florida Legislature when the issues were joined and the trial had. Whether this was or was not a good reason for a continuance of the cause was for the determination of the trial court. Only the record proper is here, and there is nothing to indicate such an abuse of discretion by the trial court as calls for a reversal of the judgment. Therefore the judgment is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

On Rehearing.

PER CURIAM. [2] A petition for rehearing suggests that the court overlooked the assignment that the court erred in submitting the cause to the jury, the plaintiff having filed no replication to the second plea containing new matter. The point is not well taken. The record shows and the opinion states that the plaintiff joined issue on both pleas. Under section 1447 of the General Statutes cited in the opinion the "joinder of issue shall be deemed to be a denial of the substance of the plea * * * and an issue thereon; and in all cases where the plaintiff's pleading is in denial of the pleading of the defendant, or some part of it, the plaintiff may add a joinder of issue for the defendant." See *Globe Theatre & Amusement Co. v. Watt*, 57 South. 201, decided December 5, 1911.

A rehearing is denied.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, COCKRELL, PARKHILL, and HOCKER, JJ., concur.

SUMPTER v. STATE.

(Supreme Court of Florida, Division A. Oct. 17, 1911. Headnotes Filed Jan. 19, 1912.)

(Syllabus by the Court.)

1. HOMICIDE (§ 134*)—MURDER IN THE SECOND DEGREE—INDICTMENT.

It is not necessary that an indictment charging murder in the second degree should allege that the act producing the death was "an act imminently dangerous to another"; but it is sufficient to describe the act, leaving it to the law and the court to say whether such act was imminently dangerous to another.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 218, 214; Dec. Dig. § 184.*]

2. CRIMINAL LAW (§ 970*)—MOTION IN ARREST.

While the sufficiency of the allegations in an indictment to charge the offense may be tested by a motion in arrest of judgment, yet upon this motion the indictment should receive a liberal construction, and even an informal or imperfect allegation of an essential fact will

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

be deemed a sufficient averment of that fact. A defective allegation not affecting the real merits, or a merely formal or clerical error, or an allegation of unnecessary matter not concerning the substance of the charge, would not be ground for arresting the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2462; Dec. Dig. § 970.*]

3. CRIMINAL LAW (§ 1156*) — NEW TRIAL — BIAS OF JUROR.

Where the evidence in support of and in opposition to a ground in a motion for a new trial alleging bias on the part of a juror is conflicting, an appellate court will not disturb the findings of the trial court settling such conflict, where there is nothing showing an abuse of a sound judicial discretion which the trial court has in such cases.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3087-3071; Dec. Dig. § 1156.*]

Error to Circuit Court, Columbia County; B. H. Palmer, Judge.

Frank Sumpter was convicted of murder in the second degree, and brings error. Affirmed.

W. H. Willson, J. B. Hodges, and A. J. Henry, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error, who is here on writ of error, was indicted, tried, convicted, and sentenced for the crime of murder in the second degree in the circuit court of Columbia county. There are two assignments of error: (1) The denial of the defendant's motion to arrest the judgment. (2) The denial of the defendant's motion for new trial. The indictment which is assailed in the motion to arrest is as follows:

"The grand jurors of the state of Florida, duly chosen, impaneled, and sworn diligently to inquire and true presentment make in and for the body of the county of Columbia, upon their oaths present that Frank Sumpter, late of said county, * * * on the 26th day of November, A. D. 1910, in the county and state aforesaid, with force and arms, and with a deadly weapon, to wit, a shotgun loaded and charged with leaden balls, and which he, the said Frank Sumpter, had and held in his hands unlawfully, but without any premeditated design to effect the death of any particular individual and evincing a depraved mind regardless of the life of Richmond Pinkney or of any other human being, in and upon the said Richmond Pinkney did make an assault. And the said Frank Sumpter did then and there, evincing a depraved mind regardless of the life of Richmond Pinkney, or of any other human being, but without a premeditated design to effect the death of said Richmond Pinkney or of any human being, shot off and discharged the leaden balls aforesaid out of the shotgun aforesaid at, towards, against, and into the head and body of said Richmond Pinkney, thereby striking, penetrating, and

inflicting with the leaden balls aforesaid so shot off and discharged as aforesaid in and upon the head and body of said Richmond Pinkney ten mortal wounds, of and from which said mortal wounds the said Richmond Pinkney did then and there die. And the grand jurors aforesaid upon their oaths aforesaid do further present that one Ben English was then and there present unlawfully evincing a depraved mind regardless of the life of Richmond Pinkney, but without any premeditated design to effect the death of the said Richmond Pinkney or any human being aiding, abetting, and assisting the said Frank Sumpter the felony aforesaid in the manner aforesaid to do and commit. Contrary to the statute in such case made and provided."

The grounds of the motion to arrest are as follows:

"(1) Because the indictment is vague, indefinite, and insufficient in law, and charges no offense under the laws of the state of Florida.

"(2) Because it is not stated in and by the said indictment that this defendant with a depraved mind, regardless of the life of Richmond Pinkney or any other particular individual, did shoot off and discharge at and, etc., the body of Richmond Pinkney, thereby killing him, and does not state that said act whereby Richmond Pinkney was killed was imminently dangerous to him or any other person.

"(3) Because the said indictment does not show that the said Frank Sumpter, when the assault was made, was then and there being, and by an act imminently dangerous to the said Richmond Pinkney or any other particular individual did with a certain shotgun then and there loaded and charged with gunpowder and leaden balls, discharged, and shot off said gun loaded as aforesaid the leaden balls aforesaid out of the shotgun loaded as aforesaid at, towards, against, and into the head and body of the said Richmond Pinkney, thereby striking, inflicting, penetrating with the leaden balls aforesaid so shot off and discharged out of said shotgun loaded as aforesaid in and upon the head and body of the said Richmond Pinkney ten mortal wounds of and from which mortal wounds the said Richmond Pinkney did then and there die, but alleges the facts in a vague and indefinite manner, and in such a way as not to charge defendant with having violated any laws of the state of Florida, and does not allege that the said act was imminently dangerous to another, evincing a depraved mind regardless of human life.

"(4) And for other good and valid reasons apparent upon the record.

"(5) The indictment does not sufficiently charge the crime for which the defendant was tried and convicted."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

We do not think that the court below erred in denying this motion in arrest. Our statute defines murder in the second degree as follows: "The unlawful killing of a human being when perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, it shall be murder in the second degree."

[1] It is true that this indictment does not allege *ipsissimis verbis* of the language used in this statute that the act by which the defendant effected the death of the deceased was "an act imminently dangerous to another," but simply describes the act, *viz.*, that he assaulted the deceased with a shotgun loaded with gunpowder and leaden balls, which gun so loaded he did shoot off to, against, and upon the deceased inflicting wounds from which he then and there died. Neither is it necessary that an indictment charging murder in the second degree should allege that the act producing the death was an act imminently dangerous to another, but it is sufficient to describe the act as does the indictment here, and leaving it to the law and to the courts to say whether such act was imminently dangerous to another. We think that the courts will take judicial notice of the fact that to shoot a man with a shotgun loaded with gunpowder and leaden balls is an act imminently dangerous to the person shot from the bare statement of the act itself, and that it would be superfluous to add, after stating such act that it was imminently dangerous to the person so shot.

[2] Whether the allegations contained in an indictment sufficiently charge the offense is a proper matter to be inquired into on a motion to arrest judgment. Yet upon this motion the indictment should receive a liberal construction, and even an informal or imperfect allegation of an essential fact will be deemed sufficient averment of that fact. A defective allegation not affecting the real merits, or a merely formal or clerical error, or an allegation of unnecessary matter not concerning the substance of the charge, would not be ground for arresting the judgment. 2 Standard Ency. of Proc. pp. 1005, 1006, and numerous authorities there cited. We do not think the indictment here is open to the criticisms made upon it in this motion in arrest, but think that it sufficiently charges the crime of which the defendant was convicted.

The only grounds of the motion for new trial presented and relied on here are 10, 11, 13, and 13b, as follows:

"(10) Because the said Ben English, who was indicted jointly with the said Frank Sumpter and one of the defendants in the trial of said cause, was during argument of counsel of defendant taken from the courtroom.

"(11) Because during the progress of the trial of said cause and during the taking of testimony therein the jury separated; that is to say, one of the jurors sitting upon and trying the said cause, to wit, W. B. Shealy, vacated his seat in the jury box without the consent of the court or counsel being heard, and without securing a suspension of the case, and while a witness was testifying, and crossed the courtroom to the water cooler, and then went out of the courtroom into the hallway north of the courtroom, returning some few minutes afterwards."

"(13) Because after the taking of testimony in said cause and after argument of counsel and charge of the court, and the jury was retiring to consider its verdict, one of the jurors, to wit, W. B. Shealy, instead of retiring with the jury, separated from them, going outside the bar of this court, and went across the courtroom, returning to the jury box and following the jury out of the courtroom, being separate.

"(13b) Because the defendant is informed and believes that one of the jurors selected and sworn to try the cause, and who did sit upon and try said cause and render the verdict herein complained of, to wit, F. N. Pucket, and who, upon his examination on his voir dire before being selected and sworn to try said cause, stated that his mind was unbiased and unprejudiced, and that he felt free to try said cause, and that he had never expressed his opinion as to the guilt or innocence of this defendant, that said juror, the said F. N. Pucket, was biased and prejudiced against this defendant, and that on the morning of the trial, to wit, on the 28th day of April, 1911, the said F. N. Pucket did express his opinion of the defendant, saying that, if he could get on the jury, he would break up that killing at the 'prop'; that this defendant was not advised of such statement by said juror until the 2d of May, 1911."

As to the tenth ground of this motion complaining that Ben English a codefendant on trial with the plaintiff in error was taken from the court during the argument of counsel, we fail to see how this could have injuriously affected the defendant. The said Ben English was acquitted in the same verdict that convicted the defendant. Had he been convicted, there might be some ground of complaint on his behalf as to this action; but we cannot see that this defendant was at all affected thereby, or that he has any cause of complaint thereat.

As to the eleventh and thirteenth of these grounds of the motion for new trial the evidence in support thereof fails to show such a separation of the juror Shealy from his fellows as would warrant us on that ground in reversing the judgment of the trial judge in the premises. It is not shown that the juror was at any time out of sight of the court or of his fellows and that he did not leave the courtroom as the motion alleges,

but got up from his seat in the jury box and went for a drink of water to the water cooler a few feet away from the jury box, and that he was at all times under the eye of the court and within hearing of the witnesses testifying in the case. We do not think this showing would warrant a reversal here, though we think that it was irregular, and is a practice that should not be encouraged.

[3] As to the ground of the motion for new trial designated as "13b," while there are two witnesses who testified by *ex parte* affidavits to remarks made by the juror Pucket in their hearing that indicated prejudice upon the juror's part against the defendant, yet the juror himself positively denied ever having made any such remarks as those sworn to by said two witnesses. Here, then, we have a conflict in the evidence on this point. This court has settled the rule that the ruling of the trial court upon the testimony produced in support and in denial of a ground in a motion for new trial alleging that one of the jurors was biased against the accused and had expressed an opinion that he was guilty before the trial will not be disturbed by an appellate court, where the evidence is conflicting, and there is nothing to show an abuse of discretion. Such questions must necessarily be left largely to the discretion of the trial judge, who may know the witnesses and be able to judge of their credibility. *Starke v. State*, 49 Fla. 41, 37 South. 850; *Yates v. State*, 26 Fla. 484, 7 South. 880. We find nothing in the record to show any abuse of this discretion by the trial judge in his ruling upon this ground of the motion for new trial.

Finding no error, the judgment of the circuit court in said cause is hereby affirmed at the cost of Columbia county; the plaintiff in error having been adjudged to be insolvent.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

BOWMAN v. AREY.

(Supreme Court of Florida, Division A. Dec. 19, 1911.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 874*)—REVIEW—SCOPE IN GENERAL.

Upon appeal from a temporary restraining order granted on notice, the equities of the bill not being finally passed upon, when the contract breached *prima facie* justifies the order, the appellate court need not go into minute critical examination to see if some portion of the contract be invalid.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 874.*]

Appeal from Circuit Court, Hillsborough County; J. B. Wall, Judge.

Suit by E. S. Arey against J. R. Bowman. From an order granting a temporary injunction, defendant appeals. Affirmed.

Wall & McKay, for appellant. H. C. Gordon and V. H. Knight, for appellee.

COCKRELL, J. This is an appeal from an order granting a temporary injunction, after full notice and conditioned upon the giving of a bond.

It appears that in January, 1911, Bowman sold out to Arey his "tailoring and gents' furnishings" business in the city of Tampa for \$1,000, together with the good will of the business, and in the contract of sale stipulated that he would not at any time within five years engage directly or indirectly, either as agent, principal, servant, or otherwise, in carrying on, conducting, or being interested in the said business of "tailoring and gents' furnishings" in Tampa, and further included in the sale the exclusive right to use his name. Notwithstanding this contract, within a few months thereafter the said Bowman opened business in said city under the name of "Bowman, the Tailor." Bowman answered, among other things, that his present business was not, strictly speaking, tailoring, but that he had samples to show customers; that he did the measuring, sending the orders to the large cities in the North to be made up, and, upon receipt, delivering them to his customer.

The temporary restraining order goes only to conducting directly or indirectly a tailoring or gents' furnishing business in Tampa, or advertising a place of business so conducted, until the further order of the court, and from entering into further contract, directly or indirectly, or as the agent of another person, to furnish clothing manufactured by him, or made by him as a tailor, or under his direction. The injunction, however, permits him to complete the orders on hand.

We think the contract *prima facie* justifies the restraining order, and that we need not now go into a minute critical examination to see if there be not some possible invalidity in some portion of the contract. The court was not required to pass finally upon the equities of the bill, nor to rule upon the demurrer incorporated in the answer. A final hearing has not been reached, nor has the demurrer been set down for hearing.

The order is affirmed.

WHITFIELD, C. J., and SHACKLEFORD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

FRANKLIN PHOSPHATE CO. v. INTERNATIONAL HARVESTER CO. OF AMERICA.

(Supreme Court of Florida, Division A. Dec. 12, 1911. Headnotes Filed Jan. 15, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 285*)—AMENDMENT—DISCRETION OF COURT.

While much must necessarily be left to the judicial discretion of the trial judge in permitting additional or new pleas to be filed by a defendant, after pleas already filed by him have been adjudged to be defective or insufficient, that discretion should be wisely exercised. There must be a limit to pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 285.*]

2. REFERENCE (§ 58*)—POWERS OF REFEREE—RULINGS ON PLEADINGS.

A referee is substituted for the court or judge, and has all the powers thereof. He may be regarded as a judge ad hoc or pro hac vice. While a referee, out of delicacy or respect for the circuit judge, might well hesitate or refuse to disturb a prior ruling made by the circuit judge upon the pleadings, yet the referee has the same power to change such prior ruling of the circuit judge as the circuit judge himself would have possessed, had no order of reference been made.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 89, 90; Dec. Dig. § 58.*]

3. PLEADING (§ 418*)—WAIVER OF OBJECTIONS—PLEADING OVER—AMENDMENT.

Under section 1698 of the General Statutes of 1906, pleading over or amending pleadings after judgment on demurrer does not waive the right to have such judgment on demurrer reviewed by the appellate court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1403-1406; Dec. Dig. § 418.*]

4. BILLS AND NOTES (§ 140*)—WAIVER OF DEFENSES—RENEWAL NOTE.

One who gives a note in renewal of another note, with knowledge at the time of a partial failure of the consideration for the original note, or false representations by the payee, etc., waives such defense, and cannot set it up to defeat a recovery on the renewal note. And where one giving such renewal note either had knowledge of such facts and circumstances, or by the exercise of ordinary diligence could have discovered them and ascertained his rights, it became his duty to make such inquiry and investigation before executing the renewal note, and if he fails to do so he is as much bound as if he had actual knowledge thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 355-359; Dec. Dig. § 140.*]

5. PLEADING (§ 216*)—DEMURRER—DETERMINATION.

Section 1444 of the General Statutes of 1906 requires that "the substantial matters of law intended to be argued shall be stated" in a demurrer, and, when a demurrer is addressed to several pleas, "the substantial matters of law intended to be argued" in support of such demurrer should be stated as against all of such pleas; and it is irregular to file a demurrer without fully complying with this statutory requirement. If, however, upon a bare inspection of a plea, as to which no matters of law intended to be argued are stated in the demurrer, such plea is found to be so faulty and defective as to constitute no defense to the action, the court would be warranted in sustaining the demurrer to such plea, as well as

to the other pleas to which the demurrer was addressed, which were found to be defective.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 535-539; Dec. Dig. § 216.*]

6. APPEAL AND ERROR (§ 1073*)—REVIEW—HARMLESS ERROR—ENTRY OF DEFAULT JUDGMENT.

It is irregular and technically error to enter a default against a defendant, while one of the pleas filed stands undisposed of. If, however, upon a bare inspection of the plea, it is found to be so faulty and defective as to constitute no defense to the action, an appellate court may hold such error harmless, and refuse to reverse the judgment, especially when the transcript of the record does not show that the defendant called to the attention of the referee, or the trial judge, as the case may be, that such pleas stood undisposed of, or offered to introduce any evidence in support thereof.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1073.*]

Error to Circuit Court, Alachua County; W. S. Broome, Referee.

Action by the International Harvester Company of America against the Franklin Phosphate Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hampton & Hampton, for plaintiff in error. E. G. Baxter and F. Y. Smith, for defendant in error.

SHACKLEFORD, J. [1] This is an action brought by the defendant in error against the plaintiff in error upon two promissory notes under seal. The declaration alleges that such notes were given as a part of the purchase price of a certain machine, sold by the plaintiff to the defendant. It is further alleged in the declaration that such second note was "given as a renewal note of note No. 2019, year 1908, of a series of notes given for a 20 H. P. engine machine, which was heretofore delivered to the defendant, and, in consideration of the renewal contract and extension of time hereby given, the defendant agreed that the plaintiff had made good all its representations, warranties, and obligations in the sale of said machine, and that it (the defendant) had no equity, right or counterclaim, against this or either of said notes." The defendant was permitted to file four sets of pleas, to all of which demurrers were interposed. We would again call attention to what we said as to the object of pleadings and what should characterize them in *Seaboard Air Line Ry. v. Rentz*, 60 Fla. 429, 54 South. 13. We would like to emphasize this statement therein: "While much must necessarily be left to the judicial discretion of the trial judge in permitting additional or new pleas to be filed by a defendant, after pleas already filed by him have been adjudged to be defective or insufficient, that discretion should be wisely exercised. There must be a limit to pleading. See *Hooker v. Forrester*, 53 Fla. 392, 43 South. 241, and prior decisions of this court therein cited upon this point."

Ten errors are assigned, all of which, except the last three, are based upon the orders sustaining the several demurrers to the different pleas, while the last three question the validity of the final judgment. We shall not consider the assignments in detail, but shall discuss such of the points presented as we think merit treatment.

[2] Three pleas were originally filed, the first two of which attempted to set up failure of consideration, and the third undertook to plead a set-off. The demurrer interposed to all of such pleas was overruled as to the first two and sustained as to the third. The defendant then filed what it termed first and second "additional" pleas, shortly after which, by agreement of counsel, an order was made, wherein it was recited that such cause was "referred to W. S. Broome, Esquire, a practicing attorney at law at the bar at Gainesville, Fla., as a referee, with full power to hear, try, and determine said cause, in accordance with the statute and rules of practice in such cases made and provided." By agreement of counsel, a slight amendment was made in the declaration, and the pleas of the defendant, filed prior to such amendment, were treated as filed to the declaration as amended. The plaintiff then interposed a demurrer to the "pleas and each of them," which was specifically sustained as to the first original and the first and second "additional" pleas, but nothing whatever is said in the order as to the second original plea. As we have already pointed out, the circuit judge had overruled the demurrer as to the first and second original pleas, which left them standing at the time the order of reference was made. It is strenuously contended by the defendant, who is the plaintiff in error here, that the ruling of the circuit judge upon the demurrer to the first and second original pleas "became *res judicata*, as between the parties, and could only be reviewed or reversed upon proper writ of error by the appellate court," and that "certainly the referee had no right or authority in law to have reviewed and reversed a preceding judgment or ruling by the circuit judge." We have examined the authorities cited by the defendant, and are of the opinion that they do not sustain its contention. The second paragraph of section 1600 of the General Statutes of 1906, which section relates to the powers and duties of a referee, is as follows:

"2. To Allow Amendments. He shall have the same power over the pleadings as to filing additional pleadings, or striking out or amending the pleadings, as the court making the reference may have."

[3] We would also refer to the discussion as to the power of referees in Jacksonville, T. & K. W. Ry. Co. v. Lockwood, 33 Fla. 573, 15 South. 327. Also see 24 Amer. & Eng. Ency. of Law (2d Ed.) 229, and 17 Ency. of Pl. & Pr. 1016, and the authorities cited in the respective notes. In fine, a referee

is substituted for the court or judge, and has all the powers thereof. Robertson v. Wilson, 59 Fla. 400, 51 South. 849, 138 Am. St. Rep. 128. He may be regarded as a judge *ad hoc* or *pro hac vice*. It can hardly be contended that a judge would not have the power to change any of the rulings upon the pleadings prior to the trial of the cause. See Mitchell v. Chaires, 2 Fla. 18, text. 21, and 6 Ency. of Pl. & Pr. 360. If the circuit judge could have changed his ruling on the demurrer, it would seem to follow, under our statute, with such an order of reference as was made in the instant case, construed in the light of the authorities, that the referee could likewise change the ruling made by the circuit judge upon the demurrer. That a referee, out of delicacy or respect for the circuit judge, might well hesitate or refuse to disturb a prior ruling made by the circuit judge upon the pleadings is beside the question. We are simply to determine the power of the referee. In passing, we would call attention to the distinction between an order and a judgment. See 23 Cyc. 667. We would also remark that the contention of the plaintiff that the defendant, by pleading over after its pleas had been held bad on demurrer, waived the right to have such ruling reviewed by the appellate court is untenable. See section 1693 of the General Statutes of 1906, and Jones, Varnum & Co. v. Townsend, 21 Fla. 431, 58 Am. Rep. 676.

[4] Having found that the referee had the power to rule upon the demurrer interposed to the different pleas, we must now determine the correctness of such ruling. We have already copied that portion of the declaration to the effect that the second note upon which the action was based was a renewal note, which contained certain express stipulations, which it is unnecessary for us to repeat here. It is further alleged in the declaration that each of the two notes upon which the action was based was given in payment for a certain machine. We are not informed by the declaration as to the date of the series of notes, further than the year 1906, for which the second note was executed on the 21st day of April, 1909, as a renewal note. It is sufficient to say that the successive pleas of the defendant to which the several demurrers were sustained formed an unsuccessful attempt upon the part of the defendant, as we read the pleas, to escape the force of the decision of this court in Padgett v. Lewis, 54 Fla. 177, 45 South. 29, wherein we held:

"One who gives a note in renewal of another note, with knowledge at the time of a partial failure of the consideration for the original note, or false representations by the payee, etc., waives such defense, and cannot set it up to defeat a recovery on the renewal note. And where one giving such renewal note either had knowledge of such facts and circumstances, or by the exercise of ordinary diligence could have discovered

them and ascertained his rights, it became his duty to make such inquiry and investigation before executing the renewal note, and if he fails so to do he is as much bound as if he had actual knowledge thereof."

This holding was followed and approved in *Hyer v. York Mfg. Co.*, 58 Fla. 283, 50 South. 485. We think that these two cases sustain the referee's rulings upon the demurrers to the pleas, and that further discussion thereof is not called for. *Sheffield v. International Harvester Co.*, 3 Ga. App. 374, 59 S. E. 1113, is also well in point.

[5] As we have previously stated, although the first demurrer interposed to the pleas upon which the referee was called to pass purported to be addressed to all of the pleas, yet the referee made no ruling thereon as to the second original plea, which was, perhaps, due to the fact that no "substantial matters of law intended to be argued" were stated in the demurrer as to such plea, as is required by section 1444 of the General Statutes of 1906. See *Heathcote v. Fairbanks, Morse & Co.*, 60 Fla. 97, 53 South. 950. Be that as it may, at the hearing upon the last demurrer to the pleas, the referee made the following order:

"This cause coming on to be heard upon demurrer of plaintiff to the amended pleas of defendant filed in said cause on the rule day in February, 1911, and due notice of time and place of said hearing having been given, and the said demurrer having been argued by counsel for respective parties, and the premises considered, it is ordered and adjudged by the court that the said demurrer be and the same is hereby sustained as to each and every ground thereof, except the first ground to fourth amended plea. And the defendant not asking leave or moving the court for further time in which to amend said pleas, or file other pleas as it may be advised, but advising the court that it would not file any other or further pleadings, thereupon the plaintiff moved the court for judgment against the defendant upon said demurrer and the failure and refusal of the defendant to plead further. Thereupon a default of said defendant is taken, and the same is hereby entered in compliance therewith upon said demurrer; wherefore the plaintiff ought to have and recover of and from the defendant its damages sustained herein by reason of the premises. Thereupon reference for further proceedings in said cause will be had by me, as referee, for the purpose of assessing the plaintiff's damages herein.

"Done and ordered at Gainesville, Florida, this 25th day of March, A. D. 1911.

"W. S. Broome, Referee."

[6] Three of the assignments are based upon this order. It is contended that it was

error to enter a default against the defendant, while its second plea stood undisposed of. Technically this was undoubtedly error. See *Livingston v. L'Engle*, 22 Fla. 427; *Asia v. Hiser*, 22 Fla. 378; *Livingston v. Anderson*, 30 Fla. 117, 11 South. 270; *Muller v. Ocala Foundry & Machine Works*, 49 Fla. 189, 38 South. 64. While this is true, if it is clearly made to appear that the defendant was not injured thereby, we must hold the error to be harmless, and therefore furnishes no sufficient ground for a reversal of the judgment. See *Livingston v. L'Engle*, 27 Fla. 502, 8 South. 728; *Southern Home Insurance Co. v. Putnal*, 57 Fla. 199, 49 South. 922; *Pensacola Electric Co. v. Bissett*, 59 Fla. 360, 52 South. 367. An inspection of such second original plea shows that it is open to the same grounds of objection which were sustained by the referee to subsequent pleas, which more fully set up the defense attempted to be set up in such second original plea. This being true, the referee, under the principle enunciated in *Heathcote v. Fairbanks, Morse & Co.*, 60 Fla. 97, 53 South. 950, might well have found the plea so faulty and defective as to constitute no defense, and have sustained the demurrer, which purported to be addressed to it, as well as to the other pleas. We must hold that the ruling, though erroneous, does not constitute reversible error.

This brings us to the consideration of the last assignment, which is that the referee erred in entering final judgment. The only argument made in its brief by the defendant in support of this assignment is that, "Of course, if default judgment was improperly entered, and if the defendant was entitled to submit testimony in support of its plea, then the entering of the final judgment was error, and should be set aside, and a new trial awarded to the defendant." We have already disposed of the assignments predicated upon the entry of the default adversely to the contention of the defendant, so that there would seem to be no occasion to discuss this last assignment. We would add that the transcript does not show that the defendant called the attention of the referee to the fact that the second original plea stood undisposed of, or offered to introduce any evidence in support thereof. This being true, the defendant might well be deemed to have waived such plea. See *Judge v. Moore*, 9 Fla. 269.

No reversible error having been made to appear to us, the judgment must be affirmed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

CLARK v. STATE. (No. 15,131.)

(Supreme Court of Mississippi. Jan. 29, 1912.)

1. CRIMINAL LAW (§ 447*)—PAROL EVIDENCE—RECORD.

Parol evidence is inadmissible to contradict the record of a court of record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1030; Dec. Dig. § 447.*]

2. CRIMINAL LAW (§ 1032*)—OBJECTIONS—WAIVER.

Under Code 1906, § 4936, providing that a judgment shall not be reversed because of enumerated errors, unless complained of in the trial court, where the indictment alleges that accused killed "Tobe Wallace," and the evidence shows that the person killed was "Tobe Hollis," there is a failure of proof, and accused may raise the objection for the first time on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2642; Dec. Dig. § 1032.*]

3. HOMICIDE (§ 142*)—OBJECTIONS—WAIVER.

Where an indictment for murder charged the killing of a person named, and the evidence showed the killing of another person, and the state did not seek to correct the indictment to correspond to the proof by amendment, the conviction could not be sustained, on the theory that the trial court could have amended the indictment, as authorized by Code 1906, § 1508.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 254; Dec. Dig. § 142.*]

Smith, J., dissenting.

Appeal from Circuit Court, Leflore County; P. O. Chapman, Special Judge.

Jim Clark was convicted of murder, and he appeals. Reversed and remanded, and new trial granted.

E. D. Stone, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

McLEAN, J. The appellant was tried, convicted of murder, and sentenced to be hanged for the killing of one Tobe Wallace. The evidence in the record clearly and unequivocally, beyond question or cavil, shows that he killed Tobe Hollis. When the attention of the Attorney General was called to the discrepancy between the indictment and the proof, a motion for a certiorari was made in, and sustained by, this court, and in pursuance thereof the original indictment and the original transcribed notes of the stenographer were sent up to this court; and the original indictment and the original transcribed notes of the stenographer show that the transcript in this court is correct. In other words, not only the transcript, but the original indictment and the original transcribed notes of the stenographer, show that appellant was indicted for the murder of Tobe Wallace, and that he killed Tobe Hollis.

[1] There is not one single instruction, either for the state or defendant, which directly or indirectly refers to the deceased as Tobe Hollis; but, upon the other hand, the

party killed, in each and every instruction, is referred to as "the deceased." There is no effort made on the part of the state to show by any sort or kind of evidence that there is any error in the record to the effect that the name of the deceased was Tobe Wallace, instead of Tobe Hollis. Only record evidence would be admissible to show this, and there is no record evidence in existence; and, of course, parol evidence is clearly inadmissible to contradict the record. Jones, Receiver, v. Williams, 62 Miss. 183. A motion in the lower court for a new trial was made upon the ground that the verdict was contrary to the law and the evidence, and such is one of the assignments of error.

[2] The sole and single question, therefore, is: Can this court afford to permit this appellant to be punished in the face of the record, which shows conclusively that he is not guilty of the crime charged? It is insisted that, notwithstanding the record shows that it was Tobe Hollis who was killed, it must be assumed that there is some mistake in the record; that surely, if upon the trial in the court below the evidence showed that it was Tobe Hollis, and not Tobe Wallace, who was killed, the defendant would have objected to the evidence as to the killing of Tobe Hollis; and, further, that if he failed to object he waived his right, and that the objection cannot be made for the first time in this court.

In answer we say that, when a person is upon trial for his life, he stands at every stage of the trial objecting to all illegal proceedings; and it is only in instances specified by the statute that he waives those things which the statute makes him waive in the event he fails to object. Section 4936 of the Code of 1906 is as follows: "A judgment in a criminal case shall not be reversed because the transcript of the record does not show a proper organization of the court below or of the grand jury, or where the court was held, or that the prisoner was present in court during the trial of any part of it, or that the court asked him if he had anything to say why judgment should not be pronounced against him upon the verdict, or because of any error or omission in the case in the court below, except where the errors or omissions are jurisdictional in their character, unless the record shows that the errors complained of were made ground of special exception in that court." This court, in *Bryant v. State*, 65 Miss. 435, 4 South. 343, says this: "The motion for a new trial, alleging that the verdict was contrary to the law and the evidence, should have been sustained. Section 1433 (which is now section 4936), to the effect that no judgment shall be reversed because of any error or omission in the case in the court below, unless the record shows that the errors

complained of were made the ground of special exception in such court, does not operate in any case, so as to supply the proof necessary to show that the offense charged had been committed." The failure of the state to make out its case was the neglect to show that the county, in which the offense was charged to have been committed, was operating under the local option law.

It seems to us to be just as necessary to prove that the party killed was the party alleged in the indictment to have been killed, as it was to show that the local option law was in force in the Bryant Case. It will be a sad, sad day in the jurisprudence of any country when the courts will permit one of its citizens to be hung for the commission of a crime of which the record made by the state completely and fully acquits him of the charge. The standing aside from the beaten path of immemorial usage, worn hard and bare by the footsteps of our forefathers in the law, in order to make way for the passing of the funeral cortege, brought about by a too liberal construction of a criminal statute enacted in derogation of the common law, is the recognition and enforcement of too dangerous a doctrine to comport with the humane and beneficent conduct of a civilized court. To permit the conviction to stand in a case where the party is charged with killing one person, and where the record shows conclusively that he killed an entirely different person, is akin to the court joining in the mob and executing the party under the form, but without the authority, of law.

This court held in *Matthis v. State*, 80 Miss. 491, 32 South. 6, that it would decline to pass on objections to evidence not made in the court below. There is a broad distinction between a failure to object to competent testimony, and where the record conclusively shows that the accused is innocent of the crime charged against him. In *Hunt v. State*, 61 Miss. 577, this court construed the record in that case to mean that the appellant was tried by a jury of 11 men. No objection was made to this in the lower court, no exceptions whatsoever were taken to it, and the matter for the first time noticed or observed when the case reached this court. After a full consideration of the question, it was the unanimous opinion of all the judges composing the court that the conviction was unlawful; the court stating there cannot be a valid jury trial by less than 12 men, and that a consent to that effect by a criminal is absolutely void. The court then proceeds to draw a distinction between merely an omission to show that there were 12 men on the jury, and where the record affirmatively shows that there were 11 only. Section 4936 passed under review by this court, and it was held that there was nothing in that section which alters the rule referred to and announced, and because the record affirmatively showed

that the accused was tried by less than 12 men the case was reversed.

[3] It may be urged that under section 1508 of the Code the lower court had the right to cause the indictment in this case to be amended, so as to charge the defendant with having killed Tobe Hollis. Section 1508 is as follows: "Whenever, on the trial of an indictment for any offense, there shall appear to be any variance between the statement in the indictment and the evidence offered in proof thereof * * * in the name or description of any person or body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offense, or in the Christian name or surname, or both, or other description whatever of any person whomsoever, therein named or described, * * * it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby, in his defense on the merits, to order such indictment and the record and proceedings in the court to be amended according to the proof, whenever it may be deemed necessary by the court to amend such indictment," etc. In *Miller v. State*, 53 Miss. 403, the defendant was indicted for an assault with a deadly weapon. The indictment alleged that the assault was made upon one Blackman. The evidence disclosed that the real name was Blackburn. The court ordered the indictment to be amended so as to correspond with the proof. This court held that it was not error for this amendment to be made. In *Wood v. State*, 64 Miss. 761, 2 South. 247, the indictment charged that the defendant made an assault upon one Socrates Scott. It appeared in evidence that the name of the injured party was Marion Socrates Scott, and that he was generally known and called by the name of Crate Scott. In this court an objection was made for the first time that there was a fatal variance between the allegation in the indictment and the evidence, as to the name of the party. This court held that there was no such fatal variance. In *Miller v. State*, 68 Miss. 221, 8 South. 273, the defendant was indicted for the murder of one James Bowman. The evidence showed that the true name was Junius Bowman. The lower court permitted the indictment to be amended so as to correspond with the proof, and this court held that such was not error.

All of these cases present an entirely different question from the one which is now presented by this record. If the court in the trial of the case at bar *had amended* the indictment in the lower court before the jury had returned the verdict, the question would have been a very different one from what it is now. The question now before the court is *not whether an amendment to the indict-*

ment was competent, so as to make the allegations in the indictment correspond with the proof. Upon the other hand, the record as now before the court shows that appellant was indicted for the murder of one person, and the evidence shows that he killed an entirely different person. We are left to conjecture entirely what the defendant would have done, had the state attempted to correct the indictment by changing the name in the indictment from Tobe Wallace to Tobe Hollis.

The question which this record presents is not what may be termed a technicality in any sense of the term. It is a matter of substantive right. To permit a person to be hanged when the evidence shows that he was convicted for the murder of a person different from the one charged in the indictment is absolutely shocking in the extreme. Our conscience recoils with absolute horror from such a proposition.

Reversed and remanded, and a new trial granted.

SMITH, J. (dissenting). Appellant was indicted for the murder of Tobe Wallace, but in the bill of exceptions the name of the deceased appears as Tobe Hollis, thus disclosing a variance between the allegation and proof of the name of the man alleged to have been murdered. No motion was made in the court below to exclude the evidence of the ground of variance, nor was any objection raising this question interposed in the court below at any time, either before or after verdict, and no such objection has been made here by counsel. This point was raised by this court sua sponte.

The fact is that appellant was tried and convicted for the murder of Tobe Wallace, and the statement of his name as being Tobe Hollis crept into the bill of exceptions by error in the making up of the same. It is manifest from this record that all parties understood that the dead man, about whom the witnesses were testifying, was the man for the murder of whom appellant was on trial. Appellant himself testified as a witness in his own behalf, and in his direct examination the following questions and answers appear: "Q. Jim, they accuse you of killing Tobe Hollis. If you did it, how did you come to do it, Jim? A. It was through an accident; it was a mistake. Q. Now, if you killed that fellow, tell how you come to do it? A. We all had a crap game there Saturday night. Q. Did you mean to kill Tobe Hollis? A. No, sir; I did not. * * * Q. Had there been anything between you and Tobe Hollis at all? A. No, sir. Q. On that night, or at any other time? A. No, sir. Q. Did you ever see Tobe Hollis before? A. Once or twice. Q. Where did Tobe Hollis live? A. On Mr. Henderson's, I think. * * * Q. State whether or not you had any ill will, malice, or bad feeling toward Tobe Hollis. A. Not a bit in the world.

* * * Q. Which one did you shoot at? A. I wasn't after Tobe Hollins. I was after him, but I shot him. Q. Who did you shoot at? A. This fellow; me and him was in the dispute. Q. What is his name? A. I don't know, sir. Q. You knew Tobe Hollins better than you knew him? A. Yes, sir; I knew Tobe Hollins." (Note that the deceased's name is here given as Hollins.) In the original bill of exceptions, which consists of the stenographer's transcribed notes, the name of the deceased sometimes appears as Tobe Hollis in type, but most of the time it appears first to have been written Tobe Wallace with a typewriter, and then a line drawn through the name Wallace and Hollis written above it. It appears from an affidavit filed by the stenographer that his original notes show that the deceased was referred to throughout the evidence by the witnesses as Tobe Wallace, but that one of the attorneys in some of his questions referred to the deceased as Tobe Hollis, and that in transcribing his notes he thought he had probably made a mistake in taking the name from the witnesses as Wallace, and consequently made the correction above set forth.

I have set out the foregoing facts simply to show the absurd result to which the error into which my Brethren have fallen has led them; for, of course, we must be governed here by the bill of exceptions, and cannot go outside of it in order to ascertain what the evidence in the court below was. Conceding, then, that according to the record deceased's real name was Hollis, what occurred was simply a variance between the name of the deceased as alleged in the indictment and his name as shown by the evidence; and had a motion been made by the district attorney, even after the evidence was closed, to amend the indictment, so as to make the name of the deceased therein conform to the proof, this amendment must have been allowed under section 1508 of the Code. Had appellant called the attention of the court and of the district attorney to this variance by interposing an objection on that ground, this amendment would, of course, have been promptly made, and the defect cured. If the defendant desired to object to this variance, it was his duty to do this before verdict, so that the amendment to the indictment could be made; and, failing to do this, the universal rule, so far as I am aware, is that he waived this defect, and cannot thereafter take advantage of it. "Consensus tollit errorem" (the acquiescence of a party who might take advantage of an error obviates its effect) is one of the most elementary of the common-law maxims of procedure. Hughes, Grounds and Rudiments of Law, vol. 2, p. 445; Broom's Legal Maxims (8th Ed.) 136. In explaining this maxim Mr. Broom says: "Where, however, an irregularity has been committed, and where the opposite party knows of the irregularity, it is a fixed rule, observed as well by courts of equity

as of common law, that he should come in the first instance to avail himself of it, and not allow the other party to proceed to incur expense. 'It is not reasonable afterwards to allow the party to complain of that irregularity, of which, if he had availed himself in the first instance, all that expense would have been rendered unnecessary.' And therefore, if a party, after any such irregularity has taken place, consents to a proceeding which, by insisting on the irregularity, he might have prevented, he waives all exceptions to the irregularity. This is a doctrine long established and well known. 'Consensus tollit errorem' is a maxim of the common law, and the dictate of common sense. * * * 'A man who does not speak when he ought shall not be heard when he desires to speak.'" *Stier v. Surget*, 10 Smedes & M. 154; *Greer v. Bush*, 57 Miss. 575; *Kim-brough v. Ragsdale*, 69 Miss. 674, 13 South. 830; *Railroad Co. v. Cathey*, 70 Miss. 332, 12 South. 253; *Railroad Co. v. Pounder*, 82 Miss. 568, 35 South. 155; *Walker v. Saunders*, 1 Miss. Dec. 50; *Railroad v. Price*, 72 Miss. 862, 18 South. 415; *Wood v. State*, 64 Miss. 761, 2 South. 247; *Unger v. State*, 42 Miss. 642; 22 Ency. Pl. & Pr. 629. "If, except where some counter doctrine presses with a superior force forbidding, a party has requested or consented to any step taken in the proceedings, or if at the time for him to object thereto he did not, he cannot afterward complain of it, however contrary it was to his own constitutional, statutory, or common-law rights." 1 Bishop's Crim. Procedure (4th Ed.) § 118. In *Kim-brough v. Ragsdale*, 69 Miss. 677,¹ the court said: "The slightest reflection should have suggested that in that way only (referring to an objection before verdict) can advantage be taken of the variance between the cause of action as stated in the pleadings and that sought to be proved." In *Railroad Co. v. Cathey*, 70 Miss. 338, 12 South. 254, it used this language: "There was a fatal variance between the declaration and the evidence in this case; but no objection was made on that ground, and, as an amendment would have been allowable, so as to conform the pleading to the evidence, if this objection had been made, it must be held to have been waived, and cannot be made available here now."

My Brethren have misunderstood the case of *Wood v. State*, supra; for they say that this court held in that case that there was no fatal variance between the indictment and the proof with reference to the person assaulted. What the court in fact did hold was that, although there may have been a variance between the indictment and the proof, the point, not having been made in the court below, could not be raised in the Supreme Court for the first time. The language of the court in that case was as follows: "The indictment charged that the appellant, on the 26th day of July, A. D.

1884, 'in and upon one Socrates Scott, did unlawfully make an assault,' etc. * * * It appears in evidence that the name of the injured party was Marlon Socrates Scott, and that he was generally known and called by the name of 'Crate' Scott, and it is conceded that this was a fatal variance, for which the conviction must be set aside. It is too late to raise the objection. If the point had been made in the court below, it would have been competent for the court to have directed an amendment according to the name proved. Code 1880, § 3081. The defendant, not having interposed his objection in the court below, cannot now be heard to complain. Code 1890, § 1433."

In addition to the common-law rule as hereinbefore set forth, it has been expressly held that under section 1413 our criminal statute of jeofails, objections on account of variances, of the character here under consideration, must be made before verdict, and, if not so made, cannot thereafter be taken advantage of. *Unger v. State*, 42 Miss. 642; *Wood v. State*, 64 Miss. 761, 2 South. 247. But I will assume, for the sake of the argument, that the two cases just cited were erroneously decided and should be overruled, that variances between allegations and proof are not included within the language of section 1413 of the Code, and that under section 4936 of the Code the objection may be made for the first time in the motion for a new trial. This section (4936) is as follows: "A judgment in a criminal case shall not be reversed * * * because of any error or omission in the case in the court below except where the errors or omissions are jurisdictional in their character, unless the record show that the errors complained of were made ground of special exception in that court." I presume that it will be admitted that, under this section, an objection of this character cannot be raised in the Supreme Court for the first time. The only hint which the motion for a new trial contains of an objection on this ground is the allegations that the verdict of the jury is contrary to the law and the evidence, and that the court erred in admitting evidence against the defendant. This language is entirely too vague and general to present the point to the court for consideration. The objection ought to have been specific, so that the court's attention below would have been directed to the precise point which the appellant desired it to consider. *Greer v. Bush*, 57 Miss. 575; *Alexander v. Flood*, 77 Miss. 927, 28 South. 787; *Richburger v. State*, 90 Miss. 806, 44 South. 772. "The general rule is that the grounds must be stated so specifically as to direct the attention of the court and opposing counsel to the precise errors complained of. A mere statement of the grounds, without further specifications, will therefore be insufficient. The purpose of the rule is to direct the attention of the trial court to the alleged erroneous ruling,

¹ 13 South. 830.

and to present to the appellate court the precise question involved.' The safest course is to assign each error with the same particularity as in a petition in error or an assignment of errors on appeal." 14 Ency. Pl. & Pr. 882.

In *Alexander v. Flood*, supra, the language of the court is: "The office of a motion for a new trial also remains the same as before, viz., to specify particular errors supposed to have been committed during the trial. Even in criminal cases, though capital, this court is forbidden to consider errors or omissions not assigned in the court below." The language of the statute is, "Made ground of special exception in the court below." The word "special," as defined by Webster, means: "Particular; peculiar; different from others; designed for a particular purpose, occasion, or person; limited in range; confined to a definite field of action." In *Darcey v. Lake*, 46 Miss. 117, a special demurrer was defined by the court to be one in which "the particular defects or objections are pointed out." It follows, therefore, that a special exception is one in which the particular matter or thing excepted to is pointed out. If a general exception had been contemplated, the word "special" would not have been used, and the statute would simply have read "made ground of exception in the court below."

The cases of *Miller v. State*, 53 Miss. 403, *Miller v. State*, 68 Miss. 221, 8 South. 273, and *Bryant v. State*, 65 Miss. 435, 4 South. 343, are not in point, for the reason that the matter here under consideration was not therein involved. In the last-named case no question of variance arose at all. The counsel for the state simply failed to introduce testimony showing that the county in which the offense was charged to have been committed was operating under local option law, and, since the court at that time could not take judicial notice of that fact, the matter stood as if the sale of liquor in the county was legal. This being true, the evidence wholly failed to show the commission of any crime. Here the evidence shows abundantly the commission of the crime intended to be charged in the indictment, and simply contains a variance between the name of the deceased as contained in the indictment and the proof.

While there are some objections—for example, one of jurisdiction—which this court ought to raise sua sponte, it is, aside from the statutes above referred to, bad practice for it to do so when the objection relates to any waivable matter; for one of the most frequent methods of waiving objections of this character is for counsel to simply state that he will make no point on it. This court is one of appellate jurisdiction only, and its office is to revise the action of the court below, and not to originate new questions here,

not acted on there. In *Doe v. Natchez*, 8 Smedes & M. 205, Chief Justice Sharkey said: "It is a general rule that questions cannot be raised in this court which were not raised in the court below. It is our duty to review the decisions of the court below; but, if we decide new questions, not raised there, we assume original jurisdiction." And in *Commercial Bank v. Martin*, 9 Smedes & M. 621, speaking through Mr. Justice Clayton, it said: "It is insisted in argument that the whole proceedings in the probate court, as set out in the record, are void; that the sale under them is void, and consequently that the derivative title of the defendant is void. But these questions were not presented in the court below at all. The record was read without objection, and, if the questions had been there raised, those matters might possibly have been supplied, the absence of which it is now urged makes the whole void. It is said it was right to exclude the sheriff's deeds, because the proceedings in the probate court were void. That point should have been presented by exceptions to the admission of that record. This court is called on to correct an error of which neither party complained in the court below. This is against our usual mode of proceedings in questions of this kind, and would convert this into a court of original, not of appellate, jurisdiction." See, also, *Thompson v. Bank*, 85 Miss. 261, 37 South. 645, *Edwards v. Lumber Co.*, 92 Miss. 598, 46 South. 69, and *Ascher & Baxter v. Moyse & Co.*, 57 South. 299, this day decided.

In the last-cited case, my Brethren say that "this court is strictly a court of review, and it is only in rare instances where the court will consider the merits of any controversy, unless passed upon in the lower court." The qualification which they seem to have made to the statement that "this court is strictly a court of review" appears there for the first time, so far as I am aware, in the decisions of this court.

For these reasons, I am unable to concur in the conclusion reached by my Brethren.

CADY et al. v. LINCOLN et al. (No. 15,604.)
(Supreme Court of Mississippi. Jan. 29, 1912.)

1. WILLS (§ 674*)—TESTAMENTARY TRUSTS—SPENDTHRIFT TRUSTS.

A will nominated B. as "executor and trustee for the purposes hereinafter specified," and by the second paragraph devised to B., "as trustee," a livery stable, to be held in trust to apply the rents and profits to the support and maintenance of testator's son and grandson, or the survivor, and upon the death of both the property to become a part of the estate and be equally divided between another son and daughter. The fifth paragraph provided that, as to the residue, testator willed that his "executor" should sell it, as he deemed advisable, and apply the proceeds: First, to testator's debts; second, by applying one-fourth of the remainder to the use of testator's son and grandson,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

named in paragraph 2, "to be held by the said B., as trustee, to be invested at his discretion, and applied, as directed, in reference to the * * * stable property in item second"; and, third, the remainder to be equally divided between the other son and daughter above referred to, and paid to them as they become of age. *Held*, that the fifth paragraph did not, as did the second, create a spendthrift trust as to the property devised therein, except as to that part of the proceeds of the sale, which was for the use of testator's son and grandson named in the second paragraph.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1585; Dec. Dig. § 674.*]

2. WILLS (§ 693*)—POWER OF SALE.

While a devise of lands to an executor for sale vests the interest in the lands in him, a provision that certain lands shall be sold by the executor confers a naked power of sale, and does not vest title in the executor.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1655-1661; Dec. Dig. § 693.*]

3. WILLS (§ 696*)—TRUST—DURATION—FAILURE TO EXECUTE.

Though a testamentary trustee does not exercise the trust by selling the property and investing the proceeds as directed, the trust continues, since equity will not permit a trust to fail for want of a trustee.

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. § 686.*]

4. TRUSTS (§ 191*)—TESTAMENTARY TRUSTS—DIRECTIONS FOR SALE.

A testamentary trust, providing, as to the residue, that "my will is that my executor shall without any order of the court sell the same as he shall think advisable * * * and the money arising from such sales * * * he shall apply" by paying testator's debts, applying one-fourth of the remainder to the use of testator's son and grandson, to be held in trust, and to be invested at the trustee's discretion, and applied for their support, and the remainder to be equally divided between other children. *Held*, that the direction as to selling the property was mandatory, and the beneficiaries could require it to be sold.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 243; Dec. Dig. § 191.*]

5. GUARDIAN AND WARD (§ 34*)—DUTIES.

The guardian of the beneficiary of a spendthrift trust takes the proceeds of the sale of the trust property burdened with the trust, being the trustee's successor as to such proceeds.

[Ed. Note.—For other cases, see *Guardian and Ward*, Dec. Dig. § 34.*]

6. TRUSTS (§ 202*)—TRUSTEE SALE—DUTY OF PURCHASERS—APPLICATION OF PRICE.

The purchasers of property, sold under a testamentary trust directing it to be sold, were not bound to see that the beneficiaries' guardian, who succeeded to the duties of the trustee, applied the money as directed by the will.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 272; Dec. Dig. § 202.*]

Appeal from Chancery Court, Lowndes County; J. F. McCool, Chancellor.

Action by Burton Cady and others against C. L. Lincoln and others. From a decree for defendants, plaintiffs appeal. Affirmed.

J. A. Orr and D. W. Houston, for appellants. Wm. Baldwin and C. L. Lincoln, for appellees.

McLEAN, J. This is a suit brought by Burton Cady and Mrs. Ozzie Cady Hogan,

Annie Leigh Cady, and Fannie Cady against the appellees, wherein the complainants allege that they are the owners, and the defendants are in possession, of squares 31 and 32 in the city of Columbus, Lowndes county, this state, asserting that the title of the defendants to this property is null and void, and asking that the claims of the defendants be canceled as clouds upon the title of complainants and that the same be removed. The common source of title is William Cady, who died in the year 1876. Mr. Cady executed the following will:

"In the name of God, Amen. I, William Cady, of the city of Columbus, county of Lowndes and state of Mississippi, being in feeble health but of sound and disposing mind, memory and understanding, do hereby make this my last will and testament, hereby revoking all former wills heretofore made, that is to say:

"First. I nominate, constitute and appoint my friend James B. Bell as executor of this my last will and testament and trustee for the purposes hereinafter specified, and having full confidence in his capacity, prudence and integrity, it is my will that he shall not be required to give security for the discharge of his duties as such executor and trustee, unless in the judgment and discretion of the proper court it should at any time become necessary and proper to require it of him.

"Second. I give, devise and bequeath to the said James B. Bell, as trustee, that certain property in the city of Columbus, known as the 'Eclipse Livery Stable' including the stables, sheds and lots thereto attached, to be held in trust for the following uses and purposes, to wit: The rents, issues and profits of the said property to be applied to the support and maintenance of my son William Cady, Jr., and his son Burton Cady, or survivor in case of the death of either. In the event of the death of both, the said property shall return to and become a part of my estate, and be equally divided between my son James M. Cady and my daughter Mary Adella Cady, in the same manner as the other property hereinafter bequeathed to them.

"Third. I give, devise and bequeath to my son James M. Cady that certain property in the city of Columbus known as the 'Horse Mansion,' including the stables, sheds, and lots thereto attached, to have and to hold during the term of his natural life, and to the heirs of his body, with all the rents, issues and profits of the same, subject, however, that the said James M. Cady, or my executor during his minority, may sell and dispose of so much of said property fronting on Market street as it shall be found profitably disposed of for business houses, the proceeds of such sale, or so much as may be necessary, to be applied to the erection of new stables on the rear portion of said property now occupied by stock sheds and lots.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"Fourth. I give, devise and bequeath to my daughter Mary Adella Cady my residence and the buildings and lots thereto attached, with the household and kitchen furniture thereto belonging, in the city of Columbus, for the remainder of her natural life, with the remainder to the heirs of her body. Provided, however, that my residence shall be occupied as a home for my family, to wit, my children and grandchildren now living, so long as they shall remain together as a family, the necessary supplies and provisions for the family to be chargeable upon the property, devised in items two (2) and three (3), unless my son William and his son Burton should cease to live with the family, in which case it shall be a charge upon the property devised to my son James M. Cady in item third.

"Fifth. As to the residue of real and personal estate, my will is that my executor shall, without any order of the court, sell the same as he shall think advisable, and on such terms as he may think best, and the money arising from such sales and from the collection of debts due me and all other sources, he shall apply as follows: First, he shall pay all my just debts; second, one-fourth of the remainder he shall apply to the use of my son William and his son Burton, to be held by the said James B. Bell as trustee, to be invested at his discretion, and applied as directed in reference to the 'Eclipse Stable' property in item second; third, the remainder to be equally divided between my son James M. Cady and my daughter Mary Adella Cady, and paid to them as they shall respectively become of age.

"Sixth. My son James M. Cady and my daughter Mary Adella Cady are to have and bear jointly the care and expense of the education and maintenance of my grandchildren, Bobby Cady and Julia Reddick. The said Bobby Cady and Julia Reddick are each to receive the sum of five hundred dollars in cash when they become of age, to be paid jointly by the said James M. and Mary Adella Cady.

"Seventh. In the event of the death of one or more of my said children without issue, the property herein devised to such child shall be equally divided between the surviving children, the share so coming, however, to my son William to be held by said trustee as provided in item second of this will."

The property in controversy is included in the residue of the real estate mentioned and referred to in item fifth of the will. This will was probated in November, 1876. At the date of the death of the testator, he left two children living—his son William Cady, Jr., who was the father of Burton Cady, and the testator's son James M. Cady, who was the father of complainants, Annie Leigh Cady, Fannie Cady, and Mrs. Ozzie Cady Hogan. Mary Adella Cady died, before her father, without issue. William Cady, Jr., died intestate in the year 1892, leaving as

his sole heir his son Burton Cady; and James M. Cady died intestate in the year 1898, and left as his sole heirs his daughters Annie Leigh Cady, Fannie Cady, and Mrs. Ozzie Cady Hogan. In September, 1887, Burton Cady, who was at that time a minor, through his guardian and next friend E. P. Richards, and E. P. Richards, guardian of said minor, filed a bill in the chancery court of Lowndes county against Fannie Leigh Cady, who was the wife of James M. Cady, and Annie L. Cady, the daughter of James M. Cady, for the sale of certain property for partition. On the same day the said Burton Cady, who sued through and by his guardian and next friend, E. P. Richards, and E. P. Richards, guardian of said Burton Cady, also exhibited a bill of complaint in said chancery court against James M. Cady for the sale for partition between Burton Cady and James M. Cady of certain property therein mentioned. The cause first instituted was numbered 735, and the cause later filed was numbered 736 upon the docket of said court. In October, 1887, the same complainant filed an amended bill in said court, numbered 736, against James M. Cady, for the sale for partition between James M. Cady of certain property therein mentioned, which property included said squares 31 and 32. Subsequently said causes, numbered 735 and 736, were consolidated and heard and determined together, and one decree was rendered adjudicating both causes. In October, 1888, a decree was rendered in said causes, wherein it was ordered that the property therein named, which included squares 31 and 32, should be sold for partition between the said Burton Cady and James M. Cady. Under that decree a commissioner was appointed to sell the property. The property was sold by the commissioner. The sale was reported to the court and confirmed. Through that sale the defendants acquired title by mesne conveyances. That portion of the proceeds of the sale of said squares 31 and 32 coming to Burton Cady were not paid to him, but under the orders of the court were paid to E. P. Richards, the duly and legally appointed and qualified guardian of said Burton Cady.

Subsequent to the filing of said bills in said causes numbered 735 and 736, Mrs. Julia A. Short became the purchaser at execution sale of the interest of James M. Cady in said squares 31 and 32, issued upon a judgment rendered against James M. Cady in December, 1887, and prior to the decree confirming the sale of the land sold under an order of the chancery court, Mrs. Julia A. Short filed her petition in said cause, in which petition James M. Cady united, praying that she be permitted to interplead, and that the proceeds of the sale made by the commissioner, so far as the same concerns the interest of James M. Cady, be ordered to be paid to her as the purchaser of his interest in squares 31 and 32. In accordance with the final de-

crees entered in said cause, the proceeds of the sale of squares 31 and 32, so far as the interest of James M. Cady was concerned, were ordered to be paid by the commissioner to Mrs. Julia A. Short. At the date of the rendition of this decree, James M. Cady was alive and was over the age of 21 years, and died in the year 1898.

[1] The only question presented by this record is whether, by virtue of the chancery proceedings, the purchaser at the commissioners' sale acquired a good title to the property embraced in item fifth of the will of William Cady, deceased. It is contended upon the part of the complainants that by item second of said will what is known as a "spendthrift trust" was created in favor of testator's son, William Cady, and grandson, Burton Cady, with remainder over to co-complainants; and, second, that the same is true of the property devised in item fifth of the will. It may be, and it doubtless is true, that the contention of complainants is correct, and that the testator, as to the property mentioned in item second of the will, did create a "spendthrift trust"; but it is equally certain that such is not the case in so far as it relates to the devise in the fifth item of the will. An examination of these two items, and of the whole will, will clearly demonstrate that the property enumerated in item fifth was never intended by the testator to be bound with the same trust restrictions and conditions prescribed by the testator as the property enumerated in item second, except that part of the proceeds of sale which was for the use of William and Burton Cady.

It will be noted, in the first place, that James B. Bell was constituted, not only executor, but also trustee. It is true an executor is a trustee, yet it is manifest from the reading of this will that the testator had clearly in his mind a difference between Bell as executor and Bell as trustee. In item second therein named, which is the "Eclipse Livery Stable," the property was devised to Bell as trustee. This is the only provision in the will wherein Bell is named as trustee, except as to the proceeds of sale of the property enumerated in item fifth. All of the other provisions named him as executor. In item fifth the testator does not devise the property to Bell—does not place in him the title, but simply directs him as executor, without any order of the court, to sell this property, if advisable, and on such terms as he shall think best; and the moneys arising from such sales shall be applied as directed in said item fifth, but the part going to William and Burton to be invested as trustee, and applied as directed in reference to the "Eclipse Stable Property."

[2] The general rule is that a devise of lands to an executor for sale passes the interest in the lands, but that a devise that lands shall be sold by an executor confers but a naked power. *Cohea v. Jemison*, 68 Miss.

510, 10 South. 46. The second subdivision of item fifth provides that one-fourth of the proceeds of sale, after paying the debts of the testator, he (that is, the executor) shall apply (the proceeds of sale) "to the use of my son William Cady and his son Burton Cady, to be held by said James B. Bell, as trustee, to be invested at his discretion, and applied as directed to the 'Eclipse Stable Property' in item second." It is manifest from this language that so much of the proceeds of sale as were to be used for William Cady and his son, Burton Cady, was to be held by said Bell as trustee, and was to be invested at his discretion, and applied as directed to the "Eclipse Stable Property"; but this related entirely and alone to the proceeds of the sale. This is not at all debatable.

[3] Bell, the executor, never sold the property, never exercised the trust confided to him, and, in view of the proposition that equity will never permit a trust to fail for the want of a trustee, the trust still existed. But this trust was not in the property itself—that is, the land—but in the proceeds of the sale. All of the debts of the testator were paid, and consequently no one was interested in this property except the beneficiaries named in item fifth of the will.

[4] The beneficiaries had a right to have this property sold, not only for the purpose of partition, but under the express directions of the will. The direction as to selling the property was mandatory; it was necessary to sell in order to execute the trust. Bell, having died without making the sale, did not countermand the direction to sell. The parties in interest had the right to demand that the property be sold, and the proceeds be used and applied as directed by the will. James M. Cady and Mary Adella were to receive their portions of the proceeds of sale when they arrived at age. No trust was created as to the proceeds of the sale of this property, which passed under the third subdivision of item fifth, except to pay it to the parties entitled to it. The proceeds of the sale of the property, as specified under the second subdivision of this item of the will, were paid to the guardian of Burton Cady under the order and directions of the chancery court.

[5] The guardian of Burton Cady was the successor of Bell, as trustee, in so far as Burton Cady's interest in the money derived from the sale of the property was concerned. This guardian of Burton Cady took it burdened with the trust. Whether he performed his trust or not is a question entirely foreign to this litigation.

[6] It surely cannot be contended that it was the duty of the purchasers of the property to supervise, or to see that the guardian of Burton Cady used and applied the money as directed by the will. All that could be expected of them was to see that the money was paid to the party who was entitled to

it, and this party at that time was the guardian of Burton Cady. The question now before the court is exactly the same as if Bell had sold the property. Had he sold under the will, the purchaser would have acquired a good title. He would not have been required to see that Bell invested the proceeds of sale and dealt with it as the will directed. The chancery court, upon the death of Bell, simply carried out the directions of the testator as to the sale, and the money was paid to the proper party, and no further duty devolved upon the purchaser, if, indeed, the purchaser was required to see that the money was paid to Burton's guardian.

The decree of the chancellor in the court below was in accordance with this opinion, and the same is affirmed.

ALLEN, City Marshal, v. McGUIRE.
(No. 15,483.)

(Supreme Court of Mississippi. Jan. 29, 1912.)
CONSTITUTIONAL LAW (§ 58*)—PARDON (§ 2*)
—EXECUTIVE POWERS.

Const. 1890, § 124, granting to the Governor power to grant pardons and remit fines, relates to violations of state laws, and does not apply to penalties for violations of municipal ordinances; and Code 1906, § 3384, empowering the mayor, with the consent of the board of aldermen, to remit fines and annul penalties for violations of municipal ordinances, is not invalid, as interfering with the constitutional power of pardon committed to the Governor.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 86-88; Dec. Dig. § 58; *Pardon, Dec. Dig. § 2.*]

Appeal from Circuit Court, Hinds County; G. G. Lyell, Chancellor.

Habeas corpus by T. J. McGuire against C. B. Allen, City Marshal of the City of Jackson, to obtain discharge from imprisonment under sentence for a violation of a city ordinance. From an order releasing petitioner, the city marshal appeals. Affirmed.

Louis C. Hallam, City Pros. Atty., for appellant. Potter & Hindman, for appellee.

MAYES, C. J. In August, 1911, T. J. McGuire was convicted in the court of the police justice of the city of Jackson of a violation of the municipal ordinances, and given a jail sentence of 30 days and a fine of \$100 and costs. Subsequently, acting under section 3384 of the Code of 1906, the mayor and board of aldermen of the city remitted 16 days of the jail sentence of McGuire on condition that he pay the fine and costs. It is indicated that the fine and costs were paid, but the city marshal refused to grant McGuire a release in accordance with the direction of the mayor and board of aldermen. The contention of the marshal is that the statute authorizing the mayor and board of aldermen to remit any part of any sentence imposed for a violation of the ordinances of

the town is void, because it conflicts with the power of pardon exclusively committed to the Governor of the state by section 124 of the Constitution of 1890 of the state. A writ of habeas corpus was applied for by McGuire, and was heard. The chancellor ordered the release of McGuire, and from this judgment an appeal is prosecuted to this court.

Section 3384 of the Code provides as follows: "The mayor shall have power to remit fines and forfeitures, and to vacate and annul penalties of all kinds, for offenses against the ordinances of the municipality, by and with the consent of the board of aldermen; but a fine or penalty shall not be remitted or annulled unless the reasons therefor be entered on the minutes by the clerk, together with and as a part of the order so doing." Counsel prosecuting this appeal for the marshal concedes that section 3384 was complied with in every particular, and we accept the concession of the marshal's counsel on this point, though the record indicates that the mayor commuted the sentence in August and the board acted on the matter in September. Section 3384 of the Code clearly contemplates that the consent of the board of aldermen shall be obtained before the remission can become effective. But, as stated, it seems to be conceded in this record, and we shall accept it as true, that section 3384 was complied with, and this consent of the board of aldermen obtained prior to any effect given the remission by the mayor of any part of the sentence.

It seems to be well settled that section 124 of the Constitution, confiding to the Governor the power to grant reprieves and pardons and to remit fines, etc., has no application to punishments imposed by virtue of municipal ordinances. In the case of *City of Paris v. Hinton et al.*, 132 Ky. 684, 116 S. W. 1197, 19 Am. & Eng. Ann. Cas. 114, and note, is found the best discussion of this subject that we have been able to find. It is held in the above case, citing numerous authorities, that the Governor of a state has no authority to pardon or remit a fine imposed on one who has been convicted in a municipal court of violating a municipal ordinance. The power given to the Governor to pardon contemplates that he shall have this power only in regard to infraction of state laws, and not municipal ordinances. Of course, the Legislature can confide the power to the Governor to pardon for offenses against municipal ordinances; but, until it has done so, he has no such power under the Constitution. This question is so ably discussed in the authorities above cited that any attempt on our part to add any thought to what has already been said would be futile and a waste of time. Affirmed.

STUARD v. SOUTHERN ENGINE & BOILER WORKS. (No. 14,792.)

(Supreme Court of Mississippi. Nov. 6, 1911.)

1. TAXATION (§ 696*)—COLLECTION—SALE OF PERSONAL PROPERTY—RIGHT TO REDEEM—STATUTORY PROVISION.

Code 1906, § 4341, provides that where taxes are not paid when due, and sufficient real and personal estate cannot be found on which to levy the same, the collector shall make a list of persons indebted to the delinquent, and advertise such indebtedness for sale in the manner prescribed for the sale of personal property distrained, and shall sell the indebtedness of whatever kinds, or so much as may be necessary to pay taxes and costs, to the highest bidder, and make an assignment thereof to the purchaser, and authorize the collector to levy on shares of the delinquent in any corporation or partnership and dispose of them as if levied under execution. Section 4342 provides that the owner of "the debts or property sold under the last preceding sections" shall have six months from the sale in which to redeem his property. *Held*, that the word "sections," in section 4342, was a clerical error, and that the word was intended to be used only in the singular, and that "the debts or properties sold under the last preceding sections" referred only to section 4341, and hence a boiler in a sawmill plant, sold for taxes, could not be redeemed.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 696.*]

2. TAXATION (§ 582*)—COLLECTION—SALE OF PERSONAL PROPERTY—VOID SALE.

The sale of a sawmill plant worth several thousand dollars for delinquent taxes amounting to \$54, when the collector might have sold some parts of the machinery without sacrificing the whole mill plant by sale, was in excess of the collector's authority to sell, and hence was void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1177-1184; Dec. Dig. § 582.*]

Appeal from Chancery Court, Harrison County; T. A. Wood, Chancellor.

"To be officially reported."

Bill by the Southern Engine & Boiler Works against J. F. Stuard and another. Judgment for complainant, and defendants appeal. Affirmed.

On February 1, 1907, J. H. Long was the owner of certain machinery, worth about \$1,260, which he had purchased in October, 1906, from the Southern Engine & Boiler Works under an agreement which recited that the title was to be reserved in the Southern Engine & Boiler Works until full payment. This machinery was personal property, being located upon the land of a third party, and was used for sawmill purposes. Long was assessed for the taxes of 1907 with a total of \$2,625 personally; the items constituting this assessment not being specified, but consisting of the sawmill plant, of which the machinery here in question had become a part. After the taxes had become due, Long transferred back to the Southern Engine & Boiler Works the machinery in question, but did not move it from his mill plant. On February 15, 1908, Long conveyed his mill plant to Fred Herrick, one of the de-

fendants, for the sum of \$800; but the machinery here in question was not included in the conveyance, and the appellee had no notice of this conveyance until several months later, when it was placed of record. In August, 1908, the tax collector sold the mill plant for the taxes of 1907 due thereon by J. H. Long, and one O'Neal became the purchaser thereof for the sum of \$54, and the tax collector executed him a deed to the mill plant, describing it as "the mill plant"; no description of any of the machinery constituting the mill plant being set out in the tax collector's deed. Thereafter, on the same day, O'Neal, for a consideration of \$400, conveyed back the said "mill plant" to Herrick, who afterwards sold same to Stuard, the appellant here, when appellee, for the first time, learned of the transaction. Thereupon appellee filed a bill in chancery, asserting its claim to the machinery in question, and praying for a discovery and an accounting, and that the court should declare the title to said machinery to be in the appellant, and for general relief.

The appellee relies chiefly upon two grounds set out in the original bill, which are: First. That within six months after the tax sale the Southern Engine & Boiler Works made a tender to the chancery clerk of the amount necessary to redeem same, basing its right to do so on section 4342 of the Code of 1906; it being claimed by appellee that this section refers back to all the preceding sections, including section 4315. The next ground relied upon by appellee is that in making the sale of the entire mill plant for the small tax due, to wit, \$54, the sheriff exceeded his authority, and that he should have sold a small part of the machinery to have satisfied the debt, and that for this reason the sale should be set aside.

Ford, White & Ford and McWillie & Thompson, for appellant. Chalmers Alexander, for appellee.

WHITFIELD, C. The reporter will set out fully the facts in the case. We notice only two assignments of error.

[1] Sections 4341 and 4342 of the Code of 1906 are as follows:

"4341. If the taxes assessed shall not be paid when due, and sufficient real and personal estate cannot be found of which to levy the same, the collector shall ascertain who are indebted to the person liable for the taxes, and shall make a list thereof, and advertise the indebtedness for sale at the courthouse door, giving five days' notice in the manner prescribed for the sale of personal property distrained; and shall sell the indebtedness, of whatever kind, or so much as may be necessary to pay the taxes and costs, to the highest bidder, for cash, and make to the purchaser an assignment there-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of; and it shall be sufficient to describe the same, in general terms, as the indebtedness of the debtor to the party assessed for taxes, stating as near the amount as can be; and such sale and assignment shall vest the indebtedness in the purchaser, who shall be entitled to sue for and collect the same. And if sufficient indebtedness cannot be found in his county to make the whole tax, the collector shall certify the whole or the balance, as the case may be, to the collector of any other county where indebtedness may exist; and the collector receiving the certificate shall advertise and sell such indebtedness, and collect the taxes, with five per centum thereon, and pay over the tax to the collector from whom the assessment was received. After the indebtedness shall have been advertised, it shall not be lawful for the owner thereof to sell, assign, collect, or compromise the same without paying the taxes. And the tax collector may levy on the shares or interest of the delinquent taxpayer in any corporation, company, or partnership, and dispose of the same as if levied on under execution.

"4342. The owner of the debts or property sold under the last preceding sections shall have six months from the day of sale in which to redeem his property, by complying with the conditions prescribed for the redemption of land sold for taxes; and the assignment of the debt or conveyance of the property by the collector shall be dealt with as provided for the conveyance of lands sold for taxes. The time for redemption shall not prevent the purchaser from exercising the rights of an owner, except the right to compromise or sell; but, in case of redemption, he shall be responsible for the real value of what he may have realized from the debt or property."

It will be observed that in section 4342 in the second line, the word "sections" is in the plural, whereas, in Code of 1892, § 3827, the word is "section" in the singular. It is insisted for the appellee that, the word being in the plural in section 4342, the whole phrase reading "the last preceding sections," the redemption of personal property provided for in section 4342 applies to all the preceding sections back to section 4315, inclusive. But the examination of those preceding sections from 4315 to 4340, inclusive, have no reference to the redemption of personal property. The language in section 4342, "the debts or property sold under the last preceding sections," must therefore be held to refer to section 4341 only; that is to say, to the debts of the tax delinquent, and the shares or interest which he may own in any corporation, company, or partnership. We think the context of section 4342 clearly shows that the word "sections," in that section, should be in the singular, and that the only personal property in respect to which

redemption is provided for is the particular personal property enumerated in section 4341. It was simply a clerical error, putting the word "sections" in the plural. Section 3827 of the Code of 1892 is identical with the section 4342 of the Code of 1906, except that the word is "section," in the singular in section 3827 aforesaid. This being so, we are unable to find any provision in the law for the redemption of any other personal property than that described in section 4341, and the personal property here, the sawmill plant, including the boiler involved, is not, of course, covered by said section.

[2] But the tax collector sold the whole mill plant, worth several thousand dollars, for the sum of about \$54 taxes. It would have been very easy for the tax collector to have sold some part of the machinery, which would have brought this small amount of taxes, without sacrificing the whole mill plant by such a sale. There could have been no practical difficulty about doing this. When land is sold, it is the duty of the tax collector to sell the smallest legal subdivision of a large tract of land that will bring the taxes. Said section 4342, in providing for the redemption of the personal property therein, dealt with methods of redemption analogous to the mode of redemption obtaining where land is sought to be redeemed. The sale of a mill plant worth several thousand dollars, for the trivial sum of about \$54, when there could have been no possible practical difficulty in selling a small part of the machinery, or some small portions of the things belonging to the machinery and realizing the taxes, is indefensible. The disproportion is so shocking that the sale must be held to have been in excess of the power of the tax collector to sell, an act of gross oppression, for which the sale must be declared void.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the decree is affirmed.

SARDIS & D. R. CO. v. GORDAN. (No. 15,266.)

(Supreme Court of Mississippi. Jan. 29, 1912.)

1. RAILROADS (§ 102*)—PRIVATE CROSSINGS—MAINTENANCE BY COMPANY—DAMAGES FOR NONMAINTENANCE.

It is not necessary, to authorize recovery of the penalty prescribed by Code 1906, § 4058, making it the duty of every railroad company to maintain suitable crossings for plantation roads, and providing that for failure to do so it shall be liable to pay \$250, recoverable by the person interested, that plaintiff show any damage to him, in addition to showing failure to maintain a suitable crossing, though actual damage may also be recovered in the suit for the penalty.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 102.*]

2. RAILROADS (§ 102*)—PRIVATE CROSSINGS—MAINTENANCE BY COMPANY—CONDITION OF CONNECTING ROADS.

Code 1906, § 4058, requiring every railroad company to maintain "convenient and suitable crossings" for necessary plantation roads, and imposing a penalty for failure to do so, does not require evidence that the road leading to the crossing is in as "suitable condition" as the crossing itself, in order to authorize recovery of the penalty for failure to maintain the crossing in a suitable condition.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 102.*]

Appeal from Circuit Court, Panola County; W. A. Roane, Judge.

Action by Mrs. S. A. Gordan against the Sardis & Delta Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Shands & Montgomery, for appellant. Pearson, Eckles & Carothers, for appellee.

McLEAN, J. The appellee brought suit in the circuit of Panola county against appellant for failure of appellant to construct and maintain two plantation crossings over the line of the defendant company and through appellant's farm. The suit was for the statutory penalty of \$250, as provided by section 4058 of the Code of 1906, and in addition thereto for actual damages of \$200. The cause was submitted to a jury, and the jury returned a verdict for \$250, the statutory penalty. It is urgently insisted by appellant that the cause should be reversed, and two reasons are assigned: First, that in order to maintain the action it is necessary that the evidence should establish that the plaintiff sustained actual damages; and, second, that the plantation road leading to the crossing should be in as good condition as the crossing itself.

[1] An examination of the statute will disclose that there is nothing in the statute (section 4058) from which it can be inferred that in order to support this action it is at all necessary that the party suing should show a damage, independent of the failure to maintain a suitable crossing. The statute itself imposes the penalty of \$250, regardless of any damage to the party suing. The statute itself fixes the amount to be recovered, and conclusively presumes that the party is damaged to this amount. The fact that actual damages may also be recovered in the suit for the penalty, as was held by this court in *Railroad Co. v. Spencer*, 72 Miss. 491, 17 South. 168, is no authority whatever for the position of appellant that, in order to maintain the suit, the evidence must show that the plaintiff sustain any damages at all.

[2] As to the second proposition, that the road leading to the crossing must be in as "suitable" condition as the crossing itself, it is equally without any merit. If the contention of the appellant were sound, it would

result in requiring railroad companies to build and maintain their crossings out of the same material that the plantation roads were constructed. As to whether the crossings are convenient and suitable is a question of fact to be determined by the jury under proper instructions from the court.

We see no error in the record, and the case is affirmed.

PENNINGTON v. RITCHIE. (No. 15,323.) (Supreme Court of Mississippi. Jan. 29, 1912.)

APPEAL AND ERROR (§ 47*)—JURISDICTIONAL AMOUNT—ATTACHMENT PROCEEDINGS.

Where the verdict, in replevin by a tenant, after property valued at \$47.80 was distrained by the landlord under an attachment for \$75 for rent, merely found that the attachment was rightfully sued out, and the judgment thereon merely required the tenant to restore the property replevied, or, in default thereof, that the landlord recover \$47.80 from the tenant and his sureties, the amount stated in the attachment affidavit, \$75, is the jurisdictional amount, giving the Supreme Court jurisdiction on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 202-225; Dec. Dig. § 47.*]

Appeal from Circuit Court, Lincoln County; D. M. Miller, Judge.

Distrain proceedings by J. T. Ritchie against W. E. Pennington, in which defendant replevied the attached property. From a judgment for plaintiff, compelling restoration of the replevied property, defendant appeals. Motion to dismiss overruled.

J. H. Sumrall, for the motion. M. McCullough, opposed.

SMITH, J. Appellee sued out an attachment against appellant and one D. B. Rockhold for the sum of \$75 for rent in arrears alleged to be due him as landlord. The writ was by the constable levied upon certain agricultural products, valued by him at the sum of \$47.80. Appellant replevied the property under the provisions of section 2856 of the Code, and in due course appeared and prosecuted his claim in the court of the justice of the peace who issued the writ. The trial in that court having resulted in favor of the landlord, the cause was appealed to the circuit court, wherein the verdict of the jury was as follows: "We, the jury, find for the plaintiff, that the attachment was rightfully sued out." Upon this verdict a judgment was entered directing appellant to restore the property replevied by him, and, in default thereof, that appellee recover of him and his sureties the sum of \$47.80, the value of the property as shown by the return of the constable upon the attachment writ. The ground of the motion to dismiss is that, according to the judgment rendered, the amount in controversy is only \$47.80, and that consequently an appeal does not lie from the judgment of the court below.

In *Biddle v. Paine*, 74 Miss. 498, 21 South. 250, it was held that the test of the jurisdiction of this court in cases of this character is the amount distrained for as fixed by the judgment of the court below. In the case at bar this amount was not fixed by the judgment; the verdict being wholly silent as to that feature of the case. Where this amount is not fixed by the verdict and judgment, the only way the amount in controversy can be ascertained is from the affidavit in attachment, the amount for which the landlord might have obtained judgment. *Schlicht v. Callicott*, 76 Miss. 487, 24 South. 869.

As the amount alleged in the affidavit is \$75, the motion to dismiss is overruled.

SHIRLEY v. STATE. (No. 15,580.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

WEAPONS (§ 11*)—CARRYING WEAPONS—Pursuit of Criminal—Pursuit of an Escaping Offender.

A deputy sheriff of one county, who goes into another county to arrest one charged with crime in the former county, after learning that such person is in the latter county, is not in "pursuit of an escaping offender," within Code 1906, § 1454, and has no more authority to arrest the offender, and no more right to carry a weapon, than any other citizen has.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. §§ 10-14; Dec. Dig. § 11.*]

Appeal from Circuit Court, Wayne County; Jno. L. Buckley, Judge.

George Shirley was convicted of carrying concealed weapons, and he appeals. Affirmed.

The state's witnesses testified that defendant had a concealed weapon on his person in a drug store at the time he was reported. His defense was that he was a deputy sheriff of Harrison county, and that he was in Wayne county for the purpose of arresting a person charged with crime in Harrison county. He was not then engaged in the pursuit of an escaped offender, nor had he been deputized by the sheriff of Wayne county to make an arrest.

On the trial the court gave the following instruction for the state: "The court charges the jury that the fact that the defendant was a duly deputized deputy sheriff of Harrison county gave him no right to serve warrants or carry a pistol in Wayne county, and if the jury believes from the evidence beyond a reasonable doubt that the defendant carried concealed in whole or in part a pistol, as testified about, then they must find him guilty, even though they may further believe that he was a deputy sheriff of Harrison county at the time."

The court refused the following instruction for the defendant: "The court instructs the jury that if they believe from the evidence that the defendant was, at the time of

the alleged carrying of the pistol concealed, a peace officer in discharge of his duties, then the jury should find the defendant not guilty."

W. H. Mayblin, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

SMITH, J. Appellant, a deputy sheriff of Harrison county, was convicted in Wayne county of carrying concealed weapons. Ordinarily, when the sheriff of one county goes into another county, he has no more right to carry a weapon concealed than has any other private citizen. Appellant claims, however, that in this instance he had the right to carry a weapon concealed, for the reason that he had gone into Wayne county to arrest certain parties for whom he had warrants issued by the clerk of the circuit court of Harrison county and addressed to the sheriff of Harrison county. He was not in pursuit of escaped offenders, within the meaning of section 1454 of the Code of 1906, but had simply heard that the parties for whom he had the warrants were in Wayne county. As deputy sheriff of Harrison county, appellant was without authority to execute these warrants in Wayne county, had no more authority there to make arrests than any other private citizen had, and, consequently, no more right to carry a weapon concealed than any other private citizen had. The court, therefore, committed no error in refusing instruction No. 2, requested by appellant, and in granting instruction No. 2, requested by the state.

Affirmed.

FROST v. STATE. (No. 15,127.)

(Supreme Court of Mississippi. Jan. 15, 1912.)

RAPE (§ 48*)—EVIDENCE—ADMISSIBILITY.

It is fatal error to permit witnesses to testify in detail as to what prosecutrix told them, including what she told them about the locality where the offense was alleged to have been committed; the prosecuting witness taking the witnesses to the alleged place and pointing out to them various objects, footprints in the sand, depressions in the earth, and cane and grass trampled down.

[Ed. Note.—For other cases, see *Rape*, Cent. Dig. §§ 67-69; Dec. Dig. § 48.*]

Appeal from Circuit Court, Wayne County; Jno. L. Buckley, Judge.

"To be officially reported."

Jim Frost was convicted of crime, and he appeals. Reversed.

E. W. Stewart, for appellant. Carl Fox, Asst. Atty. Gen., for the State.

WHITFIELD, C. The testimony in this case is vague and inconclusive to the last degree. The prosecutrix contradicts herself on one of the most vital points. In this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

extremely close case on the facts, the court permitted some half dozen witnesses to testify to what the prosecutrix told them about all the details of the alleged offense, and all about the locality where the offense was alleged to have been committed—the condition of the ground and other things. What these witnesses testified to was nothing that they had any personal knowledge of; but the prosecutrix took them down to the place where she said the alleged offense occurred, and pointed out to them various objects, footprints in the sand, depression in the earth, cane trampled down, and grass, and told them, moreover, the details of the alleged offense. This was manifest and fatal error.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment is reversed and cause remanded.

WADE v. STATE. (No. 15,436.)

(Supreme Court of Mississippi. Dec. 18, 1911.
Suggestion of Error Overruled Jan.
15, 1912.)

CRIMINAL LAW (§ 252*)—SUMMARY TRIAL—AMENDMENT OF AFFIDAVIT—DEPARTURE.

The affidavit upon which accused was convicted had originally the caption "City of Grenada," which words were stricken and the words "State of Mississippi" substituted, and recited that H., city marshal, made oath, on information and belief, that accused unlawfully sold intoxicants, "against the peace and dignity of the State of Miss.," following which were the words through which a line had been drawn: "and the ordinances of the City of Grenada, Miss." and was sworn before the mayor and ex officio justice of the peace. The words "City of Grenada" were also stricken out on the back of the affidavit, and the words "State of Miss." substituted therefor. The changes were all made in the circuit court over defendant's objection. *Held*, that the affidavit as originally drawn charged an offense against the ordinances of Grenada, and amendments striking out the words noted, and substituting the others therefor, so as to make it an offense against the state, improperly changed the offense with which accused was charged.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 252.*]

Appeal from Circuit Court, Grenada County; G. A. McLean, Judge.

"To be officially reported."

Will Wade was convicted of unlawfully selling intoxicants, and he appeals. Reversed, and remanded for new trial.

Cowles Horton, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

WHITFIELD, C. The affidavit in this case was manifestly an affidavit charging an offense against the ordinances of the city of Grenada. The words "City of Grenada" were in the caption of the affidavit original-

ly, and stricken out. The affidavit was a general form of affidavit, intended to be used when charging an offense against the state. The affidavit in full is as follows:

General Affidavit.

The State of Mississippi, Grenada County.

Before me, S. T. Tatum, Mayor of Grenada, Miss., Justice of the Peace of the County aforesaid, Claud Hall, Marshal, on information and belief, makes oath that Will Wade, in the City of Grenada, Miss., County and State aforesaid, did on the 23rd day of January, 1910, and other days unlawfully sell and barter intoxicating liquors against the peace and dignity of the State of Miss. ~~and the ordinances of the City of Grenada, Miss.~~

Claud Hall, (Marshal.)

Sworn to and subscribed before me, this the 21st Day of Feb., 1910.

S. T. Tatum, Mayor & Ex Of.
Justice of the Peace—District.

No.

General Affidavit.

State of Mississippi
vs.
Will Wade.

Affidavit of
Claud Hall, Marshal,
Before Justice of the Peace.

Filed Feb. 21, 1910.

J. P. — District.

Filed July 1st, 1910.

E. M. Ransom,
Clerk.

The words "Mayor of Grenada" were in writing, not in print. The affidavit was made by the marshal of the town, and it was sworn to before S. T. Tatum, mayor and ex officio justice of the peace. It seems that on the back of the affidavit the words "City of Grenada" were stricken out, and the words "State of Mississippi" substituted. The conclusion in the body of the affidavit originally was "against the peace and dignity of the State of Miss. and the ordinances of the City of Grenada, Miss." These last words, "and the ordinances of the City of Grenada, Miss.," were stricken out. All these changes in the affidavit were made in the circuit court by way of amendment, over the objection of the defendant. The appellant insists, and rightly, that these amendments changed the offense with which he was charged. The case of *Washington v. State*, 93 Miss. 271, 46 South. 539, is conclusive of this case. Taken in connection with the case of *Johnson v. State*, 59 Miss. 543, and *Ex parte Bourgeois*, 60 Miss. 663, 45 Am. Rep. 420, the appellant should have been tried under the affidavit as originally framed for the alleged

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

offense against the ordinances of the city of Grenada.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment is reversed and the cause remanded, for the trial of the defendant for the offense charged against him under the ordinances of the city of Grenada.

Ex parte DRAINAGE COM'RS OF LEFLORE COUNTY. (No. 15,601.)

(Supreme Court of Mississippi. Jan. 29, 1912.)

DRAINS (§ 43*)—MAINTAINING NATURAL WATER COURSES—AUTHORITY.

Since the statutes under which the drainage districts were organized do not authorize the drainage commissioners to deal with natural water courses, but only with artificial channels for the drainage of wet land, the board of drainage commissioners of Leflore county have no power to contribute to the expenses incurred by the Rucker drainage district in deepening a natural water course constituting the outlet for the waters of the two drainage districts.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 43.*]

Appeal from Chancery Court, Leflore County; M. E. Denton, Chancellor.

From the judgment rendered in proceedings by the Drainage Commissioners of Leflore County, an appeal was taken. Reversed, and petition dismissed.

E. D. Stone, for appellant. Pollard & Hamner, for appellee.

SMITH, J. The question submitted to us for decision is: Has the board of drainage commissioners of Leflore county power to contribute to the expense being incurred by the Rucker drainage district in cleaning out, straightening, and deepening Turkey bayou, a natural water course, which constitutes the outlet for the waters of the two drainage districts? Since the statutes under which these drainage districts were organized "confer no power upon the commissioners to deal with natural water courses, but are designed solely for the purpose of creating artificial channels for the drainage of wet, swamp, and overflow lands" (Haley v. Drainage Commissioners, 55 South. 353), it follows, necessarily, that the question must be answered in the negative.

The judgment of the lower court is therefore reversed, and the petition dismissed.

ENGLISH v. NEW ORLEANS & N. E. R. CO. et al. (No. 15,188.)

(Supreme Court of Mississippi. Jan. 29, 1912.)

1. APPEAL AND ERROR (§ 843*)—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

Where the parol evidence rule in force in Mississippi and in force in a sister state in

which a contract was executed is the same, it is immaterial whether the contract is governed by the *lex fori*, or by the *lex loci*.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

2. EVIDENCE (§ 397*)—PAROL EVIDENCE—VARYING WRITTEN CONTRACTS.

It is not permissible to vary by parol the part of an agreement which has been reduced to writing by the parties, though the balance of the agreement is oral.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756-1765; Dec. Dig. § 397.*]

On suggestion of error. Overruled, and part of former opinion withdrawn.

For former opinion, see 56 South. 665.

SMITH, J. [1] Appellant suggests that we have erred in holding that the rule which prohibits the varying of a written contract by parol is a rule of evidence, and consequently governed by the *lex fori*. While this rule is generally treated and referred to as a rule of evidence it may be that it is, in fact, a rule of substantive law, and consequently governed by the *lex loci*. Assuming, then, that the appellant is correct in stating that this cause must be determined by the law of Louisiana, the judgment of the lower court must still be affirmed; for the "parol evidence rule" in that state, in so far as the point now under consideration is concerned, is identical with the rule in Mississippi. Article 2276 of the Civil Code of Louisiana provides that "neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since"; and the ground of the decision in the case of *Barfield v. Saunders*, 116 La. 136, 40 South. 593, manifestly is that, "where the stipulation of a writing concerning consideration is contractual, it cannot be varied by parol." The rule in Mississippi and Louisiana, therefore, being the same, it becomes immaterial whether the contract here involved is governed by the *lex fori* or the *lex loci*; for, in either event, the result must be the same. The statement in our former opinion that "the matter now under consideration relates to a rule of evidence, and consequently the *lex fori* governs," was, therefore, unnecessary, is hereby withdrawn, and we will express no opinion relative thereto, leaving that matter to be decided when it becomes necessary for us so to do.

[2] We fully understand that this suit was brought upon a verbal agreement, and that appellant does not rely upon the written contract. We also understand that this verbal agreement was only a part of the whole agreement then entered into by the parties; a part of it having been reduced to writing. It is true that the rule in Louisiana is that "where a writing, although embodying an agreement, is manifestly incomplete and not intended by the parties to exhibit the whole

agreement, but only to define some of its terms, such parts of the actual contract as are not embraced within its scope may be established by parol evidence." *Davies v. Bierce*, 114 La. 663, 38 South. 488. For the sake of the argument, we will concede, without deciding, that the same rule prevails in Mississippi, and that the writing here under consideration is of that character; and still we must arrive at the same conclusion, for it would not be permissible to vary by parol that portion of the agreement which was by the parties thereto reduced to writing.

Overruled.

RUTHERFORD v. STATE. (No. 15,612.)
(Supreme Court of Mississippi. Jan. 15, 1912.)
HOMICIDE (§ 308*)—MURDER—INSTRUCTION.

An instruction which defines murder as the killing of a human being, with deliberate design to effect the death of the person killed, drawn under Code 1908, § 1227, is fatally defective for omitting the qualifying words "without authority of law."

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 308.*]

Appeal from Circuit Court, Tippah County; W. A. Roane, Judge.

Alvin Rutherford was convicted of a murder, and he appeals. Reversed and remanded.

Appellant assigns as error the granting of instruction No. 1, for the state, which is as follows: "The court charges the jury, for the state, that murder is the killing of a human being, by any means or in any manner, when done with the deliberate design to effect the death of the person killed; and, if the jury believe from the evidence in this case, beyond a reasonable doubt, that the defendant so killed deceased, then the jury, under their oaths, should find the defendant guilty, as charged."

Spight & Street, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

SMITH, J. The granting of the first instruction on behalf of the state, which was drawn under section 1227 of the Code, and which omits the qualifying words "without authority of law," was fatal error. *Ivy v. State*, 84 Miss. 264, 36 South. 265.

Reversed and remanded.

CAWTHON v. STATE. (No. 15,535.)
(Supreme Court of Mississippi. Jan. 29, 1912.)
CRIMINAL LAW (§ 260*)—APPEAL TO CIRCUIT COURT—CERTIFICATION OF RECORD.

Where the record contained no certified copy of the proceedings, which originated in the justice court, the circuit court was without jurisdiction, and its judgment is a nullity.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 260.*]

Appeal from Circuit Court, Marshall County; W. A. Roane, Judge.

Will Cawthon was convicted of crime, and appeals. Reversed and remanded.

Smith & Totten, for appellant. Jack Thompson, Asst. Atty. Gen., for the State.

SMITH, J. As this record contains no certified copy of the proceedings before the justice of the peace, in whose court this cause is supposed to have originated, the court below was without jurisdiction, and consequently the judgment must be and is reversed, and the cause remanded. *Rogers v. City of Hattiesburg*, 55 South. 481.

YAZOO & M. V. R. CO. v. McCALL. (No. 15,471.)

(Supreme Court of Mississippi. Jan. 15, 1912.)
CARRIERS (§ 397½*)—BAGGAGE—LIABILITY FOR LOSS—POSSESSION BY CARRIER.

Where plaintiff's baggage arrived with him over another road at an intermediate point, and was not delivered to defendant carrier, but was forwarded by mistake on another road, when he purchased his ticket from defendant railway company the next morning to continue his journey, it was not liable for its loss, though the baggage agent, who negligently forwarded the baggage, was the joint agent of all of the roads at the station.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1519-1528; Dec. Dig. § 397½.*]

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Action by R. L. McCall against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

F. M. West and E. L. Trenholm, for appellant. W. Calvin Wells, Jr., and M. Ney Williams, for appellee.

MAYES, C. J. The Yazoo & Mississippi Valley Railroad Company is not liable for any damage or loss sustained by Mr. McCall to his baggage. There was no delivery of this baggage to the Yazoo & Mississippi Valley Railroad Company under the contract of carriage which it had with McCall to transport him to Learned. The record shows that Mr. McCall left Summerland as a fellow passenger on the Gulf & Ship Island Railroad Company with one Hosey. McCall checked one trunk over the Gulf & Ship Island Railroad to Jackson, and Hosey checked two; each having their separate baggage and separate checks. The baggage seems to have arrived at its destination, and to have been received by the baggageman who acts as the joint agent of a number of roads running into a central or union station in Jackson. Both McCall and Hosey reached Jackson about 2 o'clock on the morning of the 28th of October, 1910. Mr. Hosey was bound for Ashtown, Ark., and Mr. McCall was

bound for Learned, Miss. It was necessary for Hosey to take passage on the Alabama & Vicksburg Railway in order to go to Ash-town, and McCall was to take passage on the Yazoo & Mississippi Valley Railroad to Learned. On the night after the train arrived in Jackson over the Gulf & Ship Island Railroad, neither Hosey nor McCall made any demand for their baggage until the next morning. Hosey left for Arkansas over the Alabama & Vicksburg Railway at 5:43 the next morning, and McCall left for Learned over the Yazoo & Mississippi Valley Railroad at 6. Some time before 6 o'clock McCall bought a ticket over the Yazoo & Mississippi Valley Railroad and went with his baggage check and presented it to the Yazoo & Mississippi Valley Railroad for the purpose of having his trunk checked to Learned. By mistake McCall's trunk had been checked to Arkansas as a part of Hosey's baggage. The baggageman took the check, but almost immediately discovered that through mistake McCall's trunk had been checked as a part of Hosey's baggage, and was then on its way to Arkansas. The baggageman tried to stop the trunk, but failed so to do, and it was not until nearly two months afterwards that the trunk was found and sent to Learned. When received, the contents had been rifled to some extent. McCall made no demand on the Gulf & Ship Island Road for his baggage until he had purchased his ticket over the Yazoo & Mississippi Valley Road, and at that time it was not in the depot, but had been sent away as a part of the baggage of Hosey, and, as a matter of fact, the Yazoo & Mississippi Valley Railroad agents never did have any control over his baggage, nor was it ever taken possession of by, or delivered to, them.

As to all personal baggage of a passenger, the carrier is liable as a common carrier of goods from the time it is delivered to it, and it takes possession; but it cannot be liable until this is done. When McCall purchased his ticket over the Gulf & Ship Island Railroad, and had his baggage checked and delivered into the possession of the Gulf & Ship Island Railroad, it was the duty of that road to care for the baggage until it arrived at its destination, and afterwards until it had been delivered to him. It is immaterial that the baggage agent was the joint agent of all these roads. This might have bearing on the liability of the roads to each other under whatever contract or arrangement they might have between themselves, if they have any, but does not relieve any road of its duty to fulfill its own contract of carriage with its own passengers to care for their baggage. It follows, therefore, that the court should have given a peremptory instruction to find for the defendant.

Reversed and remanded.

DULANEY et al. v. JONES & ROGERS.

(No. 15,188½.)

(Supreme Court of Mississippi. Dec. 18, 1911.
Suggestion of Error Overruled Jan.
15, 1912.)

1. SALES (§ 274*)—WARRANTIES—IMPLIED WARRANTY OF SOUNDNESS.

A seller of provisions intended for human food impliedly warrants soundness; but this is not true in the case of a sale of feed for animals.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 777-779; Dec. Dig. § 274.*]

2. SALES (§ 354*)—ACTIONS FOR PRICE—PLEADINGS.

A plea in an action for the price of feed for animals, which alleges that it was sold for that purpose, that it was so decayed as to be unfit to feed to animals, and was worthless, is equivalent to a plea of total failure of consideration, and states a good defense as against a demurrer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1011; Dec. Dig. § 354.*]

3. SALES (§ 21*)—FAILURE OF CONSIDERATION.

A buyer of feed for animals is not liable under an implied promise to pay, where the feed is worthless, because there is a total failure of consideration.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 33-38; Dec. Dig. § 21.*]

4. SALES (§ 347*)—ACTION FOR PRICE—DEFENSE—RETURN OR OFFER TO RETURN GOODS BOUGHT.

Where the goods purchased were worthless and valueless, the buyer need not return or offer to return them, to escape liability for the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 962-972; Dec. Dig. § 347.*]

Appeal from Circuit Court, Washington County; A. J. Rose, Special Judge.

Action by Jones & Rogers against L. O. Dulaney and another. From a judgment for plaintiffs, defendants appeal. Reversed.

Watson & Jayne, for appellants.

The rule of law involved in this case is that a vendor of feed stuff sold for the purpose of being fed to the animals of the vendee is held to impliedly warrant the soundness and wholesomeness of the article so sold. Houk v. Berg (Tex. Civ. App.) 105 S. W. 1176; French v. Vining, 102 Mass. 132, 3 Am. Rep. 440; 3 Blackstone, 105; Tomlinson v. Armour & Co., 75 N. J. Law, 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923; McKibbin v. Bax, 79 Neb. 577, 113 N. W. 158, 13 L. R. A. (N. S.) 646, 126 Am. St. Rep. 677; Craft v. Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139; Darks v. Scudder-Gayle Gro. Co., 146 Mo. App. 246, 130 S. W. 434; Coyle v. Baum, 3 Okl. 695, 41 Pac. 389; Cotton Oil Co. v. Trammell (Tex. Civ. App.) 72 S. W. 244; Wilson v. Dunville, 6 L. R. Ir. 210; 16 Am. & Eng. Ann. Cas. p. 499, note.

Shields & Boddie, for appellees.

The implied warranty as to food intended for human use is not extended to feed stuff

for animals. *Lukens v. Freund*, 27 Kan. 664, 51 Am. Rep. 429; *National Cotton Oil Co. v. Young*, 74 Ark. 144, 85 S. W. 92, 109 Am. St. Rep. 71; *McKinnon v. Alpena Co.*, 102 Mich. 221, 60 N. W. 472.

The doctrine of *caveat emptor* applies.

McLEAN, J. Appellees brought suit against appellants, on an open account, for goods, wares, and merchandise before that time sold and delivered, claiming a balance of \$3,191. There is annexed to the declaration the account, which shows that the goods sold were feed stuffs for animals. The second plea of the defendants was, in substance, that the account sued on was for feed stuff for animals of defendants; that said feed stuff was sold to defendants to feed to his mules, with the belief that the same was sound, wholesome feed; that said feed stuffs were not wholesome, sound, etc., but were decayed, rotten, unfit, and unwholesome feed for said mules, and were in such rotten condition as, when fed to said mules, they made said mules sick, causing the death of six of them, etc. Wherefore defendants pray that they be allowed to recoup the amount of said damage, totaling \$3,800, against the account sued for. The third plea of defendants set out that the feed stuffs were not sound and wholesome feed for their animals, but, "on the other hand, were so decayed, damaged, and rotten as to be unfit for the purpose for which same were sold, unfit to be fed to said mules, and unfit to be fed at all, and were worthless and of no value." The plaintiffs demurred to said pleas, and, the demurrer being sustained, defendants declined to answer, and a judgment was rendered for plaintiffs.

[1] It is argued with much ability, by the appellees, that an implied warranty of soundness arises only in cases where the food sold is for human consumption. After a careful consideration of the question, our conclusion is that, according to the weight of authority in this country, there is an implied warranty of soundness in the case of the sale of provisions intended for human food, but with food for other purposes there is no implied warranty of soundness. This is put upon the grounds of public policy, the controlling reason being the regard for human life and for human health. See authorities cited in brief of counsel for appellees.

[2] As to the third plea, we construe that plea to mean that its averment as to the feed stuff having been sold under an implied warranty that the same was sound and wholesome for mules of the defendants is a mere conclusion of law, and not a statement of fact, and is alleged in the plea as a mere matter of inducement. The plea alleges that the feed stuff was "worthless and of no value."

[3] We do not know of any law, and counsel have failed to cite us to any authority,

that holds that a person is liable when he buys articles that are worthless and of no value. The law does not imply a promise upon the part of the purchaser to pay for goods that are worthless and of no value. In such cases there is a total failure of consideration. We construe the plea to be equivalent to a plea of total failure of consideration.

[4] If the articles purchased are worthless and of no value at all, the purchaser is not required even to return or to offer to return them. This principle, of course, is not applicable in a case where a person buys "a pig in a bag or a cat in a sack." In such cases he must stand upon his contract; but where he purchases things for consumption, either for human food or for use of live stock, he cannot be made to pay for those things which are worthless and of no value. No question of estoppel arises upon the record in this case. We do not know what defendants did with the articles purchased. We decide this case simply on the allegation in the plea that the article was worthless. The demurrer to the third plea should not have been sustained, but plaintiffs should have replied thereto. Reversed.

FLOWERS v. STATE. (No. 15,528.)

(Supreme Court of Mississippi. Jan. 29, 1912.)

1. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR—INSTRUCTION.

Where accused was indicted for an assault and battery with intent to kill, and the evidence showed that he shot at his victim, but failed to hit him, and so was only guilty of an assault with intent to kill, a charge that, if accused was guilty of assault with intent to kill, the jury should find him guilty as charged, was erroneous, though harmless, as the punishment is the same, and an indictment for assault and battery with intent to kill will support a conviction of assault with intent.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.*]

2. CRIMINAL LAW (§ 1162*)—APPEAL—REVERSIBLE ERROR.

A conviction will not be reversed for harmless error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3085; Dec. Dig. § 1162.*]

Appeal from Circuit Court, Warren County; H. C. Mounger, Judge.

Bob Flowers was convicted of an assault and battery with intent to kill and murder, and he appeals. Affirmed.

McLaurin & Thames, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

SMITH, J. Appellant was indicted and convicted for an assault and battery with intent to kill and murder Ellen Carroll. The proof showed that he shot at Ellen, but failed to hit her, and that, consequently, he was guilty of an assault with intent to kill and murder, and not of an assault and battery

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

with intent to kill and murder. The error complained of is that the court, in effect, charged the jury, for the state, that if they believed from the evidence, beyond a reasonable doubt, that appellant was guilty of assault with intent to kill and murder, they should find him guilty as charged in the indictment, thus convicting him of the battery, as well as of the assault. [1] In so far as this instruction charged the jury to find appellant guilty as charged in the indictment, it was erroneous; but this error was perfectly harmless, and could not have prejudiced appellant. It requires no citation of authority to support the statement that, under an indictment for an assault and battery with intent to kill and murder, a conviction can be had for assault with intent to kill and murder. The latter crime is necessarily included within the former. This being true, had the court concluded its charge with a direction to find appellant guilty of an assault with intent to kill and murder, and the jury had so found, both the charge and verdict would have been correct. The crimes of assault, and assault and battery with intent to kill and murder, are mere statutory forms of attempt to commit murder, are both created by the same statute, and the punishment for each is the same. The jury, by their verdict under the instruction complained of, necessarily found the existence of facts which show that appellant was guilty of an assault with intent to kill and murder. While the verdict returned was for assault and battery with intent to kill and murder, the punishment imposed upon appellant was the same as would have been imposed upon him had the verdict been for assault with intent to kill and murder, the crime for which he was, in fact, convicted.

[2] It follows, therefore, that the error complained of was harmless, and this court has "full many a time and oft" held that it would not reverse a judgment for an error not prejudicial to the party complaining. The case of *Montgomery v. State*, 85 Miss. 330, 37 South. 835, in which the court's attention seems not to have been directed to the fact that the error was harmless, in so far as it conflicts herewith, is overruled.

Affirmed.

THAYER EXPORT LUMBER CO. v. NAYLOR. (No. 15,036.)

(Supreme Court of Mississippi. Nov. 6, 1911.
Suggestion of Error Overruled Dec. 18, 1911.)

1. EVIDENCE (§ 155*)—PAROL EVIDENCE.

Where, in an action for the price of goods sold, it appeared that the buyer had sent the seller a check bearing the words "Bal. % to date," and plaintiff was permitted to testify as to the meaning of the words, it was error

not to have permitted defendant to give his version of what was intended.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 155.*]

2. SALES (§ 339*)—RESALE—ACTION—INSTRUCTIONS.

Where a buyer of lumber refused to accept, and the seller resold it and sued for the difference, and plaintiff testified that the price of the lumber during the period between the buyer's refusal to accept and the resale was lower than the contract price, and the buyer's evidence tended to show to the contrary, an instruction which ignored the point that it was the duty of plaintiff to show that he had sold the lumber within a reasonable time at the best price obtainable was erroneous.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 339.*]

Appeal from Circuit Court, Harrison County; T. H. Barrett, Judge.

"To be officially reported."

Action by S. E. Naylor against the Thayer Export Lumber Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

On October 17, 1906, the appellant entered into a contract with the appellee to buy 500,000 feet of lumber of the classification known to the trade as "Rio deals"; the specifications and prices being shown in the contract. The contract provided for delivery not later than December 15, 1906. On November 27th the appellee delivered to the appellant 148,060 feet on the contract, for which he was paid \$3,000 on account; the number of feet not being definitely ascertained at the time of delivery. This was all the lumber of the kind specified that appellee had on hand for delivery at that time. No more lumber was delivered prior to December 15, 1906; but the appellee contends that an extension was granted until "late in January or early in February, 1907," which was contradicted by the appellant. In January a cargo of wrecked lumber was sold at auction and purchased by the appellee, who afterwards, on April 23, 1907, tendered lumber from this wrecked cargo to appellant in fulfillment of the contract, which appellant declined, after examining same. Appellant was anxious to buy lumber classed as Rio deals, but declined lumber from this wrecked cargo, because of its water-soaked and stained condition. On May 22, 1907, appellant sent appellee a statement of its account, accompanying same with a check for \$397.23, marked on its face "Bal. a/c to date." The appellee thereafter claimed that appellant had breached the contract in refusing to accept lumber from the wrecked vessel, and brought suit for the difference between the price at the time the lumber was tendered to appellant and the time the lumber was sold by appellee, in September, 1907. From a judgment for appellee, the appellant prosecutes this appeal.

There are two errors relied upon for reversal: First, that the court erred in permitting

the appellee to testify as to what the words "Bal. a/c to date" on the face of the check meant, and in refusing to permit appellant's witness to testify as to his understanding of the meaning of these words on the check. The next objection urged by the appellant is the granting of instruction No. 2 for the appellee, plaintiff below, which is as follows: "The court instructs the jury, for the plaintiff, S. E. Naylor, that if they believe from the evidence that the contract entered into between plaintiff and defendant was extended from the time of the delivery of the lumber mentioned in said contract, and if they further believe from the evidence that the plaintiff was ready, willing, and able all during said extended period of time to fulfill and carry out said contract and deliver the lumber called for therein in accordance with the terms of said contract, and if the jury further believe from the evidence that plaintiff, which defendant refused to receive, had to sell the lumber under said contract, for defendant's account, at a lower price than the price which defendant agreed to pay plaintiff for it, on account of defendant's refusal to receive and pay for said lumber, then the jury will find for the plaintiff in a sum equal to the difference between the contract price, which defendant agreed to pay for said lumber, and the price that plaintiff sold said lumber for, as they may believe from the evidence."

May & Sanders and Hanun Gardner, for appellant. Geo. S. Dodds and J. A. Leathers, for appellee.

WHITFIELD, C. [1] The action of the court in refusing to permit the appellant to present its version of what was intended by the letter and check of May 22, 1907, after having permitted the appellee to present his version of same, is reversible error. If no parol testimony was admissible, it was error to have heard the plaintiff's testimony on this subject. But if, looking at the letter and the statement of account and the check with the words "Bal. a/c to date," it could be fairly said that the expression was left in doubt as to its true meaning, then, surely, if the plaintiff was permitted to testify as to what it meant, so should the defendant have been. In section 15, vol. 1, of Wigmore on Evidence, it is said: "Prior introduction of inadmissible evidence estops the party offering it from objecting to the admission of similar evidence on the part of his opponent." Either the court should have shut out all evidence, or permitted both parties to testify as to what the phrase "Bal. a/c to date" meant. This letter and check were dated May 22, 1907, and this suit was not instituted for nearly two years thereafter, April 15, 1909.

[2] We think, also, that instruction No. 2 given for the plaintiff is fatally erroneous.

There was a dispute in the testimony as to what the state of the market for Rio deals was between the date of the breach of the contract, if it was breached, March, and September, 1907. The plaintiff testified that the price obtaining during that time was much lower than the contract price. The defendant's evidence, by a number of other lumber merchants, was to the direct contrary. The preponderance of the testimony was with the defendant on this point, and yet the charge omits to state the vital point—that it was the duty of the plaintiff to show that he sold the lumber within a reasonable time after the breach of the contract at the best price obtainable in the market at Gulfport, after the breach of the contract and before the sale. The instruction as written left the jury to find for the plaintiff if they were satisfied that the plaintiff eventually had to sell the lumber at a less price than that stipulated in the contract, although he could have sold at a price equal to or greater than the contract price at some period between the breach and the sale.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment is reversed, and the cause remanded.

BROOKS v. DE SOTO OIL CO. (No. 15,431.)
(Supreme Court of Mississippi. Jan. 15, 1912.)

1. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—PLACE FOR WORK—DECLARATION.

Declaration alleging that a master maintained an unguarded set screw upon a revolving pulley, near which his servants were required to work, was not demurrable, as he was either negligent as a matter of law or the question of his negligence was one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

2. MASTER AND SERVANT (§ 235*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE OF SERVANT.

A servant has a right to presume that his master has furnished him a safe place in which to work, and is not guilty of contributory negligence in failing to examine the machinery about which he is required to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.*]

Appeal from Circuit Court, Washington County; J. M. Cashin, Judge.

Action by Si Brooks against the De Soto Oil Company. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. Reversed and remanded.

This is an appeal from a judgment of the circuit court sustaining a demurrer to the declaration of appellant (who was plaintiff

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

below). The declaration contains two counts, which are substantially as follows:

First count: At the time of the occurrence of the injuries complained of, appellee was operating an oil mill, and among other departments thereof it was operating a linter department, where the lint remaining on cotton seed was ginned off and baled, and that as a part thereof it was operating a huller; that for the purpose of operating the machinery necessary to do the hulling and linting, and as a part of the motor power thereof, there was a shaft in the linter department, which was run by a belt from the engine below, and on which shaft there was a pulley, over which ran a belt that was connected with and operated what is known as a feeder to the hullers, which pulley was fastened on said shaft and kept tight thereon by a set screw, the head of which protruded $2\frac{1}{2}$ inches above the neck of the pulley, and was left unprotected and uncovered, and was dangerous to operatives who might go near it in performance of their duties; that when said machinery and pulley were running the set screw was not visible, and when said machinery was not running said set screw was largely obscured from view by the rim of the pulley; that the belt which run over the pulley and operated the feeder to the hullers occasionally ran off of the pulley onto the shaft, and it thereby became necessary to replace it on the pulley, and that such was done while the machinery was in motion, which was not of itself a dangerous act to attempt to do, except for the dangerous condition of said set screw; that, at the time of the injuries complained of, appellant was employed by appellee in the capacity of huller, whose duties were to take the lint from the huller to the press and bale the same, and while he was thus engaged in this employment he was, without first being notified by appellee of the dangerous condition of said set screw, directed and ordered by his supervisor, who was foreman or boss of that department, to replace the belt on the pulley, said belt having run off thereof onto the shaft, which appellee proceeded to attempt to do in obedience to orders, and while attempting to do so he was caught in his clothes by said set screws, and thrown over and over the shaft, and thereby greatly bruised, injured, and maimed, having, among other injuries, his right leg and foot so crushed as to render amputation necessary, and otherwise causing him great suffering, etc.

Second count: The second count alleges substantially the same facts as set forth in count 1, further alleging and alleging in addition thereto that appellee well knew of the dangerous condition of said set screw, and had failed to notify and warn him of such dangerous condition.

To the above declaration appellee interposed the following demurrer, to wit:

(1) That neither count stated a cause of action.

(2) The declaration shows plaintiff's negligence was the proximate cause of the injury.

(3) That both counts of the declaration show clearly that appellant knew of the alleged danger and defects in said set screw, and the danger was such that no prudent man would have obeyed the orders of the alleged superior to replace the belt, and that plaintiff knew the risks arising from replacing said belt.

This demurrer was sustained by the court, and, appellant declining to amend his declaration, the court dismissed the same, and from that judgment this appeal is prosecuted.

Watson & Jayne, for appellant. C. L. Marshall and Walton Shields, for appellee.

SMITH, J. [1] That this unguarded set screw constituted a menace to the life and limb of any person engaged in the work being done by appellant at the time of his injury is hardly open to question, and that this danger could have been easily removed by guarding or sinking the set screw is also equally obvious. This being true, unless there existed circumstances not appearing in this record which relieved appellee from the duty of guarding or sinking this set screw, it follows, either that appellee was negligent as a matter of law in failing to guard or sink the screw, and thus furnish appellant with a safe place in which to work, or it was for the jury to say whether it was negligent in failing to do so. In either event, the demurrer should have been overruled. *Matthews Co. v. Bouchard*, 28 Can. S. C. 580; *Mountain Copper Co. v. Pierce*, 136 Fed. 150, 69 C. A. 148; *Pruke v. South Park Foundry & Machine Co.*, 68 Minn. 305, 71 N. W. 276; *Geno v. Fall Mountain Paper Co.*, 68 Vt. 571, 35 Atl. 475; *Homestake Mineral Co. v. Fullerton*, 69 Fed. 923, 16 C. A. 545; *Rabe v. Consolidated Ice Co. (C. C.)* 91 Fed. 457. We are aware that there is a line of decisions dealing with the question of unguarded set screws announcing a contrary rule; but we decline to follow them, and fully agree with Mr. Thompson in his criticism of them contained in sections 4021, 4022, and 4023 of volume 4 of the second edition of his work on Negligence.

[2] There are no facts alleged in the declaration from which it could be said that appellant was guilty of contributory negligence. He was under no duty to examine the machinery, for he had a right to presume that the master had discharged his duty of furnishing him a safe place in which to work.

Reversed and remanded.

LEMMON & GALE CO. v. GRAY BROS.

(No. 15,358.)

(Supreme Court of Mississippi. Jan. 29, 1912.)

Appeal from Circuit Court, Union County; W. A. Roane, Judge.

Action between the Lemmon & Gale Company and Gray Bros. From the judgment, the Lemmon & Gale Company appeals. Affirmed.

Jones & Knox, for appellant. C. Lee Crum, for appellees.

PER CURIAM. Affirmed.**WOLFE BROS. SHOE CO. v. WATSON.**

(No. 15,684.)

(Supreme Court of Mississippi. Jan. 29, 1912.)

Appeal from Circuit Court, Panola County; N. A. Taylor, Judge.

Action between the Wolfe Brothers Shoe Company and W. H. Watson. From the judgment, the Shoe Company appeals. Dismissed.

Shands & Montgomery, for the motion. V. Otis Robertson, opposed.

PER CURIAM. Motion to docket and dismiss sustained.**MALAGA PACKING CO. v. THREEFOOT BROS. & CO.** (No. 15,509.)

(Supreme Court of Mississippi. Jan. 29, 1912.)

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action between the Malaga Packing Company and Threefoot Bros. & Co. From a judgment, the Malaga Packing Company appeals. Affirmed.

See also, 97 Miss. 21, 52 South. 209.

F. V. Brahan, for appellant. Baskin & Wilburn, for appellees.

PER CURIAM. Affirmed.**YAZOO & M. V. R. CO. v. GUTHRIE.** (No. 15,449.)

(Supreme Court of Mississippi. Jan. 29, 1912.)

Appeal from Circuit Court, Yazoo County; W. A. Henry, Judge.

Action by J. B. Guthrie against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mayes & Longstreet, for appellant. Barbour & Henry and M. B. Grace, for appellee.

PER CURIAM. Affirmed.**YAZOO & M. V. R. CO. v. ABBOTT & WHITE.** (No. 15,267.)

(Supreme Court of Mississippi. Jan. 29, 1912.)

Appeal from Circuit Court, Panola County; N. A. Taylor, Judge.

Action by Abbott & White against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

ment for plaintiff, and defendant appeals. Affirmed.

Mayes & Longstreet, for appellant. Shands & Montgomery, for appellee.

PER CURIAM. Affirmed.**YAZOO & M. V. R. CO. v. YOUNG.** (No. 15,204.)

(Supreme Court of Mississippi. Jan. 29, 1912.)

Appeal from Circuit Court, Quitman County; Sam C. Cook, Judge.

Action by J. H. Young against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

St. John Waddell and Mayes & Longstreet, for appellant. Mack & Donaldson and W. F. Gee, for appellee.

PER CURIAM. Affirmed.**COOK v. STATE.** (No. 15,371.)

(Supreme Court of Mississippi. Jan. 29, 1912.)

Appeal from Circuit Court, Calhoun County; W. A. Roane, Judge.

D. B. Cook was convicted of assault, and appeals. Affirmed.

Haman & Bates, for appellant. Jack Thompson, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.**FRANCIS v. STATE.**

(Supreme Court of Florida, Division B. Oct. 10, 1911. Headnotes Filed Jan. 19, 1912.)

*(Syllabus by the Court.)***HOMICIDE (§ 348*)—WRIT OF ERROR—REVIEW—QUESTIONS OF FACT.**

Where there has been a conviction of murder in the second degree, and the appellate court upon a careful consideration of the evidence finds that it does not make out such offense, but at most might support a conviction for manslaughter merely, such judgment will be reversed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 724; Dec. Dig. § 348.*]

Error to Circuit Court, Gadsden County; J. W. Malone, Judge.

Charleston Francis was convicted of murder in the second degree, and he brings error. Reversed, and new trial ordered.

W. C. Hodges, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error, as defendant below, was indicted for, and tried and convicted of, the crime of murder in the second degree, in the circuit court of Gadsden county, and seeks reversal of the sentence and judgment pronounced upon him by writ of error. But one error is assigned and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

presented here, the denial of the defendant's motion for new trial made upon the ground that the verdict rendered was contrary to the evidence and to the law. The evidence in full, as presented to us in the record brought here, is as follows:

Henry Turner for the state testified as follows: "I know High Barrow, but I do not know Charleston Francis, I saw some people pass my place on January 28, 1911, and a few minutes afterwards I heard a shot fired. I ran out there and struck a light, in the dark, and found High Barrow lying down in the road face down. There was a mark where a bullet had come out of the back of his head. I turned him over, and saw where a bullet had entered his head, just above the nose. I then went about 50 yards, to another man's house, and got him to come there. I did not see any knife, or other weapon. I held a lamp up and looked around. I stood in one place. Other people were there when I left, and other people were there when I returned. I was related by marriage to High Barrow."

Luke Long for the state testified as follows: "Will Long (my brother), Henry Carter, High Barrow, and myself were coming from the festival on January 28, 1911. We met Charleston Francis, Sam Tillman, Amos De Vaughn, and Will Sanders on the road, who were going to the festival. We stopped and said 'Hello,' and talked about different things. They asked us how the festival was, and we told them it was quiet, but to go on and have a good time if they could. Charleston Francis spoke to High Barrow and asked him to pay him back some money which he owed him. High replied to him, 'You must be drunk.' Charleston said, 'No; I am not drunk.' Then High said, 'You must be drunk, man,' and Charleston said, 'No; I am not drunk, but I think you treat me dirty about what you owe me.' Then I heard Charleston say to High, 'Have you got a pistol?' and High replied, 'No; I have got my damn knife.' I then pulled High Barrow away and Will Sanders pulled Charleston Francis away. High walked around behind me going towards his house, and Charleston Francis had come to about the middle of the road which made them face each other, and High said as he walked around me, and said, 'I will cut your damn throat,' and right then the pistol fired. They were about 10 feet away from each other, as near as I can get at it. We all met in a footpath by the side of the road, and when I pushed High back, I pulled him over to the other side of the road, and Will Sanders pulled Francis back, but remained on the same side of the road where we all met, and Francis went from there toward the middle of the road going toward the side of the road that High had gone to. I did not see High Barrow raise his hand when he said, 'I will cut your damn throat.' It was dark and I heard Charleston say, 'Stand back! stand back!'"

Henry Carter for the state testified as follows: "I was with High Barrow and two other men on January 28, 1911, coming from the festival, when we met Charleston Francis and four other men, going to the festival. This was in Gadsden county, Fla. We talked awhile about different things, and told them to go on to the festival and have a good time. I heard Charleston Francis ask High Barrow to pay him back some money he owed him, and I heard High Barrow tell Francis that he was drunk. Charleston Francis said, 'No; I am not drunk,' and Barrow said, 'You must be drunk,' and Francis said again that he was not drunk. Then I heard Francis say 'Have you got a pistol?' and he said, 'No; I have got my damn knife,' and then Will Sanders took a hold of Charleston Francis and pulled him back, and Luke Long caught High Barrow by the back of his coat and pulled him back and across the road leaving Francis on the other side of the road. High walked right around Luke Long and said to Charleston Francis, 'I will cut your God damn throat,' and then Charleston Francis shot him. Francis had come to the middle of the road toward the side that we had taken High. Francis was about five steps from High when he shot him. It was a dark night. I could not see any weapons, but I saw the flash of the pistol. I heard Francis say to Barrow, when he stepped around Luke Long, 'Get back! get back!' and Francis took two or three steps back. I think they were about as far apart as from here to the end of that table (about 12 feet). I did not see any knife there. I do not know whether High Barrow had one or not. High Barrow was facing toward Charleston Francis and toward his (High's) house, when the shot was fired. The deputy sheriff came there over an hour afterward. There were a lot of others there in the meantime."

And thereupon the state announced that it rested its case, and the defendant caused to be produced and sworn, as a witness, one Amos De Vaughn, who testified as follows: "I was with Charleston Francis and the others the night that we met in the road in Gadsden county, Fla., on January 28, 1911. I was going to the festival. Sam Tillman, Will Sanders, and Charleston Francis were with me. High Barrow, Henry Carter, Will Long, and Luke Long had been to the festival. We met and all said 'Hello' and talked about different things. We told them the festival was no good, but they might go on and try to have a good time, if they wanted to. I heard Charleston Francis ask High Barrow to pay him back some money he claimed High Barrow owed him, and they had stepped aside a little ways, when they were talking about it. I heard High Barrow say when he asked him for the money, 'You must be drunk,' and Charleston answered, 'No; I am not drunk.' Then I heard High say again, 'You must be drunk,' and Charleston again answered him that he was 'not

drunk, but you have treated me dirty about the money you owe me.' Then I heard Charleston say to High, 'Have you got a pistol?' and he said, 'No; I have got my God damn knife,' and Will Sanders caught hold of Charleston Francis and pulled him back, and Luke Long caught hold of High Barrow, and pulled him back across the road and when he did so High Barrow ran around Luke Long, and said to Charleston Francis, 'I will cut your God damn throat,' and lifted his hand up like he had something in it. I heard Charleston say, 'Stand back! stand back! don't come up on me,' and then he fired. Charleston was backing back about three steps when he said to High, 'Don't come up on me.' High took two or three steps toward Francis, holding up his hand when the pistol fired. When Francis fired he was about the middle of the road. It was so dark all I could see was the blaze of the pistol when it was fired. They were about 10 or 12 feet apart when the pistol fired. I am not related to either Charleston Francis or High Barrow."

Will Sanders for the defendant testified as follows: "I was with Charleston Francis, Amos De Vaughn, and Sam Tillman going to the festival, when we met Will Long, Luke Long, and High Barrow. We stopped to talk in the path along the side of the road. It was in Gadsden county, Fla., on January 28, 1911. We were all friendly and were talking about the festival. I heard Charleston Francis say to High Barrow to pay him back some money he owed him, and High Barrow told him he must be drunk. Charleston Francis said he was not drunk, but that you have treated me dirty about the money you owe me,' and they repeated it once or twice. Then I heard Charleston Francis say to High Barrow, 'Have you got your pistol?' and he said, 'No; I have got my damn knife.' Then I took hold of Charleston Francis and pulled him back down the road, and Luke Long caught hold of High Barrow and swung him around, but let him loose of him just as he swung him around. High Barrow then ran behind Luke Long toward Charleston Francis, and said, 'I will cut your God damn throat.' Charleston backed back two or three steps and said, 'Get back! get back! don't come on me,' and fired. When the shot was fired High was on the other side of the road from the place where they first started to fuss and Francis had gone to the middle of the road from the side of the road where Sanders had taken him. High Barrow had his right arm raised when he said, 'I will cut your God damn throat.' I do not know what was in his hand. It was so dark all I could see was the flash of the pistol. I never saw the pistol. When we told Charleston Francis he had killed High Barrow he said, 'Oh, Lord! what will I do? my poor wife and children!' and walked off down the road."

Sam Tillman, for the defendant, testified as follows: "I was present on January 28,

1911, in Gadsden county, Fla., when High Barrow was shot by Charleston Francis. We were going to the festival, and met High Barrow and some others coming from the festival. We stopped and asked them how the festival was, and they said it was slow, but that we might have a good time if we went there. Charleston Francis and High Barrow had stepped aside a step or two, and I heard Charleston ask High to pay him back some money he owed him, and he answered, 'You must be drunk, man,' and Charleston answered, 'No; I am not drunk, I just wants my money and I think you treat me real dirty about it,' and then I heard him say, 'Have you got a pistol?' and High said, 'No; this is not my gun. It is my God damn knife.' Then Will Sanders pulled Charleston back and Luke Long pulled High Barrow back. High Barrow ran around behind Luke Long towards Charleston Francis with his right hand lifted up, and said, 'I will cut your God damn throat.' Charleston Francis was backing back and said, 'Get back! get back! don't come on me,' and then fired. He fired almost immediately after High Barrow said, 'I will cut your God damn throat.' They were facing each other when the shot was fired. It was so dark I did not see the pistol and I did not see what High had in his hand. I saw the flash of the pistol when it was fired. I also heard High say to Francis when they were talking about the money, 'You must be mad,' and heard Charleston say, 'Yes; I am as mad as I can be,' and then it was I heard Charleston say, 'Is that your gun you have got?' and he said, 'No; this is my damn knife.'"

J. P. Smith, for the defendant, testified as follows: "I know Charleston Francis and I know his general reputation in the community for being peaceable, orderly, and law-abiding, and his reputation is good, and I do not testify this way because he dealt with me as a customer."

The defendant testified as follows: "I am Charleston Francis. I was going to the festival in Gadsden county, Fla., on January 28, 1911, with Sam Tillman, Will Sanders, and Amos De Vaughn, and we met High Barrow, Luke Long, Will Long, and Henry Carter. We had never had any trouble with each other. We had been good friends. I had loaned High Barrow some money. We stepped aside a step or two, and I asked him to pay it back to me, and he told me I must be drunk, and I told him I was not drunk, and he repeated that I must be drunk, and said, 'Fellows, ain't he drunk?' and I told him 'No,' I was not drunk, but I wanted him to pay me what he owed me, because I thought he treated me real dirty about it. Then I saw him run his hand down toward his hip pocket, and I said to him, 'Is that your pistol you have got?' and he said 'No; this is not my pistol, this is my damn knife.' Then Will Sanders caught hold of me and pulled me back down the road, and Luke Long caught

High Barrow on the back of the coat and swung him around and pulled him back but let him loose, and he ran around Luke Long's back and took three or four steps toward me, raising up his right hand, and said, 'I will cut your God damn throat.' He was in front of me then, and I then took about five steps away from him. I stepped back several steps and lifted my hand toward him and said, 'Stand back! stand back! don't come on me,' but when he said, 'I will cut your God damn throat,' I was afraid he was going to cut me, because he had told me he had his knife, and I fired my pistol at him one time. The money he owed me was money he had borrowed from me several months before. I put my pistol in my pocket that night because I expected to go to the festival alone. I never had had any trouble with anybody else in my life and never had had any trouble before with him."

And thereupon concluding with this witness, the defendant rested his case, whereupon the state recalled Luke Long in rebuttal, who testified as follows: "I do not know what money it was Charleston Francis claimed High Barrow owed him, but I know he did owe him some money for some whisky which he got from him once when I was present and which we drank up together."

Albert Gregory, for the state, testified as follows: "I went to the place where High Barrow was killed and got there an hour or so after he was killed. I carefully searched his body and the ground near his body for a weapon, but found no knife or other weapon."

Does this evidence make out a case of murder in the second degree? We cannot see that it does. If it does not make out a case of justifiable homicide in favor of the defendant, the most that can be made out of it against him is the crime of manslaughter, and, so finding, the court below erred in denying the motion for new trial.

The judgment of the circuit court in said cause is, therefore, hereby reversed and a new trial ordered at the cost of Gadsden county.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

FARNSWORTH v. TAMPA ELECTRIC CO.
(Supreme Court of Florida. Division A.
Dec. 5, 1911. Headnotes filed
Jan. 3, 1912.)

(Syllabus by the Court.)

1. STREET RAILROADS (§§ 101, 111*)—OPERATION—CONTRIBUTORY NEGLIGENCE—ISSUES AND PROOF.

In an action brought against a railroad company by one seeking to recover damages for injuries, whether to his person or his property, alleged to have been occasioned by the negligence of the defendant, there can be

no recovery if the evidence establishes the fact that the plaintiff's own negligence was the sole cause of the injury, and this may be shown under the general issue.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 225, 226; Dec. Dig. §§ 101, 111.*]

2. NEGLIGENCE (§ 119*)—OPERATION—ACTIONS FOR INJURIES—ISSUES AND PROOF.

Chapter 4071 of the Laws of Florida, Acts of 1891, p. 113, changed the common-law rule in actions brought against railroad companies in certain particulars therein set forth, and section 2 thereof, now section 3149 of the General Statutes of 1906, provides that, if the plaintiff and the defendant company are both in fault, the plaintiff may recover, "but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him." While contributory negligence as a defense in such an action should be pleaded, yet, where it appears from the proofs adduced by the plaintiff, the defendant company may avail itself of the same under the general issue.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

3. STREET RAILROADS (§ 112*)—OPERATION—ACTIONS FOR INJURIES.

Section 3148 of the General Statutes of 1906 creates the presumption that a person injured by the operation of a railroad was thus injured through the negligence of such road, which presumption it is incumbent upon the defendant railroad company, in an action brought against it, to overcome by proofs.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 227, 228; Dec. Dig. § 112.*]

4. STREET RAILROADS (§ 112*)—ACTIONS—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.

In any action seeking to recover damages for injuries to person or property, whether brought against a railroad company, in which action section 3148 of the General Statutes of 1906 would apply, or against some other defendant, alleged to have been caused by the negligence of the defendant, all that may properly be required of the plaintiff is to establish by competent evidence the negligence of the defendant in causing the injury, as laid in the declaration. The plaintiff cannot be required to show that he was not guilty of contributory negligence, the burden is the other way, and if the evidence is evenly balanced the fact of contributory negligence is not established, and upon this issue the verdict should be for the plaintiff. The only difference in this respect in an action brought against a defendant who does not come within the class enumerated in such section 3148, is that in such case the fact of injury is not made prima facie evidence of the negligence of the defendant.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 227, 228; Dec. Dig. § 112.*]

5. TRIAL (§ 194*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY—CREDIBILITY OF WITNESSES.

To the jury is given the function of passing upon the credibility of the witnesses and the weight of the evidence, and it is error for the trial judge to usurp such function.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-466; Dec. Dig. § 194.*]

6. TRIAL (§ 203*)—INSTRUCTIONS—DUTY OF TRIAL JUDGE.

It is the duty of the trial judge to charge the jury upon the law of the case, and, since

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the jury must take the law from the trial judge and be guided by his utterances, it is of the utmost importance that he should charge the law applicable to the issues being tried correctly.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 474, 482, 483, 486; Dec. Dig. § 203.*]

7. NEGLIGENCE (§ 136*) — ACTIONS — QUESTIONS FOR JURY.

Questions of negligence and of contributory negligence are for the jury to determine when the facts are controverted.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

8. TRIAL (§ 252*) — INSTRUCTIONS — REQUISITES AND SUFFICIENCY.

A charge or instruction should not impose either upon the plaintiff or defendant a duty not shown to exist.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

9. APPEAL AND ERROR (§§ 1135, 1177*) — DISPOSITION OF CAUSE — DECISION IN GENERAL.

Where there is evidence to sustain the verdict, and no material error of law or procedure appear, the judgment will be affirmed, but, where it appears that an erroneous charge could reasonably have misled or confused the jury to the injury of the party complaining of it, a new trial will be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4620; Dec. Dig. §§ 1135, 1177.*]

10. APPEAL AND ERROR (§ 1068*) — REVIEW — PREJUDICIAL NATURE OF ERROR — INSTRUCTIONS.

In an action against an electric railroad company, seeking to recover damages for injuries alleged to have been occasioned by the negligence of the defendant company, where an instruction is given which erroneously defines the duty of the plaintiff to such defendant company or imposes an unnecessary or improper burden upon the plaintiff, the judgment rendered in favor of such defendant company should be reversed, unless the evidence adduced was of such a character as would not reasonably have warranted any other than a verdict for the defendant company.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.*]

11. TRIAL (§ 243*) — INSTRUCTIONS — CONTRADICTORY INSTRUCTIONS.

Contradictory charges or instructions should not be given, as their tendency necessarily is to confuse and mislead the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564-566; Dec. Dig. § 243.*]

12. TRIAL (§ 250*) — INSTRUCTIONS — NUMBER OF INSTRUCTIONS.

Only such instructions should be requested by either the plaintiff or defendant as bear upon the law of the case and will aid the jury in trying and determining the issues, as unnecessary instructions afford opportunities for error, and are burdensome to the courts. When a large number of instructions are given, they are also well calculated to confuse and mislead the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.*]

13. HIGHWAYS (§ 169*) — USE BY TRAVELERS — AUTOMOBILES.

Owners and operators of automobiles have the same right to use the streets and highways that owners and operators of other vehicles

possess. All alike must exercise reasonable care and caution for the safety of others.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 458; Dec. Dig. § 169.*]

14. STREET RAILROADS (§ 85*) — OPERATION — RIGHT OF WAY OVER TRACKS.

While the right of a street railway to that part of the street on which its tracks are laid is not an exclusive one, yet the rights are superior to those of the general public, except at street crossings, where the rights of both are equal.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 193, 195; Dec. Dig. § 85.*]

15. STREET RAILROADS (§ 117*) — OPERATION — ACTIONS FOR INJURIES — QUESTION FOR JURY.

The driver of a vehicle, whether automobile, carriage, wagon, or other kind, about to cross a street railway track at a street crossing in a city, is not in every case required as a matter of law to stop, look, and listen.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

Error to Circuit Court, Hillsborough County; J. B. Wall, Judge.

Action by J. J. Farnsworth against the Tampa Electric Company. Judgment for defendant and plaintiff brings error. Reversed.

V. H. Knight and H. S. Hampton, for plaintiff in error. P. O. Knight, for defendant in error.

SHACKLEFORD, J. An action was brought by the plaintiff in error against the defendant in error to recover damages for personal injuries and for injury to the plaintiff's automobile, in which he was riding and which he was operating at the time, alleged to have been received as the result of the collision of one of the cars of the defendant with the automobile of the plaintiff, at the intersection of Marion and Scott streets in the city of Tampa, which collision is alleged to have been caused by the negligence of the defendant.

The first error assigned is based upon the sustaining of a demurrer to the declaration, but, in view of the fact that the plaintiff filed an amended declaration, under which he could offer all the evidence admissible under the original declaration and no additional burden was thereby imposed on him, we must hold that the error, if any, in such ruling was harmless.

We consider it unnecessary to set out the pleadings. The defendant filed a plea of not guilty, and also two other pleas to which a demurrer was sustained. No plea of contributory negligence was filed. A trial was had, which resulted in a verdict and judgment in favor of the defendant. This judgment the plaintiff has brought here for review by writ of error and has assigned 26 errors. In view of the conclusion which we have reached, it becomes unnecessary to discuss these assignments in detail. We believe that the application of a few well-settled

principles will enable us to make a proper disposition of the case.

[1] In an action brought against a railroad company by one seeking to recover damages for injuries, whether to his person or his property, alleged to have been occasioned by the negligence of the defendant, there can be no recovery if the evidence establishes the fact that the plaintiff's own negligence was the sole cause of the injury, and this may be shown under the general issue. *Atlantic Coast Line R. R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318, and *Seaboard Air Line Ry. v. Rentz*, 60 Fla. 449, 54 South. 20.

[2] Chapter 4071 of the Laws of Florida, Acts of 1891, p. 113, changed the common-law rule in certain particulars that affect the result in this case. We have had occasion several times to construe the different sections of this chapter, so shall not go into any discussion thereof now. It is sufficient to say that section 2 thereof, which appears in the General Statutes of 1906 as section 3149, provides that, if the plaintiff and the defendant company are both in fault, the plaintiff may recover, "but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him." See *Atlantic Coast Line R. R. Co. v. Crosby*, supra; *Atlantic Coast Line R. R. Co. v. McCormick*, 59 Fla. 121, 52 South. 712; *Florida East Coast Ry. Co. v. Smith*, 61 Fla. 281, 55 South. 871. In the last-cited case, following prior decisions, it was held that, "while contributory negligence as a defense to an action in tort should be pleaded and proven, yet, where it appears from the proofs of the plaintiff without objection, the defendant may avail itself of the same under the general issue." [3] Section 3148 of the General Statutes of 1906 creates the presumption that a person injured by the operation of a railroad was thus injured through the negligence of such road, which presumption it is incumbent upon the defendant railroad company, in an action brought against it, to overcome by proofs. *Atlantic Coast Line R. R. Co. v. Crosby*, supra, and *Pensacola Electric Co. v. Bissett*, 59 Fla. 360, 52 South. 367. [4] It is also true that in any action seeking to recover damages for injuries to person or property, whether brought against a railroad company, in which action the above-cited statute would apply, or against some other defendant, alleged to have been caused by the negligence of the defendant, all that may properly be required of the plaintiff is to establish by competent evidence the negligence of the defendant in causing the injury, as laid in the declaration. The plaintiff cannot be required to show that he was not guilty of contributory negligence, such burden being cast upon the defendant. Not only is it not essential that the whole evidence convince the jury that the plaintiff was not guilty of contributory negligence, the burden is the other way, and if the evidence is evenly balanced the fact of

contributory negligence is not established, and upon this issue the verdict should be for the plaintiff. *Hainlin v. Budge*, 56 Fla. 342, 47 South. 825. The only difference in this respect in an action brought against a defendant who does not come within the class enumerated in section 3148 of the General Statutes of 1906 is that in such case the fact of injury is not made prima facie evidence of the negligence of the defendant. See *Pensacola Electric Co. v. Alexander*, 58 Fla. 387, 50 South. 673, and *Seaboard Air Line Ry. v. Smith*, 53 Fla. 375, 43 South. 235, and cases there cited.

[5] It is elementary that to the jury is given the function of passing upon the credibility of the witnesses and the weight of the evidence, and it is error for the trial judge to trench upon or usurp such function. See *Garner v. State*, 28 Fla. 113, 9 South. 835, 29 Am. St. Rep. 232, and *Roberson v. State*, 40 Fla. 509, 24 South. 474. [6] Section 1496 of the General Statutes of 1906, which we have several times construed, provides as follows:

"1496 (1088). Duty of judge to charge jury.—Upon the trial of all cases at law in the several courts of this state, the judge presiding on such trial shall charge the jury only upon the law of the case; that is, upon some point or points of law arising in the trial of said cause.

If, however, upon the conclusion of the argument of counsel in any civil case, after all the evidence shall have been submitted, it be apparent to the judge of the circuit court, or county court, that no evidence has been submitted upon which the jury could lawfully find a verdict for one party, the judge may direct the jury to find a verdict for the opposite party."

Although it may have been true in England at one time, as the old couplet has it,

"For twelve honest men have decided the cause
Who are judges alike of the facts and the laws,"

Lord Mansfield's variant of the second line, "Who are judges of facts, but not judges of laws," describes the situation as it has always existed in this state. This court has carefully guarded these respective functions of the trial judge and the jury, as a glance through its decisions will readily show. Since the jury must take the law from the trial judge and be guided by his utterances, it is of the utmost importance that the trial judge should charge the law applicable to the issues being tried correctly. [7] We have also repeatedly held that questions of negligence and of contributory negligence are for the jury to determine when the facts are controverted, as in the instant case. See *German-American Lumber Co. v. Brock*, 55 Fla. 577, 46 South. 740. [8] We have also held that "A charge should not impose upon a defendant a duty not shown to exist." *Escambia County Electric Light & P. Co. v.*

Sutherland, 61 Fla. —, 55 South. 83. It necessarily follows that neither should a charge impose upon a plaintiff a duty not shown to exist. [8] We have also repeatedly held that "where there is evidence to sustain the verdict, and no material errors of law or procedure appear, the judgment will be affirmed." *Seaboard Air Line Ry. v. Moseley*, 60 Fla. 186, 53 South. 718. We have likewise held that "where it appears that an erroneous charge could reasonably have misled or confused the jury to the injury of the party complaining of it, a new trial will be granted." *Atlantic Coast Line R. R. Co. v. Wallace*, 61 Fla. 93, 54 South. 893. [10] We held that, "Where an error has been committed in defining the duty of a defendant electric company to its patrons to be harmless to the defendant, the evidence must be of such a character as would not reasonably have warranted any other than a verdict for the plaintiff." *Escambia County Electric Light & Power Co. v. Sutherland*, supra. The principle is likewise applicable in an action against an electric railroad company, seeking to recover damages for injuries alleged to have been occasioned by the negligence of the defendant company, where an instruction is given which erroneously defines the duty of the plaintiff to such defendant company or imposes an unnecessary or improper burden upon the plaintiff.

We have given all the evidence adduced our careful examination, but it would not be proper for us to express an opinion thereon, in view of the fact that we have reached the conclusion that the judgment must be reversed for certain errors which were committed by the trial judge in his instructions to the jury. It is sufficient for us to say that, as is usually true in these negligence cases, upon a number of points the evidence is conflicting, therefore we are unable to declare that the erroneous instructions, some of which we shall set out, were harmless to the plaintiff. Under proper instructions, we cannot say what verdict the jury might have rendered, acting as reasonable men, the test which we have applied. See *Pensacola Electric Co. v. Bissett*, 59 Fla. 360, 52 South. 367.

[11] A large number of instructions were given, both at the request of the plaintiff and of the defendant, some of which are of a conflicting and contradictory nature and were well calculated to confuse and mislead the jury, but we shall not undertake to point out and discuss this phase. [12] Again and again we have expressed our disapproval of the practice of requesting an unnecessarily large number of instructions. See *Gracy v. Atlantic Coast Line R. R. Co.*, 53 Fla. 350, 42 South. 903; *Atlantic Coast Line R. R. Co. v. Crosby*, 53 Fla. 400, 42 South. 318; *McCall v. State*, 55 Fla. 108, 46 South. 321. We would also refer to *Kinney v. City of Springfield*, 35 Mo. App. 97.

From the different instructions given at

the request of the defendant we single out and copy the following, each of which is assigned as error:

"(11) The court charges you that it is the law that it is the duty of a traveler to exercise his sense of sight and hearing, and to look and listen for the approaching street car, and that his failure to do so is negligence. *And, if necessary, it is also his duty to stop. (Exceptions noted to charge.)*"

"(14) The court instructs you that it was the duty of the plaintiff, upon approaching the track of the defendant, and before going on the same, to exercise a proper degree of care and caution, and to have made a vigilant use of his eyes and ears for the purpose of ascertaining whether or not a street car was approaching, because it was negligence in the plaintiff to approach the track, or to walk or drive along or across the same without first stopping and looking up and down, because he was bound to presume that a car might be approaching.

"(15) With the coming into use of the automobile new questions as to reciprocal rights and duties of the public and that vehicle have and will continue to arise. At no place are those relations more important than at the grade crossings of railroads. The main consideration hitherto with reference to such crossings has been the danger to those crossings. A ponderous, swiftly moving locomotive, followed by a heavy train, is subject to slight danger by a crossing foot passenger, or a span of horses and a vehicle; but, when the passing vehicle is a ponderous steel structure, it threatens not only the safety of its own occupants, but also those on the colliding train. And when to the perfect control of such a machine is added the factor of high speed, the temptation to dash over a track at terrific speed makes the automobile, unless carefully controlled, a new and grave element of crossing danger. On the other hand, when properly controlled, this powerful machine possesses capabilities contributing to safety. When a driver of horses attempts to make a crossing and is suddenly confronted by a train, difficulties face him to which the automobile is not subject. He cannot drive close to the track or stop there, without risk to his horses, frightening, shying, or overturning his vehicle. He cannot well leave his horses standing, and if he goes forward to the track to get an unobstructed view, and look for coming trains, he might have to lead his horses or team with him. These precautions the automobile driver can take, carefully and deliberately, and without the nervousness communicated by a frightened horse. It will thus be seen an automobile driver has the opportunity, if the situation is one of uncertainty, to settle that uncertainty on the side of safety, with less inconvenience, no danger, and more surely than the driver of a horse. Such being the case, the law, both from the standpoint

of his own safety and the menace his machine is to the safety of others, should, in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and precaution as to go to his own safety and that of the public. If the law demands such care, and those crossing make such care, and not chance, their protection, the possibilities of automobile crossings accidents will be minimized. The duty of an automobile driver approaching tracks where there is restricted vision, to stop, look and listen, and to do so at a time and place where looking and where listening will be effective is a positive duty."

"(17) The duty of an automobile driver approaching a railroad crossing, where there is restricted vision, to stop, look and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty."

We shall treat these assignments together. It will be observed that they instruct the jury that as a matter of law it is "the duty of an automobile driver approaching a railroad crossing, where there is restricted vision, to stop, look, and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty," also that "it was negligence in the plaintiff to approach the track, or to walk or drive along or across the same without first stopping and looking up and down, because he was bound to presume that a car might be approaching." This doctrine was not only stated but repeated and emphasized. The instructions also lay special stress upon the duty of an automobile driver in approaching tracks to stop, look and listen, as distinguished from the driver of other kinds of vehicles.

[13] The defects which vitiate these instructions are so obvious that extended discussion is not required. It was held in *House v. Cramer*, 134 Iowa, 374, 112 N. W. 3, 10 L. R. A. (N. S.) 655, 13 Am. & Eng. Ann. Cas. 461, that "operators of automobiles have the same right to use the highways that drivers of horses or other vehicles possess, but they must exercise reasonable caution for the safety of others, and in determining the degree of care required the character of the machine, its speed, size, appearance, manner of movement, noise and the like may be taken into consideration." Also, see note to this case on page 463 of 13 Am. & Eng. Ann. Cas., where a number of authorities will be found collected. It is said in *Cunningham v. Castle*, 127 App. Div. 580, text 586, 111 N. Y. Supp. 1057, 1061: "The automobile is not necessarily a dangerous device. It is an ordinary vehicle of pleasure and business. It is no more dangerous per se than a team of horses and a carriage, or a gun, or a sailboat, or a motor launch." It was said in *City of Chicago v. Banker*, 112 Ill. App. 94, text 99: "The fact that an au-

tomobile is a comparatively new vehicle is beside the question. The use of the streets must be extended to meet the modern means of locomotion." The discussion in *Moses v. Pittsburg F. W. & C. R. R. Co.*, 21 Ill. 516, as to the right to the use of streets will be found profitable. Also, see *Brinkman v. Pacholke*, 41 Ind. App. 662, text 666, 84 N. E. 762. As was said in the note in 13 Am. & Eng. Ann. Cas., referred to above: "Accordingly it has been generally held that the owner of an automobile has the same right as the owner of other vehicles to use highways or streets, and that like them he must exercise reasonable care and caution for the safety of others." In fine, whatever may be our individual feelings toward the automobile, and we recognize the fact that some view it with less and some with more favor, it would seem to have come to stay with us, and we would hardly be warranted in classing it as "an undesirable citizen," and we most assuredly cannot treat it as an outlaw.

[14] It is stated, we think correctly, in *Clark's Street Railway Accident Law*, § 103: "While it is clear that the right of a street railway to that part of the street on which its tracks are laid is not an exclusive one, it is generally held that its rights are superior to those of the general public, except at street crossings, where the rights of both are equal." Also, see *Nellis on Street Railway Accident Law*, 270, 36 Cyc. 1495, and authorities cited in the notes.

[15] While the authorities are not in entire harmony upon the point, the decided weight of authority is to the effect that the driver of a vehicle about to cross a street railway track is not, in every case, required as a matter of law to stop, look, and listen. See *Clark on Street Railway Accident Law*, p. 293; *Nellis on Street Railway Accident Law*, 353 et seq.; 36 Cyc. 1537 to 1541. The law is thus stated by Judge Taft in *Cincinnati St. Ry. Co. v. Whitcomb*, 66 Fed. 915, text 919, 14 C. C. A. 183, 187:

"The exceptions to the charge of the court are very voluminous, very long, and many of them are quite frivolous. Generally, the exceptions to the charge may be comprehended under three heads: First, the court was asked to charge the jury that it was the absolute duty of Whitcomb not only to look and listen for the coming of the car, but also to stop, look, and listen. It certainly is not the law that persons crossing street railway tracks in a city in a vehicle are obliged to stop before crossing, unless there is some circumstance which would make that ordinarily prudent. We have already held in the cases of *Railroad Co. v. Farra*, 66 Fed. 496, 13 C. C. A. 602, and *McGhee v. White*, 66 Fed. 502, 13 C. C. A. 608, that it is not the absolute duty, as matter of law, for one crossing a steam railway track to stop, look, and listen, but that the necessity for stop-

ping is to be determined by the circumstances, and is usually a question to be left to the jury, and so the court below in this case treated it. The rule cannot be stricter in respect to crossing a street railway than in crossing a steam railroad. The cases relied upon are chiefly Pennsylvania cases. In that state the Supreme Court has adopted a rule of law requiring every person to stop, look, and listen before crossing the railroad track. This rule is not followed in other states, and certainly is not the law in the federal courts."

The Supreme Court of Massachusetts, in *Robbins v. Springfield St. Ry. Co.*, 165 Mass. 30, text 36, 42 N. E. 334, 335, has stated its view of the law as follows:

"The decisions of this court show that a distinction has been taken with respect to the duty to look and listen when crossing the tracks of a steam railroad where a railroad train has the exclusive right of way, and when crossing the tracks of a street railway company in a public street where the cars have not an exclusive right of way, but are run in the street in common with other vehicles and with travelers. The fact that the power used by the street railway company is electricity, instead of that of horses, has not been deemed by the court sufficient to make the rule of law which has been laid down concerning the crossing of the track of a steam railroad exactly applicable to a street railway."

We would also refer to *Tacoma Ry. & Power Co. v. Hays*, 110 Fed. 496, 49 C. C. A. 115, and *Chicago & Joliet Ry. Co. v. Wanic*, 230 Ill. 530, 82 N. E. 821, 15 L. R. A. (N. S.) 1167. The cases of *Hackney v. West Jersey & S. R. Co.*, 78 N. J. Law, 454, 78 Atl. 747, 32 L. R. A. (N. S.) 286, and *Phillips v. Washington & Rockville Ry. Co.*, 104 Md. 455, 65 Atl. 422, 10 Am. & Eng. Ann. Cas. 334, especially the respective notes appended thereto, will prove serviceable.

There is no necessity for discussing the other assignments. It necessarily follows from what we have said that the judgment must be reversed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

BANK OF JASPER v. TUTEN et al.
(Supreme Court of Florida, Division A. Dec. 19, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 901*) — REVIEW — PRESUMPTIONS—BURDEN OF SHOWING ERROR.

It is the duty of the appellant or plaintiff in error to make the errors of which he com-

plains clearly to appear; every presumption being in favor of the correctness of the rulings of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3670; Dec. Dig. § 901.*]

2. SALES (§ 479*) — CONDITIONAL SALES — RIGHT OF VENDOR TO POSSESSION.

Where a party executes a promissory note in payment for personal property sold to him, and expressly states therein that the title to or ownership of such property shall remain in the vendor until such note is paid, and the debtor not only fails to pay such note, but absconds, the vendor has the legal right to take possession of such property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1438; Dec. Dig. § 479.*]

3. APPEAL AND ERROR (§ 1009*) — REVIEW — QUESTIONS OF FACT.

While the findings and conclusions of a chancellor, where the testimony is not taken before him, but before a master or examiner, by reason whereof he is not afforded an opportunity of seeing and hearing the witnesses, are not entitled to the same weight as the verdict of a jury, yet, even in that case, they should not be disturbed by an appellate court, unless they are clearly shown to be erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

4. APPEAL AND ERROR (§ 934*) — REVIEW — PRESUMPTIONS.

In equity, as well as at law, every presumption is in favor of the correctness of the rulings of the trial judge; and a final decree rendered by him, based largely or solely upon questions of fact, will not be reversed, unless the evidence clearly shows that it was erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781; Dec. Dig. § 934.*]

Appeal from Circuit Court, Hamilton County; B. H. Palmer, Judge.

Bill in chancery by the Bank of Jasper against S. S. Tuten and others. From a decree for defendants, plaintiff appeals. Affirmed.

C. A. Stephens and A. B. & C. C. Small, for appellant. B. B. Johnson, for appellee P. H. Sandlin.

SHACKLEFORD, J. The Bank of Jasper, a corporation, filed its bill in chancery against S. S. Tuten and others, seeking to foreclose a mortgage alleged to have been executed by S. S. Tuten upon certain described personal property to secure the payment of a promissory note executed by Tuten to the complainant. Among other things, the bill alleges that Tuten had been engaged in operating a shingle mill near the town of Jasper, but had become financially involved, and had absconded, leaving his property without care or protection; that certain creditors had instituted actions of attachment against Tuten; and that, by virtue of the writs of attachment issued therein, the sheriff had taken possession of some of Tuten's property. P. H. Sandlin and certain other named parties were made codefendants with Tuten; it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

being alleged in the bill that such codefendants claimed some right or interest in the mortgaged property, but that all of such rights and interests were subordinate and inferior to the mortgage lien of the complainant.

A decree pro confesso was entered against Tuten. P. H. Sandlin and Henry Amerson, two of the defendants, filed their joint and several answer to the bill. It would seem that certain other named defendants also filed their answers, but they are not copied in the transcript. One of the allegations in the bill was that the defendant P. H. Sandlin, prior to the institution of the suit, had wrongfully taken into his possession and custody three of the mules described in the mortgage, and had sold the same; wherefore it was prayed that such defendant be required to account for the same. In his answer, Sandlin denies that Tuten ever acquired the ownership of three of the mules described in the bill of complaint and the mortgage, or that he had the right or authority to mortgage the same, but, on the contrary, avers that such mules belonged to Sandlin individually, who has sold the same to Tuten conditionally, with the understanding that the title thereto was to remain in Sandlin until Tuten had fully paid off the purchase price therefor, which Tuten had not done. There is no occasion to set forth the other averments in the answer, which contained the usual general denial found in such a pleading. A general replication was filed to this answer, which replication was also addressed to the answers filed by the other defendants, and the cause was referred to an examiner to take the testimony of such witnesses as might be produced before him by the respective parties.

The cause came on for final hearing upon the pleadings and the evidence taken therein, and a final decree was rendered therein, wherein it was found, among other things, that the equities in part were with the complainant and in part with Sandlin. We copy the following paragraph of the decree:

"It further appears to the court, and the court so finds from the evidence taken in this cause, that, prior to the execution of the complainant's mortgage upon the two mules described, the said mules were the property of the defendant P. H. Sandlin, and that, prior to the execution of said mortgage, the said P. H. Sandlin sold and delivered the said mules to the said firm of Tuten & Duncan conditionally; that afterwards G. W. Duncan, a member of the said firm of Tuten & Duncan, withdrew therefrom, conveying his interest in said firm to S. S. Tuten herein, and the said S. S. Tuten thereupon becoming the possessor of said mules; that the sale by the said Sandlin to the said Tuten & Duncan was a conditional sale; that the said Sandlin retaining the right, title to, and ownership of, said mules till the notes were paid, and, if not paid at maturity, said Sand-

lin's right to take possession of said mentioned mules to him was."

It is obvious that some word, or words, is omitted at the end of this paragraph; but we copy it as it appears in the transcript. We can readily gather what was intended. The equities were found to be with the complainant as against all the other defendants. It is further recited in the decree that a receiver had been appointed "for the purpose of taking possession of the mortgaged property, and who in fact did take possession of the same under the order of the court, and make sale thereof"; such sales aggregating the sum of \$700. Then follows the order as to the disbursement of such amount. The complainant has appealed from this final decree, and has assigned several errors, all of which question the correctness of the decree in finding that any of the equities were with Sandlin as against the complainant; consequently that is the only point upon which we are called to pass.

[1] We are not advised as to just what portions of the mortgaged property the receiver took possession and sold, but it is clear that he did not take possession of the mules which Sandlin averred in his answer belonged to him. The testimony is somewhat confused. In his answer Sandlin avers that three of the mules described in the bill and mortgage belonged to him, having been sold by him conditionally to Tuten, who had not complied with the conditions of the sale, by fully paying for them, so as to acquire the ownership thereof. In the testimony taken before the examiner, Sandlin was first interrogated as to two mules, which he had conditionally sold to Tuten, and then later was interrogated as to four mules which he had so sold, none of which are described or identified, further than they were "called the Stewart mules." Sandlin further testified that Tuten had never fully paid for any of them, so as to acquire the title, and that he had retaken possession of all four of them, had sold them, and applied the proceeds arising therefrom to the balance due for their purchase price, as well as to certain other indebtedness due from Tuten to him. In his testimony, Sandlin, in response to a question as to whether he had obtained possession "of the two mules involved in this case," replied in the affirmative. It is not clear whether the other two mules were involved in the suit or not, but, as the decree refers to only two mules, we would infer not. We have time and again declared that it is the duty of the appellant or plaintiff in error to make the errors of which he complains clearly to appear. See *McKinnon v. Lewis*, 60 Fla. 125, 53 South. 940; *Baker & Holmes Co. v. Indian River State Bank*, 61 Fla. 108, 55 South. 836; *Danson v. State*, 56 South. 677, decided here at the present term.

[2-4] We find upon an inspection of the different notes executed by Tuten to Sandlin, which were filed in evidence, that it is

expressly stated that the "right, title to and ownership of four mules, the property for which this note is given, shall remain vested in P. H. Sandlin or bearer, till this note is paid, and if not paid at maturity, the holder of this note has the right to take possession of said four mules without any process of law." There can be no question that the mules were conditionally sold by Sandlin to Tuten. See *Campbell Printing Press & Manuf'g Co. v. Walker*, 22 Fla. 412, 1 South. 59; *Smith v. Hope*, 47 Fla. 295, 35 South. 865; *Scotch Mfg. Co. v. Carr*, 53 Fla. 480, 43 South. 427. The case of *American Process Co. v. Florida White Pressed Brick Co.*, 56 Fla. 116, 47 South. 942, 16 Ann. Cas. 1054, is well in point. Tuten, having failed to discharge the indebtedness due Sandlin, as evidenced by such notes, never acquired the title to or became the owner of the mules in question, and, Tuten having absconded, Sandlin had the legal right to take possession of the mules, sell them, and apply the proceeds to the payment of Tuten's indebtedness to him. The chancellor properly found that the equities were with Sandlin and against the complainant as to such mules. No error has clearly been made to appear to us. See *Baxter v. Liddon*, 62 Fla. —, 56 South. 410, and prior decisions of this court there cited.

The decree must be affirmed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

PALMER v. JACKSON.

(Supreme Court of Florida, Division A. Dec. 19, 1911.)

(*Syllabus by the Court.*)

LIMITATION OF ACTIONS (§ 31*)—LIMITATIONS APPLICABLE—LIABILITY NOT FOUNDED ON WRITING.

In an action for damages, where it is alleged that the defendant, a physician, "undertook the treatment of" the plaintiff, and that "it was the duty of the defendant as physician to properly and skillfully treat the plaintiff, but the defendant did so carelessly, negligently, and unskillfully treat the plaintiff that he was thereby injured," the cause of action is upon an "obligation or liability not founded upon an instrument of writing," and is barred in three years, under subdivision 5 of section 1725 of the General Statutes of 1906.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 142; Dec. Dig. § 31; **Physicians and Surgeons*, Cent. Dig. § 36.]

Error to Circuit Court, Dade County; Minor S. Jones, Judge.

Action by W. R. Palmer against James M. Jackson, Jr. Judgment for defendant, and plaintiff brings error. Affirmed.

R. B. Gautier, for plaintiff in error.

WHITFIELD, C. J. On February 11, 1910, W. R. Palmer commenced an action against James M. Jackson, Jr., a physician, to recover damages for injuries caused by the defendant's careless, negligent, and unskillful medical treatment of the plaintiff, whom he had undertaken to treat on June 25, 1906.

The defendant pleaded not guilty, and also that the cause of action did not accrue within three years before the action was commenced. A demurrer to the latter plea was overruled, and, the plaintiff not desiring to amend his declaration, final judgment for the defendant was entered. Plaintiff took a writ of error, which was duly recorded, thereby giving this court jurisdiction of the defendant in error, who is not represented by counsel here.

The declaration alleges that the defendant did "undertake the treatment of" the plaintiff, and that "it was the duty of the defendant as physician to properly and skillfully treat the plaintiff"; but the defendant did so carelessly, negligently, and unskillfully treat the plaintiff that he was thereby injured. These allegations are applicable to a tort growing out of a contract, and they do not exclude the existence of an express or implied verbal contract relation between the parties which is usual in such cases.

Thus considered, the action was upon a "obligation or liability not founded upon an instrument of writing," and was barred in three years. Section 1725, subd. 5, Gen. St. The judgment is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

CANNON et al. v. STATE.

(Supreme Court of Florida, Division B. Oct. 20, 1911. Headnotes Filed Jan. 19, 1912.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 280*)—PLEAS IN ABATEMENT—CERTAINTY.

Pleas in abatement, being dilatory, are not favored by the courts and must be strictly construed, they must be certain to certain intent in every particular, they must be unambiguous, and must leave nothing to be supplied by intendment, and must leave no supposable special answer unobviated.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 645-651; Dec. Dig. § 280.*]

2. GRAND JURY (§ 30*)—PROCEEDINGS—DISCHARGE—REASSEMBLING.

A grand jury that has been discharged or dismissed may be recalled and reassembled during the same term of the court, and proper indictments then properly returned by them are valid.

[Ed. Note.—For other cases, see *Grand Jury*, Dec. Dig. § 30.*]

3. GRAND JURY (§ 30*)—PROCEEDINGS—RECESS—VALIDITY OF SUBSEQUENT PROCEEDINGS.

By a special order a term of our circuit court may be adjourned or recessed over to a fixed date until after the sitting of the court in another place or county, and in such case, upon reassembling at the date fixed in the order of adjournment, it will be but a continuation of the same original term, and a grand jury that has been discharged may be then lawfully recalled and reassembled, and any proper indictment then properly returned by them will be valid.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 30.*]

4. INDICTMENT AND INFORMATION (§ 9*)—GRAND JURY PROCEEDINGS—FINDING INDICTMENT—HEARING EVIDENCE.

When a grand jury investigates a case before them by examination of witnesses, and upon such investigation presents an indictment, but in such indictment makes a mistake in a name therein set forth, or in any other respect, and such grand jury is subsequently recalled to correct the mistake, and they do correct it by returning a new and correct indictment, it is not necessary to the validity of such new and corrected indictment that such grand jury should, before returning it, have re-examined and reheard the witnesses upon whose evidence the first incorrect indictment was found.

[Ed. Note.—For other cases, see Indictment & Information, Cent. Dig. § 34; Dec. Dig. § 9.*]

5. INDICTMENT AND INFORMATION (§ 10*)—NUMBER OF GRAND JURORS.

Every indictment must be found and presented by at least 12 members of the grand jury, but it is not necessary to the validity of an indictment that all of such grand jury above that number should be either present or consenting.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 10.*]

6. CRIMINAL LAW (§ 1178*)—WRIT OF ERROR—REVIEW—ABANDONMENT OF ERROR.

Where the following statements in the briefs of counsel: "We are of the opinion that the motion for new trial should have been sustained by the lower court for the reasons set out in the motion." "None of the assignments of error are abandoned; we insist on them all"—constitute the only argument or presentation here of an assignment of error predicated on the denial of the motion for new trial, *held*, that this is but a reiteration of the assignment of error, without any argument, and is an abandonment of such assignment here.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.*]

Error to Circuit Court, Polk County; J. B. Wall, Judge.

Thomas C. Cannon was convicted of murder in the second degree, and Simeon S. Driggers of manslaughter, and they bring error. Affirmed.

L. E. Roberson, for plaintiffs in error. Park Trammell, Atty. Gen., and C. O. Andrews, for the State.

TAYLOR, J. The plaintiffs in error, as defendants below in the circuit court of Polk county on an indictment charging them with murder in the first degree, were convicted, the defendant Thomas C. Cannon of mur-

der in the second degree, and the defendant Simeon S. Driggers of manslaughter, and were sentenced as the law provides, and seek a reversal of the sentences imposed by writ of error.

Before pleading in bar, the defendants interposed the following plea in abatement:

"Now come the said Thomas C. Cannon and Simeon S. Driggers in their own proper persons in the court here, and, having had the said indictment read, saith that the state ought not further to prosecute the said indictment against them, the said Thomas C. Cannon and said Simeon S. Driggers, because they saith that heretofore, to wit, on the 21st day of March, 1911, the said circuit court was convened for the spring term of the said court in said county, at which time a grand jury was duly impaneled for the transaction of such business as might come before it, and that on the 24th day of March, 1911, said grand jury, having completed its labors, made its final report to said court, and was duly discharged by his honor, the judge of said court, for said term and allowed to go hence; that on the 25th day of March, 1911, his honor, the circuit judge, adjourned the said spring term of said court, all of which more fully appears by the records of said court; that on the 6th day of April, 1911, his honor, the circuit judge, recalled the said grand jurors by a writ to the sheriff of said court, requiring the presence of the said grand jurors on the 7th day of April, 1911, at 9 o'clock a. m., for the purpose of having the said grand jury re-indict these defendants; that on the forenoon of April 7, 1911, 16 members of the previous grand jury answered to the call of their names, W. K. Keen and C. C. Hardin of the original panel not answering and not appearing. Whereupon the court administered to said 16 the formal oath to diligently inquire and true presentment make of all such matters as shall come to their knowledge, and then charged said body that it had been discovered a mistake had been made in the indictment against these defendants in the name of the deceased, and instructed them to retire to their rooms and investigate said case. Whereupon said body of 16 grand jurors repaired to their room, and without having heard any testimony on said date returned into court the indictment here pleaded unto. These defendants allege that said indictment so returned against them is illegal and of no effect for the following reasons:

"First, that said grand jury was illegally constituted and assembled, in that they were not drawn and selected in the manner required by law.

"Second, because said grand jury was charged by the court to investigate said case and did not do so.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

"Third, because said grand jury found and returned said indictment as a true bill without having heard any testimony or having any witnesses before them on said date, and so the said Thomas C. Cannon and the said Simeon S. Driggers say that the action of the said grand jury on the 7th day of April, 1911, in indicting these defendants, was and is illegal. And the said Thomas C. Cannon and the said Simeon S. Driggers in fact saith that they are the same parties so indicted and named in said indictment of said grand jury on the 7th day of April, 1911, and not other and different persons. And this the said Thomas C. Cannon and the said Simeon S. Driggers are ready to verify; therefore they pray judgment and that by the court that the said indictment be quashed, for the reason that the action of the said grand jury was and is illegal and without authority of law."

To this plea the state attorney demurred upon divers grounds, which demurrer was sustained by the trial court, and this ruling constitutes the only assignment of error that is argued or presented here.

[1] In a long line of decisions here we have held the rule to be that pleas in abatement, being dilatory in character, are not favored by the courts, and that they must be certain to certain intent in every particular, they must be unambiguous, and must leave nothing to be supplied by intendment, and must leave no supposable special answer unobviated. *Taylor v. State*, 49 Fla. 60, 38 South. 380; *Woodward v. State*, 33 Fla. 508, 15 South. 252; *Reeves v. State*, 29 Fla. 527, 10 South. 901; *Jenkins v. State*, 35 Fla. 737, 18 South. 182, 48 Am. St. Rep. 267; *Shepherd v. State*, 36 Fla. 374, 18 South. 773; *Tervin v. State*, 37 Fla. 396, 20 South. 551; *Hodge v. State*, 29 Fla. 500, 10 South. 556; *Miller v. State*, 42 Fla. 266, 28 South. 208; *Knight v. State*, 42 Fla. 546, 28 South. 759; *Easterlin v. State*, 43 Fla. 565, 31 South. 350; *Kelly v. State*, 44 Fla. 441, 33 South. 235; *McLeod v. Citizens' Bank*, 56 South. 190.

[2] In the case of *Green v. State*, 60 Fla. 22, 53 South. 610, we have held that a grand jury that has been discharged or dismissed may be recalled and reassembled during the same term of the court, and that indictments then properly returned by them are valid. See section 3860, General Statutes of 1906.

[3] In the case of *Peoples v. State*, 46 Fla. 101, 35 South. 223, we have held there is nothing in the statutes of this state limiting a term to a continuous sitting not interrupted by the holding of a term in another county, and by several courts it has been held that by a special order a term may be adjourned over until after the sitting of the court in another place, citing *State v. Van Auken*, 98 Iowa, 674, 68 N. W. 454; *State of Florida v. Charlotte Harbor Phosphate Co.*, 70 Fed. 883, 17 C. C. A. 472; *State v. Rogers*, 56 Kan. 362, 43 Pac. 256; *Kingsley v. Bagby*,

2 Kan. App. 23, 41 Pac. 991. This plea of the defendants is uncertain in its statement as to the adjournment of the term; it simply says that the circuit judge on the 25th day of March, 1911, adjourned the said spring term of said court, all of which more fully appear by the records of said court, and on the 6th day of April, 1911, recalled the said grand jury. The records of the court here alluded to in the plea may have shown, had the facts been fully stated in the plea, that the spring term of said court was not adjourned sine die, but, on the contrary, that said spring term was continued over and adjourned or recessed only until April 6th, when it reconvened, and, if this be true, then it was but a continuation of the same spring term, though a term may have been held in another county during the interval of the recess; and in such event the court committed no error in then recalling and reassembling the same grand jury, and having them to correct any mistake they may have made in any indictment found by them during their first sitting, by returning new indictments to take the place of those in which such mistakes existed; and any indictment then properly presented by them would be valid. The plea in abatement should have negated the idea that this adjournment of the court was not a final adjournment, but only a recess of the same term for a few days and to a day fixed and certain. This defect in the plea subjected it to demurrer, and the court below committed no error in sustaining such demurrer.

[4] As to the contention of the plea that the indictment was invalid because the grand jury took no testimony on the date that they returned or presented it, this is without merit. The plea shows on its face that this same grand jury had investigated this case before and presented an indictment therein, but had therein misstated the name of the deceased, and that this new indictment was returned by them on the same evidence as the former one, and was practically the same indictment as the former one, only with the name of the deceased correctly stated. Under these circumstances, it was not necessary for the same grand jury to rehear or retake the same testimony upon which they found and returned the first indictment.

[5] As to that ground of the said plea that complains of only 16 grand jurors being present and taking part in the return of the indictment, there is no merit. In *Gladden v. State*, 12 Fla. 562, it was held that every indictment must be found by at least 12; but it is not necessary that all above that number should be present consenting.

[6] As to the other assignments of error, all that is said in the briefs in reference to them is the following: "We are of the opinion that the motion for new trial should have been sustained by the lower court, for the reasons set forth in the motion." "None of the assignments of error are abandoned;

we insist on them all." This was but a reiteration of the assignments of error, without any argument, and is an abandonment of such assignments here. *Thomas v. State*, 36 Fla. 109, 18 South. 331.

Finding no error, the judgment of the circuit court in said cause is hereby affirmed at the cost of Polk county; the plaintiffs in error being adjudged to be insolvent.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

CROOM v. OCALA PLUMBING & ELECTRIC CO.

(Supreme Court of Florida, Division B. Nov. 11, 1911. Rehearing Denied Dec. 19, 1911.)

(Syllabus by the Court.)

1. TRUSTS (§ 152*)—EXPRESS TRUSTS—"SPENDTHRIFT TRUST."

A "spendthrift trust" is defined to be those trusts that are created with a view of providing a fund for the maintenance of another, and at the same time securing it against his own improvidence or incapacity for self-protection. The provisions against alienation of the trust fund by the voluntary act of the beneficiary, or in invitum by his creditors, are the usual incidents of such trusts. Even if such a deed properly constructed was valid and effectual in this state to exempt the property conveyed therein from the debts of the beneficiaries named therein, yet where the deed, as does the one involved herein, provides that the trustees named therein shall convey all or any part of the corpus of the property conveyed thereby to the named cestui que trustents or to their assigns as they may direct upon their joint request expressed in writing, this provision in the deed virtually gives to the cestui que trustents named therein such absolute dominion over the property as to vest in them or their assigns an absolute title to the property, and such deed does not exempt the property from the debts of such cestui que trustents. The general rule is that when one has an interest in property which he may alien or assign, that interest, whether legal or equitable, is liable for the payment of his debts.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 196; Dec. Dig. § 152.*]

For other definitions, see *Words and Phrases*, vol. 7, p. 6609.]

2. REFERENCE (§ 99*)—FINDINGS—CONCLUSIVENESS.

The rule is well settled that when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, both of fact and law, and such reference is entered as a rule of court, it is a submission of the controversy to a special tribunal, selected by the parties, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law; and its determinations are not subject to be set aside and disregarded at the bare discretion of the court; or, as the same rule is otherwise more tersely expressed, when a master has been appointed by consent of the parties, his findings have the weight of a verdict of a jury.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 148-156; Dec. Dig. § 99.*]

Appeal from Circuit Court, Marion County; W. S. Bullock, Judge.

Bill in equity by the Ocala Plumbing & Electric Company against Sarah B. Croom. From a decree for complainant, defendant appeals. Affirmed.

H. M. Hampton and R. L. Anderson, for appellant. Richard McConathy, for appellee.

TAYLOR, J. The appellee as complainant below filed its bill in equity in the circuit court of Marion county against the appellant and others to foreclose a mechanic's lien on three buildings located in the town of Ocala in Marion county. The defendants below demurred to the original and amended bills, which demurrers were overruled, then the defendants answered the bill severally, replications were filed to the several answers, and the cause by consent of all parties was referred to a special master to take the testimony and to report his findings on both the facts and the law of the case to the court. Upon the filing of the report of the master the circuit judge rendered a decree against the defendant Sarah B. Croom for the aggregate sum of \$238.33, adjudging a lien in favor of the complainant upon her undivided one-fifth interest and estate in the lot upon which said buildings were located, and foreclosing said lien, and ordering a sale of her interest in said property to satisfy said decree, it appearing from the proofs in the case that said buildings were erected for her and the work and materials supplied for her at her request. From this final decree, the defendant Sarah B. Croom appeals here.

The defendant contended in her demurrers to the original and amended bills and in her answer that the following deed filed as an exhibit to the complainant's amended bill showed on its face that the same was a spendthrift deed to trustees to hold said property in trust for the cestui que trustents therein named the same not to be subject to their debts, and that the same was not subject to a lien for the debt of the said Sarah B. Croom who was one of such cestui que trustents, she having no other interest or estate in said lot of land except that conveyed by said deed, which is as follows:

"This indenture made this 14th day of December, 1901, between Jeffie E. Bell, widow, of the county of Marion, state of Florida, party of the first part, and Jeffie Harvey Bell and Joseph Hamlyn Bell, as trustee, of the county and state aforesaid, parties of the second part, witnesseth: That the said party of the first part for and in consideration of the sum of five dollars to her in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, and sold to the said parties of the second part, their successors and assigns forever, the following described land,

lying and being in the county of Marion, state of Florida, to wit: East two-thirds of lot one, Caldwell's addition to Ocala, commencing at a point one and forty-eight hundredths chains east of the northeast corner of lot thirty-nine, Caldwell's addition to Ocala, thence east one and forty-seven hundredths chains, thence south three and forty-eight hundredths chains, thence west one and forty-seven hundredths chains, thence north three and forty-eight hundredths chains to point of beginning. Together with the tenements, hereditaments and appurtenances thereto belonging. To have and to hold the above described premises, together with the appurtenances unto the said parties of the second part, their successors and assigns forever. In trust however, to and for the sole use and benefit of the said Jeffie E. Bell during the remainder of her natural life and upon her decease, then in trust to and for the sole use and benefit of her children namely: Margaret Bell, Mrs. Hardy C. Croom, born Sarah Marianne Bell, Robert Benjamin Bell, Jeffie Harvey Bell and Joseph Hamlyn Bell, and upon the following conditions and for the following purposes, to wit: The object of this instrument is to secure to my said children a home as long as and whenever they or any of them desire or choose to occupy the same as a home. They or any of them shall have the right to occupy the said premises as a home at any and all times, if they so desire, except when let or leased by said trustees as hereinafter provided. Provided, however, that this right of occupancy by my children shall not include the family of any of my children unless consented to by all my children then living. In the event of any of the cestui que trusts herein being declared a bankrupt by a court of competent jurisdiction or becoming insolvent, such insolvency being evidenced by the fact that such cestui que trust or cestui que trusts has or have not sufficient visible property to satisfy an execution issued against him, her or them, without levy upon his, her or their interest or interests in the herein described property, then, in that event the interest or interests of such bankrupt or insolvent cestui que trust or cestui que trusts shall become forfeited, determine and cease, and shall revert to and become vested in the remaining solvent cestui que trust or cestui que trusts. The said Jeffie Harvey Bell and Joseph Hamlyn Bell trustees are hereby authorized and empowered to and shall convey all or any part of the above described premises to the cestui que trusts or their assigns and shall direct upon their joint request expressed in writing under their hands and seals. The said trustees are hereby authorized and empowered upon the request of the cestui que trusts herein to rent, let or lease the herein described premises or any part thereof, for such periods of time as the cestuis que trusts

shall provide, when the said premises or any part desired to be so let or leased are not occupied by any of my said children as a home or residence. The said trustees shall apply the rents and profits of said premises, first, to the payment of such taxes as may be legally assessed against the herein described property; second, to the maintenance of said property in good repair; third, to the keeping of the dwelling house thereon insured in a sufficient sum; fourth, the residue to be paid to the cestui que trusts for their equal and sole use and benefit; fifth, in the event of the death of any of the cestui que trusts said residue shall be divided equally between all and the heirs of such as may be deceased. The said party of the first part does hereby fully warrant the title to said lands and will defend the same against the lawful claims of all persons whomsoever.

"In witness whereof the said party of the first part has hereunto set her hand and seal and the said parties of the second part to signify their acceptance of the trust herein declared, have hereunto set their hands and seals to day and year above written.

"Jeffie E. Bell. [Seal.]

"Jeffie H. Bell. [Seal.]

"Joseph H. Bell. [Seal.]

"Signed, sealed and delivered in our presence as witnesses:

"Bettie Smith.

"T. E. Biggs."

[1] Even if we were to hold that properly constructed spendthrift trust deeds were valid in this state, and potent to exempt the property conveyed therein from the debts of the beneficiaries named therein, even then the deed copied above cannot be held to be such a deed as will exempt the property therein described from a lien to secure an indebtedness of one of the named cestui que trustents for work and labor performed and materials for same furnished in the creation of buildings erected on said property by such cestui que trust. A spendthrift trust is defined to be those trusts that are created with a view of providing a fund for the maintenance of another, and at the same time securing it against his own improvidence or incapacity for self-protection. The provisions against alienation of the trust fund by the voluntary act of the beneficiary, or invitum by his creditors, are the usual incidents of such trusts. 26 Am. & Eng. Ency. Law (2d Ed.) p. 138, and authorities cited.

The deed quoted above expressly provides that the trustees named therein shall convey all or any part of the corpus of the property conveyed thereby to the named cestui que trustents or to their assigns as they may direct upon their joint request expressed in writing under their hands and seals. This provision in the deed virtually gives the cestui que trustents named therein such absolute dominion over the property as to vest

in them or their assigns an absolute title to the property, when it vests in them the right to require the trustees, upon their bare request, to convey any part or the whole of the property either to them or to their assigns in fee simple absolute. The general rule is that when one has an interest in property which he may alien or assign, that interest, whether legal or equitable, is liable for the payment of his debts. *Wenzel v. Powder*, 100 Md. 36, 59 Atl. 194, 108 Am. St. Rep. 330.

From what has been said our conclusion is that the deed in question is not sufficient to exempt the interest of the appellant in the property conveyed thereby from the payment of her debts to which it is otherwise liable.

[2] It is next contended that the evidence fails to support the findings of the special master and concurred in by the chancellor in the decree rendered as to the amount of the indebtedness found to be due to the appellee from the appellant. The rule seems to be well settled that when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, both of fact and of law, and such reference is entered as a rule of court, it is a submission of the controversy to a special tribunal, selected by the parties, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law; and its determinations are not subject to be set aside and disregarded at the bare discretion of the court. *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764. Or as the rule is expressed in the case of *Carr v. Fair*, 92 Ark. 359, 122 S. W. 659, when a master has been appointed by consent of parties, his findings have the weight of a verdict. Upon the question of the amount of the indebtedness due from the appellant to the appellee the evidence was conflicting, but there was an abundance of evidence, if credence was given thereto by the master, to sustain his findings and report. This being true and he having been appointed by consent of the parties with power to pass upon both the law and the facts, his findings on the facts must be regarded as having the same weight as the verdict of a jury as to such facts, and this finding having been concurred in by the chancellor in his final decree, we do not feel justified from anything in the record before us in disturbing his conclusions on the facts. This disposes of all the substantial issues presented in the appeal, and finding no error the decree appealed from in said cause is hereby affirmed at the cost of the appellant.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD and COCKRELL, JJ., concur in the opinion. WHITFIELD, C. J., disqualified.

POPE v. STATE.

(Supreme Court of Alabama. June 29, 1911.
On Rehearing, Dec. 21, 1911.)

1. CRIMINAL LAW (§ 1159*)—APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Where a prosecution for murder is properly submitted to the jury, the Supreme Court will not determine a question of mere weight of evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

2. JURY (§ 103*)—JURORS—COMPETENCY.

Where a juror admitted that he had heard about the case and had formed an opinion, but repeatedly stated he thought it would have no effect on his verdict, and that it would be governed by the evidence, though he thought it would be somewhat different if he had never heard of it, he was properly pronounced competent, though he also stated that he could not be absolutely sure that what he had heard might not unconsciously have some influence on him.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 461-479; Dec. Dig. § 103.*]

3. CRIMINAL LAW (§ 703*)—TRIAL—OPENING CASE TO JURY.

Where the solicitor for the state opened the case by merely reading the indictment, whereupon defendant's counsel, supplementing his formal plea of not guilty, made a statement to the jury deprecatory of the state's case, indicating that another than defendant would be shown to be guilty, it was not error for the court to permit the state to make a rebuttal statement in reply to that of defendant's counsel by outlining what the state expected to prove relative to defendant's guilt.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 703.*]

4. CRIMINAL LAW (§ 699*)—TRIAL—STATEMENT TO JURY—DISCRETION OF COURT.

Neither party is required to make a preliminary statement of his case other than by his formal pleadings, but counsel on either side may state to the jury the case as he proposes and expects to present it; the extent and scope of such statements being within the discretion of the trial court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1655, 1656; Dec. Dig. § 699.*]

5. CRIMINAL LAW (§§ 398, 448*)—EVIDENCE—CONCLUSION OF WITNESS—BEST EVIDENCE.

Where a witness testified that he saw certain shoes claimed to belong to defendant a day or two after the murder, his testimony, given 18 months thereafter, that he examined the shoes at the coroner's inquest, found them a little damp, like they had been washed—specked with what he decided were blood stains—and had the appearance of being scraped, was not objectionable as of the witness' conclusion, or that the shoes were the best evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. §§ 398, 448.*]

6. CRIMINAL LAW (§ 448*)—EVIDENCE—CONCLUSION OF WITNESS.

Where a witness, in describing his tracking of a wagon and a mule from the scene of the murder toward defendant's house, stated that they left the road, his further statement, that the vines growing over the fence alongside were mashed down "like something went over the fence," was not objectionable as a conclusion.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 448.*]

7. HOMICIDE (§ 174*)—EVIDENCE—RELEVANCY.

Where a witness testified that he tracked a wagon and mule from the scene of the murder toward defendant's house, that the tracks left the road, and that the vines growing over the fence alongside were mashed down as though something went over the fence, he was properly permitted to testify that when he was following the tracks he had not heard who was accused of the killing.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 174.*]

8. CRIMINAL LAW (§ 691*)—TRIAL—RECEPTION OF EVIDENCE—RESPONSIVENESS.

While the interrogator on motion may exclude matter not responsive to his inquiry, even though competent, the opposite party has no right to object to an answer because not responsive, if the answer is competent.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 691.*]

9. CRIMINAL LAW (§ 448*)—EVIDENCE—CONCLUSION OF WITNESS—HARMLESS ERROR.

The state claimed that defendant at the time of the murder was driving a wagon to which was hitched a mule belonging to him, but which was in the possession of C., who lived on defendant's place. A witness testified that tracks traced by him from the scene of the murder to defendant's house showed that the animal's left hind foot was cupped, and that there were two protruding nails in the right hind foot, as shown by their imprint on the ground. He then testified that C.'s mule would have made a track with a hollow place on the inside, with the left hind foot, when he was asked, "would it have made a track that is similar or like the track of the left hind foot of the mule and wagon that you tracked from the alley to defendant's house?" and the witness replied in the affirmative. *Held*, that the evidence was admissible.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 448.*]

10. CRIMINAL LAW (§ 450*)—EVIDENCE—CONCLUSIONS—TRACKS.

While the witness who had examined an alleged track of defendant stated that it "corresponded" with the track made by him, with which the witness compared it by measurement and certain marked peculiarities, and also that two tracks "measured the same," he may not testify that a certain shoe or foot could or would make a particular track.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 450.*]

11. CRIMINAL LAW (§ 452*)—EVIDENCE—EXPERTS.

Where the state claimed that defendant at the time of the murder was driving a wagon to which was hitched a mule belonging to C., a witness with 15 years' experience in shoeing horses was properly permitted to testify as to the condition of the C. mule's right hind foot and the liability of a loose nail to drop out.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 452.*]

12. CRIMINAL LAW (§ 1169*)—EVIDENCE—CONCLUSION OF WITNESS.

The state claimed that defendant at the time of the murder was driving a mule which belonged to him, but which was in the possession of C., who lived on his place. An expert blacksmith had been permitted to testify that the left hind foot of C.'s mule was cupped and would make a print similar to those which the witness found leading from the place of the homicide to defendant's house. Defendant's counsel claimed that the killing was done by

B., who lived with his mother in a house by the road just where the crime was committed. *Held*, that a question whether B.'s mule could make the track that the witness saw from a certain peach tree to defendant's house was objectionable as calling for a conclusion, and, there being evidence warranting an inference that B. committed the crime, was prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.*]

13. CRIMINAL LAW (§ 368*)—EVIDENCE—RES GESTÆ.

Where defendant claimed that the homicide was committed by B., who lived with his mother at the point where the difficulty occurred, evidence that B.'s mother, hearing a noise, called to him at the time of the homicide, and that he replied, "Don't you hear somebody fighting out there in the road?" was inadmissible as res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 368.*]

14. CRIMINAL LAW (§ 363*)—EVIDENCE—"RES GESTÆ."

Time alone is not the determining criterion of the question whether a thing said or done is a part of a given transaction, but it must be so connected with the main transaction as to virtually form a part of it, entirely excluding all remarks or exclamations of mere bystanders or lookers on, who in no way participate in the transaction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 804; Dec. Dig. § 363.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6130-6136; vol. 8, p. 7787.]

15. CRIMINAL LAW (§ 1169*)—PREJUDICE—EVIDENCE.

Wrongful admission of evidence of an undisputed fact with which defendant was in no way connected, and adding nothing to the proof of defendant's guilt, was not prejudicial to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

16. HOMICIDE (§ 174*)—EVIDENCE—ARTICLES OF PERSONAL PROPERTY.

Where certain sorghum seed and peas had been taken from decedent's ginhouse on the night of the murder, evidence of the finding of such seed and peas in defendant's back yard several weeks thereafter was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 363; Dec. Dig. § 174.*]

17. HOMICIDE (§ 338*)—ADMISSION OF EVIDENCE—PREJUDICE.

Where neither the fact nor the manner of the killing in question was in dispute, defendant was not prejudiced by the statement of a witness that a rock, which did not come from defendant's possession, nor from his premises, but which was picked up near the murdered man's body, had a certain substance on it which the witness thought was hair.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 338.*]

18. CRIMINAL LAW (§ 770*)—TRIAL—INSTRUCTIONS.

An instruction that, no matter how strong the circumstances may be, if they can be reconciled with the theory that some other person may have done the act, defendant is not guilty, was objectionable for failure to predicate a "reasonable" theory of some other person's guilt.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 770.*]

19. CRIMINAL LAW (§§ 807, 811*)—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.

A requested charge, which is argumentative and singles out parts of the evidence, may be properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960, 1969-1972; Dec. Dig. §§ 807, 811.*]

20. CRIMINAL LAW (§§ 807, 811*)—INSTRUCTIONS — ARGUMENTATIVE INSTRUCTIONS — RACE.

A request to charge that the jury, in arriving at their verdict, must consider the evidence as fairly as they would if it were a case of a negro accused of killing a negro, a white man accused of killing a white man, or a white man accused of killing a negro, and that it was just as much the duty of the jury to acquit a negro of the charge of killing a white man if they did not believe from all the evidence that he was guilty beyond a reasonable doubt as it would be the duty of the jury to acquit a white man of the charge of killing a negro, etc., was properly refused as argumentative, and also because the law does not distinguish between white people and negroes as to their guilt or innocence of crime.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §§ 807, 811.*]

21. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

A request to charge that, as the case rested entirely on circumstantial evidence, it was the jury's duty to carefully consider every material point in the state's theory, and if any one of them entertains a reasonable doubt as to the existence of any link in the state's chain of evidence, and that link was necessary to establish the state's theory, they could not find the defendant guilty, was properly refused for the reason that the reasonable doubt which requires a verdict of not guilty should grow out of all the evidence, and not from a consideration of a single link or part.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1901-1922; Dec. Dig. § 789.*]

22. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—EVIDENCE.

An instruction that the state's evidence against defendant was circumstantial, and that before the jury could convict defendant on such testimony they must believe from the evidence beyond all reasonable doubt and to a moral certainty that B., a third person, was not guilty of the killing, was properly refused, since, even though there was evidence of B.'s guilt, the evidence against defendant may also have been sufficiently strong to convince the jury of his participation in the crime.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 789.*]

23. CRIMINAL LAW (§ 1186*)—APPEAL—REVERSAL—STATUTES.

Under Code 1907, § 6264, declaring that convictions must not be reversed for error which is not prejudicial to defendant, the court must be satisfied that the verdict would not have been different if the error had not been committed, and must consider the entire record and reverse or affirm according as it may be satisfied as to its effect on the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219; Dec. Dig. § 1186.*]

Anderson, Mayfield, and Sayre, JJ., dissenting.

Appeal from City Court of Anniston;
Thomas W. Coleman, Jr., Judge.

Ervin Pope was convicted of murder, and he appeals. Reversed and remanded.

For former report of this case, see 168 Ala. 33, 53 South. 292.

The exceptions to evidence are sufficiently set forth in the opinion of the court. The following are the charges refused to plaintiff:

"(1) The court charges the jury that, no matter how strong the circumstances may be, if they can be reconciled with the theory that some other person may have done the act, then the defendant is not shown to be guilty.

"(2) The court charges the jury that, no matter how strong the circumstances may be, if they can be reconciled with the theory that some other person may have done the act, they cannot find the defendant guilty.

"(3) The court charges the jury that, if you entertain a reasonable doubt that the shoes offered in evidence were worn by Ervin Pope the night of the homicide, and if you consider this a necessary link in the state's chain of evidence, you cannot find the defendant guilty.

"(4) The court charges the jury that it is the duty of each of you to consider the testimony in this case with the utmost care, and that when it is necessary, in order to establish the theory of the defendant's guilt, to draw inference from the evidence as to facts not directly proven, that you must not draw that inference and convict this defendant, unless you would draw the same inference and act on it in matters of the greatest concern and importance to your own private affairs.

"(5) I charge you, gentlemen of the jury, that if you believe from the evidence that the thief who robbed McClurkin started when the light was struck, and had time to get past Body's house before McClurkin could have overtaken him, that the defendant is entitled to have you consider this circumstance as showing the improbability of the state's theory that the thief was Ervin Pope, who was overtaken at Body's house.

"(6) The court charges the jury that, in considering any statement made by the defendant at the time of and since his arrest, and claimed by the prosecution to be inconsistent, improbable, and as casting suspicion upon defendant, it is proper that they should take into consideration the weakness of human nature and weakness of the defendant, if such be shown, the excitement and fear operating on him at the time, if such be shown, together with all the circumstances in which he was placed, and determining from the whole evidence the weight or value as evidence you will give to such statement.

"(7) The court charges the jury that in arriving at their verdict in this case they must consider the evidence as fairly and im-

partially as they would if this were the case of a negro accused of killing a negro, a white man accused of killing a white man, or a white man accused of killing a negro.

"(8) The court charges the jury that there is no evidence in the case that the defendant had not heard that McClurkin had been killed at the time of his arrest, or at the time he was taken into custody at his house on the morning after the homicide.

"(9) The court charges the jury that the evidence on the part of the state against the defendant is circumstantial, and before you can convict him on such testimony you must believe from the evidence beyond all reasonable doubt, and to a moral certainty, that John Body was not guilty of the killing.

"(10) The court charges the jury that if they would not be willing to act upon the evidence in this case, if it was in relation to matters of the most solemn importance to their own interests, then they must find the defendant not guilty.

"(11) The court charges the jury that, before they can convict the defendant, they must be satisfied to a moral certainty, not only that the proof is consistent with the defendant's guilt, but that it is wholly inconsistent with any other rational conclusion; and, unless the jury are so convinced by the evidence of the defendant's guilt that they would each venture to act upon the decision in matters of the highest importance and concern to his own interests, then they must find the defendant not guilty.

"(12) The court charges the jury that this case rests entirely on circumstantial evidence; that it is their duty to carefully and seriously consider every material point in the state's theory; that if any one of them entertains a reasonable doubt as to the existence of any link in the state's chain of evidence, and that link is a necessary one to the remainder of the state's theory, you cannot find the defendant guilty.

"(13) The court charges the jury that they have a right, in considering the evidence, to take into consideration the traits, characteristics, and peculiarities of the white and negro race; but, outside of that, they must not let their verdict be influenced in the slightest degree by the fact that the deceased was a white man and the accused a negro.

"(14) The court charges the jury that it is their duty to contrast the manner and demeanor of the witnesses for Pope with the manner and demeanor of the state's witnesses; and you must apply this test, also, to the testimony of Pope as a witness for himself.

"(15) I charge you that it is just as much the duty of a jury to acquit a negro of the charge of killing a white man, if you do not believe from all the evidence that he is guilty beyond a reasonable doubt, as it would be the duty of a jury to acquit a white man of the charge of killing a negro, if the jury did

not believe beyond a reasonable doubt that he was guilty.

"(16) The court charges the jury that, if they believe all evidence in the case, they should find the defendant not guilty."

Niel P. Sterne, for appellant. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

SOMERVILLE, J. This is the second appeal in this case, the first being reported in *Pope v. State*, 168 Ala. 33, 53 South. 292. On the first trial, as on the second, appellant was convicted of murder in the first degree, and sentenced to death. The record presents for review numerous rulings of the trial court, the most important of which are discussed at length in the brief of counsel for appellant. We consider these in the order in which they are presented.

1. The trial court properly refused to give for the defendant the general affirmative charge. We cannot undertake to review the evidence at length in this opinion; but we have examined it with painstaking care, and are satisfied that, taken as a whole, it fairly and reasonably permits of inferences favorable to the guilt of the defendant. *Toles v. State*, 54 South. 511; *Turner v. State*, 97 Ala. 57, 12 South. 54.

[1] The insistence of appellant's counsel in this behalf, forceful and earnest as it is, was for the consideration of the jury, and we cannot usurp their functions by here passing upon the mere weight of the evidence they had before them.

[2] 2. The juror Stovall, having been examined by the court, was pronounced competent. On cross-examination by defendant's counsel, he admitted that from what he had heard of the case he had "drawn an opinion"; but he repeatedly stated that he thought it would have no effect on his verdict, that he knew he would be governed by the evidence. He said further: "I expect it would be somewhat different if I had never heard of it. It would be according to the evidence given in. I can't say how it would be." And, finally, as to whether he was absolutely certain that what he had heard might not unconsciously have some influence on him, he said, "I couldn't be for sure."

Under the principles fully discussed and laid down in *Long v. State*, 86 Ala. 36, 40, 5 South. 443, this juror was undoubtedly competent. It seems certain from his whole examination that he had no fixed opinion of defendant's guilt which would bias his verdict. It is not necessary to a juror's competency that he shall be able to say that he feels absolutely certain that previous impressions will not unconsciously influence his verdict. This is a purely psychological speculation which must be deemed foreign to the purposes of the law, which guarantees only approximate and not absolute impartiality in jurors. As said by Chief Justice

Marshall on the trial of Aaron Burr: "Light impressions, which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him"—cited and approved in *Long v. State*, 86 Ala. 42, 5 South. 447.

In *Long v. State*, the rule on appeal is thus stated: "The reviewing court, therefore, should exercise caution, and the finding of the trial court should not be set aside, unless it affirmatively appears that, on the answers of the juror taken as a whole, he entertained a fixed opinion which would bias his verdict."

The ruling in the case of *King v. State*, 89 Ala. 146, 7 South. 750, cited and relied on by appellant, is by no means in point, as will be seen by an examination of the challenged juror's answers in the report of that case. While, on the other hand, our ruling here is in accord with the ruling in *Hammil v. State*, 90 Ala. 577, 8 South. 380, on substantially the same conditions.

[3] 3. In opening, the state's case was presented to the jury by the solicitor by merely reading the indictment. Supplementing his formal plea of not guilty, defendant's counsel made a statement to the jury depreciatory of the state's case, and indicating that another than the defendant would be shown to be guilty. The record does not set out all that counsel said, but recites that he "addressed the jury at some length along the lines indicated." Over the objection of defendant that the state had no right to go into a rebuttal statement, the court allowed associate counsel for the state to reply to the statement of defendant's counsel by outlining what the state expected to prove relative to defendant's guilt.

[4] Under the practice prevailing in this state, neither party is required to make any preliminary statement of his case other than by his formal pleadings. But counsel on either side may state to the jury the case as he proposes and expects to present it to them on the evidence. *Mann v. State*, 134 Ala. 1, 18, 32 South. 704; 12 Cyc. 570, 571. The course followed by the trial court in the present case seems to be identical with that approved in *Mann v. State*, supra. The question raised is one of trial practice merely, and falls within that class of matters the regulation and control of which have always been left to the sound discretion of the trial court; and error cannot be imputed to its action with respect thereto except perhaps in cases of flagrant and prejudicial abuse. Defendant's objection to the reply statement was properly overruled.

[5] 4. The testimony of the witness Will-

iams, for the state, that a pair of shoes, alleged to be the defendant's, were, when he examined them at the coroner's inquest, a little damp, like they had been washed—specked with what he decided were blood stains—and had the appearance of being scraped, was clearly not subject to the objections interposed; the objection insisted on being that it was but the conclusion of the witness, and the shoes were the best evidence. *James v. State*, 104 Ala. 20, 16 South. 94. The witness saw the shoes a day or two after the murder, in April, 1909, and his testimony was delivered in October, 1910. It is manifest that the jury could not on this trial judge of physical conditions, necessarily ephemeral in their character, as they existed 18 months before; and that, otherwise than as he did, the witness could not fairly and adequately inform the jury as to those appearances and conditions. Had the witness been testifying to the instant appearance of the shoes, the objections and arguments in support thereof would be sound and appropriate. These considerations dispose of numerous other assignments of error based on practically identical rulings of the trial court, which we shall therefore not notice in detail.

[6] 5. The witness Joe Dodgen, in describing his tracking of a wagon and mule from the scene of the murder towards defendant's house stated that they left the road, and that the vines growing over the fence alongside were mashed down "like something went over the fence." Defendant moved to exclude this statement on the ground that it was a conclusion of the witness. We think the motion was properly overruled. *Watkins v. State*, 89 Ala. 82, 8 South. 134.

[7] 6. This witness was allowed against defendant's objection to state that, when he was following these tracks, he had not then heard who was accused of the killing. This evidence was on the former appeal of this case held to be admissible, but we are now urged to reconsider and reverse that ruling. We have again considered the merit of this evidence, and are still of the opinion that, in view of the peculiar nature of the witness' other testimony, it was a legitimate matter for the consideration of the jury in connection therewith.

[8] 7. The theory of the state was that defendant, at the time of the murder, was driving a wagon to which was hitched a mule belonging to defendant, but which was in the possession of Ambrose Curry, who lived on defendant's place. The witness Joe Dodgen had testified that the tracks traced by him from the scene of the crime to defendant's house showed that the animal's left hind foot was cupped, which he inferred from the shape of the track; and that there were two protuberant nails in the right hind foot, as shown by their imprint on the ground. The witness then stated that he had found a mule whose foot could have

made these tracks. This was objected to as not being responsive to the solicitor's question. This objection was not well taken. The interrogator may on motion exclude matter not responsive to his inquiry, even though competent, for the obvious reason that his witness cannot dictate to him what evidence shall be introduced; but, if the evidence is competent, the other party has no right whatever to object to it because not responsive, and, if competent, the objection should so specify.

[9] 8. This witness stated that the Ambrose Curry mule would have made a track with the hollow place on the inside, with the left hind foot. The solicitor then asked him, "Would it have made a track that is similar or like the track of the left hind foot of the mule and wagon that you tracked from the alley to Pope's house?" The witness replied that it would. We think this testimony was admissible, and not subject to the objection that it was the conclusion merely of the witness.

[10] This court has frequently held that a witness should not be allowed to state that a certain shoe or foot could or would make a particular track; that being, it is said, the very fact the jury are to determine. *Busby v. State*, 77 Ala. 66; *Riley v. State*, 88 Ala. 193, 7 South. 149; *Hodge v. State*, 97 Ala. 37, 12 South. 164, 38 Am. St. Rep. 145.

It has also been held that a witness should not be allowed to state that two particular tracks are the same. *Terry v. State*, 118 Ala. 79, 84, 23 South. 776. But, on the other hand, it has been held that a witness who had examined the alleged track of the defendant could state that it "corresponded" with a track made by him next day, with which the witness compared it, "by measurement, and certain marked peculiarities." *Busby v. State*, 77 Ala. 66. And also that two tracks "measured the same." *Gilmore v. State*, 99 Ala. 154, 159, 13 South. 536. While, in another case, it was ruled that the witness could not state that particular tracks "corresponded with the track of defendant." *Livingston v. State*, 105 Ala. 127, 16 South. 801.

In *James v. State*, 104 Ala. 20, 22, 16 South. 94, the witness had described the physical peculiarities of the defendant's tracks. He was then asked, "What was the *similarity* between the tracks at the forks of the road and the seed room door?" Objection that this called for the witness' opinion was overruled, and the witness stated that the peculiarities of the tracks at the two places were "the same." The question and answer were held to be competent.

In an attempt to harmonize the *James Case* with the ruling in *Terry v. State*, 118 Ala. 85, 23 South. 776, the writer of the opinion in the latter case palpably misinterpreted the facts upon which the ruling in the *James Case* was founded.

A consideration of the foregoing cases, to

say nothing of those in other jurisdictions, would seem to justify the observations of Mr. Wigmore: "The opinion rule day by day exhibits its unpractical subtlety and its useless refinements of logic. Under this rule we accomplish little by enforcing it, and we should do no harm if we dispensed with it. * * * We should do no harm, because, even when the final opinion or inference is admitted, the inference amounts in force usually to nothing unless it appears to be solidly based on satisfactory data, the existence and quality of which we can always bring out, if desirable, on cross-examination." And he concludes: "Add, finally, the utter impossibility of a consistent application of the rule, and the consequent uncertainty of the law, and we understand how much more it makes for injustice rather than justice. It has done more than any one rule of procedure to reduce our litigation towards a legalized system of gambling." 3 Wigmore on Evidence, § 1929.

We do not mean, however, to overturn the general principles of the opinion rule as established by the decisions of this court. But we think the spirit of the rule is not violated by the shorthand statement of similarity here made by this witness, in connection with the marked peculiarities stated by him, subject as it was to cross-examination by defendant. *Fuller v. State*, 117 Ala. 36, 23 South. 688. And we are unwilling to embarrass trial courts by any further extension of the rule of exclusion, at least as a basis for the reversal of judgments on appeal.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur in this conclusion; while ANDERSON, MAYFIELD, and SAYRE, JJ., dissent, holding that the admission of this evidence was error for which the judgment of conviction should be reversed.

[11] 9. Several questions were asked this same witness, who was a practical blacksmith with 15 years' experience in shoeing horses, relative to the condition of the Curry mule's right hind foot, and the liability of a loose nail to drop out. He being an expert in this line, the answers of the witness were clearly competent, and their admission was not error.

[12] 10. It was the theory of defendant's counsel that the murder was committed by John Body, a negro, who lived with his mother, Nett Body, in the house by the road just at the point where the crime occurred. Presumably to weaken this argument, the solicitor asked the same witness, "Could the John Body mule make the track that you saw from that peach tree to Ervin Pope's house?" Over defendant's objection that this called for a conclusion of the witness, he was allowed to answer, "No."

Under the authorities above cited, this objection was well taken, and the admission of the witness' answer was manifest error.

[23] Section 6264, Code 1907, declares that

"the judgment of conviction must not be reversed because of error in the record, when the court is satisfied that no injury resulted therefrom to the defendant." This language has been construed to mean that the court must be satisfied that the verdict of the jury would not have been different if the error had not been committed. *Dennis v. State*, 118 Ala. 79, 23 South. 1004.

It is therefore mandatory upon us to consider the entire record and reverse or affirm on this ruling according as we may be satisfied as to its injurious or noninjurious effect upon the jury's verdict. And, in doing this, we are to be governed by practical considerations of reason and common sense, rather than by the unsubstantial apprehensions that formerly found expression in the rule of reversal in every case for any error apparent in the record; while, at the same time, the just rights of defendants must be carefully guarded, and substantial doubts resolved in their favor.

We have sifted the evidence with care, and find no facts from which the jury could have drawn an inference that John Body committed the murder, or shared in its commission. While it is true that the proximity of the accused to the scene of the crime at an unreasonable hour has been held to be an incriminating circumstance (*Ross v. State*, 74 Ala. 532; *Lindsey v. State*, 54 South. 516), the mere fact that the crime occurred on the highway near the home of the accused cannot by itself yield any inference of his guilt.

Nor does the theory find any support in the fact that the subpoena issued for Body was returned with the indorsement, "Not found," 18 months after the date of the crime. This does not show flight by Body; and, if it could be so interpreted, even his flight is not a circumstance available to this defendant. *Levison v. State*, 54 Ala. 520; *Kemp v. State*, 89 Ala. 52, 7 South. 413.

We are therefore fully satisfied that the attempted exculpation of Body's mule, whether by legal or illegal evidence being merely irrelevant, could not have influenced the verdict of the jury unfavorably to the defendant, since they could not, on the evidence, have imputed guilt to Body; and the error complained of cannot avail for a reversal of the judgment of conviction.

[13] 11. Nett Body, the mother of John Body, testified that she and John were in his house, where she also lived, on the night of the murder, and that, hearing a noise, she called out to him. Over defendant's objection, she was then allowed to state that he replied, "Don't you hear somebody fighting out there in the road?" This statement by John Body was clearly not admissible as a part of the *res gestæ* of the murder going on outside, and was obnoxious to the hearsay rule.

[14] Time alone is not a determining criterion when the question is whether a thing

said or done is a part of a given transaction. *Domingus v. State*, 84 Ala. 9, 11 South. 190. It must be so connected with the main transaction as to virtually form a part of it. *A. G. S. R. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403.

The unanimous opinion of courts, as well as commentators, is that the remarks or exclamations of mere bystanders or lookers on, who in no way participate in the transaction, are not admissible in evidence under the *res gestæ* doctrine. *Flynn v. State*, 43 Ark. 289; *Wilkins v. Ferrell*, 10 Tex. Civ. App. 231, 30 S. W. 450; *State v. Riley*, 42 La. Ann. 995, 8 South. 470; *State v. Oliver*, 39 La. Ann. 470, 2 South. 194; *Butler v. M. Ry.*, 143 N. Y. 417, 38 N. E. 454, 26 L. R. A. 46, 42 Am. St. Rep. 738; *Ganaway v. S. L. D. Ass'n*, 17 Utah, 37, 53 Pac. 830; *Carr v. State*, 76 Ga. 592; *Leahey v. Cass Ry. Co.*, 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300; *Chicago Ry. Co. v. Cummins*, 24 Ind. App. 192, 53 N. E. 1026; *Wharton on Crim. Law*, §§ 262, 263; 1 Bish. Crim. Ev. § 1087.

[15] But, although erroneous, the admission of Body's statement was absolutely without prejudice to the defendant. It merely referred to an undisputed fact, and in no possible way suggested defendant's connection therewith. If it be urged that its purpose was to show that Body was in the house while the crime was being committed outside, the answer is that the witness had already testified, without objection, that he was in the house with her at the time. Moreover, in any aspect, even if it tended independently to exculpate Body, for the reasons set forth in the paragraph above, it added nothing to the proof of defendant's guilt, and in no way weakened the inference of his innocence. We therefore hold that he cannot complain of its admission.

[16] 12. There was no error in allowing witnesses to testify to their finding of sorghum seed and peas in defendant's back yard several weeks after the burglary and murder. Such articles had been taken from McClurkin's ginhouse on the night of the murder, and the fact that some weeks had elapsed was but a circumstance for the jury to consider in estimating the probative value of the discovery. The fact was none the less relevant.

[17] 13. The witness Norton was allowed, against defendant's objection, to state that a certain substance pointed to on a rock, picked up near the murdered man's body, was hair; the rock itself being in evidence. It may be conceded that whether or not the rock had hair upon it should have properly been left to the jury. But it is difficult to understand what this had to do with the guilt or innocence of defendant, or in what way it could have prejudiced him.

Neither the fact nor the manner of the killing was in dispute, and this rock did not come from defendant's possession, nor from

his premises. If the statement was improperly admitted, its admission was harmless, and defendant cannot complain of it.

14. We have examined and considered all the other rulings of the trial court on the admission of evidence, and find no errors with respect thereto.

[18] 15. Charges 1 and 2 are bad, because they do not predicate a reasonable theory of some other person's guilt.

[19] Charges 3, 5, 6, 8, 13, and 14, because they single out evidence, and are also argumentative.

Charges 4, 10, and 11, because they are argumentative and misleading.

[20] Charges 7 and 15, because the law does not distinguish between white people and negroes, so far as their guilt or innocence of crime is concerned, and because they are argumentative.

[21] Charge 12, because the reasonable doubt which requires a verdict of not guilty should grow out of the whole evidence, and not from consideration of a single link or part.

[22] Charge 9 is bad because, for the reasons set out in paragraph 10, above, there was no evidence to support it, and it was wholly abstract. It is bad, also, even if there was evidence of Body's guilt, because the evidence against defendant may nevertheless have been sufficiently strong to convince the jury of his participation in the crime, and to produce the inference of collusion.

It results that the judgment of the trial court must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON, and McLELLAN, JJ., concur. ANDERSON, MAYFIELD, and SAYRE, JJ., dissent on the single point indicated in the opinion, as to which they hold there was error for which the judgment should be reversed.

ANDERSON, J. (dissenting). The witness Dodgen, after testifying to certain tracks seen in the road, and after describing the foot of a certain mule belonging to the defendant, was permitted, over the objection of the defendant, to testify that this foot would make a track similar to the one he saw in the road. He did not see the mule make a track and could not, therefore, testify as to the correspondence of tracks, if this would be permissible, and his evidence was simply his opinion that the foot examined by him would make a track similar to the one he saw in the road. He could and did describe the track he found in the road, also the condition of the mule's foot, and it was for the jury to determine whether or not the mule examined would make a track like or similar to the one found in the road. This evidence is directly opposed to the cases of

Busby v. State, 77 Ala. 66; Livingston v. State, 105 Ala. 127, 16 South. 801; Hodge v. State, 97 Ala. 40, 12 South. 164, 38 Am. St. Rep. 145; Riley v. State, 88 Ala. 193, 7 South. 149; Young v. State, 68 Ala. 569. I think the trial court erred in not excluding this evidence. Nor am I willing to hold that it was error without injury, as the case was one of circumstantial evidence, and the connection of the defendant with the mule track found in the road, was a most material and important factor, and the opinion of this witness Dodgen, that the mule's foot would make a track similar to the one found in the road, could be, and doubtless was, a most effective weapon to be used both in the argument of counsel and by a juror to bring doubtful members over to a conviction.

MAYFIELD and SAYRE, JJ., join in this dissent.

On Rehearing.

SOMERVILLE, J. As appears from the original opinion, the court unanimously held that the admission of certain testimony, which was admitted against defendant's objection, and which tended strongly and pointedly to show that John Body was not the person who murdered McClurkin, was erroneous as a matter of law. The theory of the defense was and is that Body, and not the defendant, committed the murder. We were then of the opinion that there was no substantial evidence that had any tendency to implicate Body, and that the theory of his guilt did not rise above the dignity of mere suspicion; and hence our conclusion that the erroneous admission of testimony in exculpation of Body could have had no material influence upon the verdict of the jury, and was therefore not prejudicial to the defendant.

The evidence against the defendant was entirely circumstantial, and in many respects unusual and peculiar. As usual in such cases, it took a wide range, and included many minute circumstances. We have reconsidered the whole evidence with a special view to its tendencies with respect to the possible responsibility of Body for the crime charged against the defendant; and, in the light of this examination, we are now all of the opinion that the composite effect of all the circumstances shown in evidence might have led the jury, by deductions not strained nor irrational, to impute the commission of the crime to Body. As said by Chilton, J., in Campbell v. State, 23 Ala. 69: "Circumstances may be minute, and, considered separately, of very little importance, shedding but a dim ray of light upon the transaction sought to be elucidated; yet, when grouped together and considered in the aggregate, they may constitute a chain of evidence

which draws the mind to a very satisfactory conclusion."

The result is that we are now unable to declare that we are satisfied that the erroneous admission of the evidence referred to did not materially influence the verdict of the jury adversely to the defendant.

The application for rehearing is granted, the judgment of affirmance set aside, the judgment of the trial court reversed, and the cause remanded for another trial. All the Justices concur, except DOWDELL, C. J., not sitting.

CENTRAL OF GEORGIA RY. CO. v. KNIGHT.

(Court of Appeals of Alabama. Nov. 30, 1911.)

1. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION.

In determining objections to the court's charge, it must be construed as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 703; Dec. Dig. § 295.*]

2. SHIPPING (§ 164*)—PASSENGERS—CONTRACT—STATEROOM ACCOMMODATIONS.

Where a ticket entitled plaintiff to a first-class passage over defendant's railroad to S., and thence by steamship to N., the passage on the steamer requiring plaintiff to spend the entire night, defendant having contracted, but failed to reserve a stateroom on the steamship by wire, such failure constituted a breach of the contract.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 164.*]

3. SHIPPING (§ 164*)—PASSENGERS—CONTRACT FOR TRANSPORTATION—CUSTOM AND USAGE.

First-class transportation, including all-night travel on passenger steamer, carried with it the right to stateroom accommodations as a matter of common knowledge, for, by custom and usage, a passenger contracts for such accommodation when securing a first-class passage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 533; Dec. Dig. § 164.*]

4. SHIPPING (§ 165*)—PASSENGERS—BREACH OF CONTRACT—ACTION—INSTRUCTIONS.

In an action for breach of a railroad contract for transportation, including a steamship voyage by its failure to reserve stateroom accommodations on the boat, an instruction that, if defendant did not agree to furnish a stateroom, the jury should find for defendant, unless they further found that it was impracticable for plaintiff to travel on the boat without a stateroom, and, if she could not so travel, then it would be a violation of her contract, etc., was proper.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 537; Dec. Dig. § 165.*]

5. SHIPPING (§ 165*)—PASSENGERS—TRANSPORTATION CONTRACT—BREACH—ELEMENTS OF DAMAGE.

Plaintiff's husband had purchased a ticket for plaintiff from B. by way of S. to N., including transportation by rail to S. and by steamship from S. to N. The agent agreed to telegraph for stateroom accommodations on the boat, which he failed to do. *Held*, that the jury, in determining damages, were properly permitted to take into consideration the fact that, to the knowledge of defendant's agent, the trip was

part of plaintiff's bridal trip, and the delay incident to going by way of S., in order to take the trip by water.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 534; Dec. Dig. § 165.*]

6. SHIPPING (§ 163*)—TRANSPORTATION CONTRACT—ACCOMMODATIONS TO BE FURNISHED BY CONNECTING CARRIERS—CONSIDERATION.

Where plaintiff's husband purchased a ticket for her involving transportation over defendant's line, and thence by steamship to destination, defendant agreeing to wire for a stateroom on the steamship, such agreement was a part of the contract of carriage, which inured to plaintiff's benefit, and was not nudum pactum.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 163.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Alice Knight against the Central of Georgia Railway Company for damages for delay in transportation and breach of contract. Judgment for plaintiff in the sum of \$400, and defendant appeals. Affirmed.

The oral charge complained of is as follows: "If you find that they did not agree to furnish a stateroom, you will find for the defendant, unless you should find that it was impracticable for her to travel on the boat without a stateroom. If you find that she could not travel on the boat without a stateroom, then it would be a violation of her contract." (2) "If they agreed to undertake, and undertook, to send a telegram for the accommodations to be reserved for her, and to have them reserved for her, and when she reached Savannah she applied there, either through herself or husband, for the accommodations, and they were not furnished in accordance with the contract, then the defendant is liable." The other charges sufficiently appear from the opinion.

London & Fitts, for appellant. Gaston & Pettus, for appellee.

PELHAM, J. The appellant, a common carrier, having a commercial and also a ticket agent at Birmingham, Ala., sold to appellee a ticket entitling her to first-class passage from Birmingham, Ala., to Norfolk, Va., transportation to be by rail from Birmingham to Savannah, Ga., over the appellant's railroad, and from thence to destination by boat over the Merchants' & Miners' Transportation Company, a connecting carrier of appellant. The appellee sued for breach of the contract of carriage, alleging in the third count of the complaint, which was the only count submitted to the jury, that she purchased a ticket from the agent at Birmingham entitling her to first-class passage over appellant's railroad from that point to Savannah, Ga., and that appellant undertook and agreed as part of the contract of carriage to arrange by telegraph to engage for her a stateroom on the connecting

carrier's boat or steamer at Savannah making connection with the railroad and bound for Norfolk. The case was tried on a plea of the general issue to this count of the complaint, which alleges that, by the breach of the contract, appellee was "caused to suffer a great loss of time and money, was greatly delayed, harassed, humiliated, and annoyed, and was caused much physical inconvenience and discomfort, and great mental distress and worry."

It appears from the evidence introduced on the trial, and is also alleged as a fact known to appellant at the time the ticket was purchased, that appellee was a bride, and that the ticket sold to her was for a pleasure journey, a bridal trip; and that she had in contemplation as a part of the enjoyment of this honeymoon excursion a steamer voyage with the groom on appellant's regular connecting carrier from Savannah to Norfolk. The husband of appellee testified that a few days previous to the purchase of the ticket for appellee he had informed the commercial agent of appellant in Birmingham of the purposes of the trip, and discussed the different routes with him, and that the agent had stated that the reservation of the stateroom on the boat would be made when the ticket was purchased; that they would make the reservation by wire. This witness further testified that the commercial agent referred him to the ticket agent at the terminal station in Birmingham for a purchase of the ticket on the day it was secured, and at the time of paying for it the ticket agent stated that the stateroom accommodations would be reserved. On arrival in Savannah, appellee and her husband made inquiry of the agent of appellant and also of its connecting carrier, and ascertained that no telegram had been received and no stateroom accommodation reserved on the connecting steamer, and she was unable to secure such accommodations, although she applied to the agent of appellant and the connecting carrier for them. The appellee arrived in Savannah on or about schedule time Tuesday morning. The connecting steamer sailed that afternoon. The next steamer was not scheduled to sail before the following Saturday. After failing to get accommodations on the connecting boat, appellee took the train about 2 or 3 o'clock that same afternoon for Norfolk, and reached there before the arrival of the boat on which she had expected to go. Appellant's commercial agent at Birmingham with whom the negotiations were had with reference to the purchase of the ticket by appellee's husband testified that the holder of such a ticket as the appellee had would be entitled to first-class passenger accommodations from Birmingham to Norfolk; that the Merchants' & Miners' Transportation Company was a regular connection of the Central of Georgia Railway Company, the appellant; that he did not recall having any conversa-

tion with appellee's husband about the sale of the ticket in question; that the custom was to telegraph to Savannah and ask for stateroom accommodations, and, if they were secured, to inform the prospective passenger.

[1-3] The appellant excepted to portions of the oral charge of the court, and insists here that giving these portions of the charge constitutes error. The charge must be construed as a whole (*B. R. L. & P. Co. v. King*, 149 Ala. 504, 42 South. 612), and, when so construed, we cannot assert that the portions objected to are erroneous. That part of the charge made the ground of the first assignment of error: "If you find that they did not agree to furnish a stateroom, you will find for the defendant, unless you should find that it was impracticable for her to travel on the boat without a stateroom. If you find that she could not travel on the boat without a stateroom, then it would be a violation of their contract"—is most favorable to appellant in the light of the testimony of the appellant's agent that the ticket held by appellee entitled her to first-class passage from Birmingham to Norfolk. That part of the ticket entitling her to passage from Savannah to Norfolk was for passage on board a steamer on which she would have to spend the entire night, and the charge substantially, when construed as a whole, left it to the jury to determine whether or not it was impracticable for the appellee to travel all night on a boat without stateroom accommodations, when she held a ticket sold to her by appellant entitling her to first-class passenger accommodations on the boat. The testimony on behalf of appellee was to the effect that appellant had agreed and undertaken as a part of the contract of carriage to wire and reserve for her a stateroom, and, if the jury believed this evidence (and there was but slight negative testimony in conflict with it), a failure to do so would constitute a breach of the contract, whether to travel all night on the boat without a stateroom was or was not practicable; and we might say that first-class transportation, including all-night travel on a passenger steamer, carriers with it the right to stateroom accommodations as a matter of common knowledge, for, based on custom and usage, the passenger contracts for such accommodations when securing first-class passage.

[4] As to the second assignment of error based on the court's oral charge, it is enough to say, to meet appellant's objections urged by brief, that the court was laying down rules applicable to the evidence. There was no evidence even tending to show that appellant had sent a telegram endeavoring to reserve accommodations, as, according to appellee's contention, it had contracted to do. The liability of appellant for failure to furnish accommodations was limited to failure "in accordance with the contract." The complaint by a fair and reasonable construc-

tion of its language avers a breach of the contract of carriage in failing to secure accommodations on appellant's connecting carrier by wiring for a stateroom reservation on the ticket purchased from appellant. The allegations of negligent failure are merely descriptive of the breach complained of. *W. U. Tel. Co. v. Garthright*, 151 Ala. 413, 44 South. 212.

[5] We cannot subscribe to the doctrine, so insistently urged by appellant, that appellee would be precluded from recovering more damages because this trip was made soon after her marriage, when she was on her bridal trip. The appellant did not seek to challenge these facts, which were specifically set out and averred in the complaint (with the additional averment that they were known to appellant) by motion to strike, or otherwise. Nor was any objection interposed on the trial to the introduction of the evidence tending to prove these allegations as laid in the complaint, but appellant raises the question by requesting the following charge which was refused by the court: "Under the evidence in this case, the plaintiff cannot recover any damages because this trip was made soon after the marriage; nor is she entitled to recover any more damages because of having been recently married at that time." The complaint alleges that appellee was on her bridal trip, and that appellant knew this when it sold her the ticket. Appellee's husband testified, without objection, that he apprised the agent of appellant, with whom he discussed the selection of the route, that it was a bridal trip, and that he "wanted all the water route I could get." The agent of the appellant only contradicts this by testifying he did not recall any conversation had with appellee's husband about the purchase of the tickets. Special circumstances distinguishing the particular contract from the great mass of contracts of the same kind, when known or communicated, become an implied element of the contract, and the parties are presumed to contract in reference to them. *Daugherty v. Am. U. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435. The appellee having averred and offered proof in support of the fact that she was taking a bridal tour on the occasion the contract was breached, and that this was known to the appellant when entering into the contract of carriage, we are unable to see on what sound rule or reason the jury should not be allowed to consider this in measuring the amount of damage, if they conclude the appellee is entitled to be awarded damages for a breach of the contract of carriage. A different measure of damages would obtain to compensate an unattended, delicate woman who was going to the bedside of her dying father for being rudely put off a railroad train in the rain at night and at the wrong station, where she was a

stranger and there was no station agent, from that which would justly prevail as to a robust man who was on an ordinary business trip for being put off the train in the same way under similar surroundings. A woman regards her bridal tour among the important events of her life, and the mental distress and worry she might undergo on such an occasion because of being prevented or delayed in securing stateroom accommodations for a voyage by water on which she had set her heart would no doubt be greater than if the denial or delay and attendant annoyance and disappointment came to her at some other time, and this was a proper matter for the jury to consider in the imposition of damages for mental distress and worry under the pleadings and evidence in this case.

There was no error committed in refusing the charge requested by appellant that the appellee could not recover anything for delay. This contract of carriage under appellee's contention was for a pleasure trip, embracing a boat voyage, which fact was known to appellant, and, by appellant's failure to wire for accommodations, appellee was unable to secure them, and was delayed in taking the trip by water. The journey by all-rail from Birmingham to Norfolk could have been made in about the same time as to Savannah, had appellee desired; and, considered in the light of an all-rail trip, appellee was delayed in reaching her destination at Norfolk, as no object appeared for going to Savannah except to take the boat for the purpose of reaching her destination at Norfolk.

[6] The consideration or arrangements between the bride and groom, whereby he furnished her the ticket for which he paid the appellant, is not to be questioned by appellant by saying that the agreement to wire as to appellee was nudum pactum, for appellant received the money for her ticket, and the special agreement to wire was part of the contract of carriage and inures to her benefit.

The amount of the judgment as rendered by the court is not excessive, and the motion for a new trial was properly overruled.

No error appears of which the appellant can complain, and the judgment of the court below is affirmed.

Affirmed.

AVERY & CO. v. TURNER.

(Court of Appeals of Alabama. Nov. 30, 1911.)

1. APPEAL AND ERROR (§ 664*)—RECORD—RECITALS.

Where the judgment entry shows only that issue was joined on defendant's pleas, and does not indicate the disposition of other pleadings, and the entire record shows that the issues raised by the other pleadings were in fact contested at the trial, the recital of the judgment does not warrant a conclusion that the issues

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tendered by the other pleadings were abandoned or waived by the parties, especially where it appears that the alleged abandoned pleadings were attacked by demurrer and motion, and the rulings thereon alleged as error in the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 664.*]

2. EVIDENCE (§ 461*)—PAROL EVIDENCE.

Where a written order for machinery provided for the delivery of lumber in payment therefor, but did not specify the kind of lumber, parol evidence of the kind of lumber intended was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

3. PRINCIPAL AND AGENT (§ 122*)—SCOPE OF AGENT'S AUTHORITY—DECLARATIONS.

Where the question of an agent's authority to accept lumber in payment for machinery was in issue, evidence of his declarations as to the willingness of his principal to accept lumber in payment was admissible.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 416-419; Dec. Dig. § 122.*]

4. WITNESSES (§ 287*)—EXAMINATION—CROSS-EXAMINATION.

Where, on direct examination of a witness, defendants without objection elicited part of a conversation, and upon cross-examination plaintiff elicited other details, defendants were entitled upon redirect examination to bring out the entire conversation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1000-1002; Dec. Dig. § 287.*]

5. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—ERROR FAVORABLE TO PARTY COMPLAINING.

Appellant cannot complain that the trial court instructed the jury on a matter presented by appellee's pleading as to which appellant had made no issue, the court having treated the matter as put in issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. § 1033.*]

6. TRIAL (§ 143*)—TAKING CASE FROM JURY—PEREMPTORY INSTRUCTIONS.

Where there is a conflict in the evidence, plaintiff is not entitled to the general affirmative charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 342; Dec. Dig. § 143.*]

Appeal from Circuit Court, Cleburne County; John Pelham, Judge.

Action by Avery & Co. against W. M. Turner. From a judgment for defendant, plaintiff appeals. Affirmed.

Barker & Stephens and Blackwell & Agee, for appellant. W. B. Merrill, for appellee.

WALKER, P. J. The personal property mentioned in the two counts of the complaint—one of them being in detinue and the other for a conversion—was sold by the plaintiff (the appellant here) to one Falkner, from whom the defendants (the appellees) acquired it. In reference to the pleadings in the case, the record proper shows the following: On September 9, 1910, the defendants filed two pleas, neither of which was numbered, but the first one set out was a plea of *res adjudicata*, and the other one was the general issue. The plaintiff demurred to the plea of *res ad-*

judicata, referring to it as "defendants' first plea." On September 14th the defendants filed two pleas, numbered 1 and 2, No. 1 being the general issue, and No. 2 being a plea setting up a tender of lumber in payment of the purchase price for the property sued for, under a provision on that subject in the contract of sale. The plaintiff filed demurrers to the plea of tender. The recital in the minute entry as to the sustaining of the demurrer to "plea No. 1" manifestly refers to the plea first in the order of filing, and not to the plea of the general issue filed September 14th, which bore that number, as the former of of these two last-mentioned pleas was the only one of them to which a demurrer was interposed, and, in the circumstances stated, might well have been intended by the designation used in the judgment entry. The minute entry shows that the demurrer to plea No. 2, the plea of tender, was overruled. The result of these rulings was to eliminate the plea of *res adjudicata*, and to leave the plea of tender in the case, to be replied to. The plaintiff filed replications to that plea, one of the replications being the general replication, tendering an issue on the plea, and the others being special replications setting up in effect that the tender pleaded was not in accordance with stipulations between the parties on the subject. To these special replications the defendants filed a rejoinder setting up in effect a waiver by the plaintiff of a tender of lumber by his refusal to accept any lumber under the contract. To this rejoinder the plaintiff filed a surrejoinder setting up an offer by the plaintiff on a date named to allow the purchaser of the machinery to deliver lumber in payment therefor on an order then given by the plaintiff, "which defendant did not cut or fill and did not tender to plaintiff." The judgment entry, after showing the overruling of demurrers to the replications, and the overruling of the plaintiff's motion to strike the rejoinder, recites that "issue being joined on the defendant's pleas," came a jury, etc. Relying on the recital just quoted, the counsel for the appellant contends that the record shows that the replications, the rejoinder and surrejoinder were abandoned or waived by the parties and that the case was tried only on issue joined on the defendants' pleas.

[1] This contention cannot be reconciled with what the record as a whole shows was done in the course of the trial. The recital in the judgment entry as to "issue being joined on the defendants' pleas" does not negative the joinder of issue on other pleadings which the record proper shows were before the court. When the proceedings in the trial, as disclosed by the entire record, make it manifest that the issues raised by such other pleadings were in fact contested in the trial, a judgment entry which, as to the joinder of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

issues between the parties, shows no more than that issue was joined on the defendants' pleas, without otherwise indicating the disposition made of other pleadings in the case, may be regarded as omitting to recite all the issues made in the case; and, in this situation, such a recital does not justify the conclusion that issues tendered by other pleadings found in the record proper were abandoned or waived by the parties. *Dannelley v. State*, 180 Ala. 182, 30 South. 452.

But the judgment entry itself plainly indicates that the pleadings were insisted on which the appellant now claims were abandoned or waived. It shows that demurrers to the replications were submitted to the court and were by the court overruled. It further shows that the court overruled a motion made by the plaintiff to strike the rejoinder. This incident indicates that the plaintiff was trying to get rid of the issue tendered by that pleading, but does not suggest that the defendants waived or abandoned it. Furthermore, it is manifest from some of the evidence introduced on the trial without objection and from charges requested by both the plaintiff and the defendants that both parties acted on the assumption that the trial involved issues raised by the pleadings subsequent to the defendants' pleas. And the plaintiff's motion for a new trial bears on its face evidence that at the time it was filed he did not entertain the notion that those subsequent pleadings had ceased to cut a figure in the case, as one of the grounds of the motion was the action of the court "in overruling the plaintiff's demurrer to the defendants' rejoinder to plaintiff's first, third, and fourth replications." It is not to be supposed that the plaintiff would have urged the court to grant a new trial because of that ruling if he had then been under the impression that the replications and the rejoinder had been abandoned or waived. It would be a contradiction of the whole tenor of the trial to affirm that the record as a whole indicates that the claim of the defendants that the plaintiff had waived a tender of lumber by refusing to accept lumber offered in pursuance of the provision of the contract on the subject (*Root v. Johnson*, 99 Ala. 90, 10 South. 293) was not in fact a matter of contest between the parties under the pleadings set out in the record and the evidence introduced. *McLendon v. Grice*, 119 Ala. 513, 24 South. 846; *Richmond & Danville R. Co. v. Farmer*, 97 Ala. 141, 12 South. 86; *City Loan & Banking Co. v. Byers*, 1 Ala. App. 583, 55 South. 951.

[2] The purchaser's written order for the machinery provided for his cutting and delivering lumber in payment of the deferred installments of the purchase price, but did not specify the kind of lumber to be shipped. It was competent for the defendants to show by parol testimony what was the understanding on this subject arrived at at the time be-

tween the purchaser and the agent of the seller who had charge of the negotiation. This was proper for the purpose of identifying the subject-matter of this feature of the contract. *Moore v. Barber Asphalt Paving Co.*, 118 Ala. 563, 23 South. 798; 2 Page on Contracts, § 1217.

[3] The evidence without conflict showed that the plaintiff, when the purchaser first undertook to make a payment in lumber on the purchase price of the machinery, declined to accept such payment, claiming lack of authority in the selling agent to bind the plaintiff by such a stipulation. There was evidence tending to show that subsequently the plaintiff receded from this position, but under the evidence it was a question for the jury whether at any time his consent to accept lumber in payment was or was not accompanied by such conditions or restrictions as he was not entitled to impose under the provisions of the contract on the subject. In this connection it was proper to permit the defendants to prove what the plaintiff's agent said on the subject on the occasion when the latter claimed that he expressed the willingness of the plaintiff to accept lumber in payment.

[4] On the direct examination of the defendants' witness Smith part of conversations between the purchaser of the machinery and the plaintiff's agent in reference to the plaintiff's accepting lumber in payment on the purchase price was brought out without objection. On the cross-examination of this witness the plaintiff elicited other details of these conversations. The plaintiff having elicited part of the conversations, it was not error to permit the defendants, on the redirect examination of the witness, to bring out still other details of one of the conversations connected with the matters in reference to which the witness had been cross-examined. *Simmons v. State*, 145 Ala. 61, 40 South. 680.

[5] What is said in argument by the counsel for the appellant in reference to the rulings of the court in giving and refusing charges requested is largely colored by the assumption on their part that the principal, if not the only, question arising under the evidence and the pleadings insisted on was whether or not the defendants' plea of tender should be sustained, and that any claim by the defendants, suggested by pleadings filed in their behalf, that conduct of the plaintiff had dispensed with the necessity of making any tender at all, was, by waiver or consent of the parties, eliminated from the case. The court already has expressed its opinion to the effect that the record does not warrant any such assumption. The defendants presented by appropriate pleading the claim that the plaintiff himself waived the making of a tender by refusing to accept lumber under the stipulation on that subject. Plainly there is nothing for the appellant to complain of in the fact, indicated by the record, that the

court in its instructions to the jury accorded to the plaintiff the benefit of having put in issue the allegations of the pleading of the defendants which set up that claim, though the only answer to it made by any pleading of the plaintiff found in the record is a statement, not supported by evidence, in reference to an offer by the plaintiff to accept lumber and an order for lumber given by him, "which *the defendant accepted, and did not cut or fill and did not tender to the plaintiff.*"

[8] In view of the conflict in the evidence already mentioned, it is manifest that the court was not in error in refusing to give the general affirmative charge and charge A requested by the plaintiff.

Each of the other written charges refused to the plaintiff was faulty in ignoring the question of a waiver by the plaintiff of a tender of lumber and the evidence bearing upon that question.

The counsel for the appellant do not point out any fault in either of the written charges given at the instance of the defendants which would make the giving of it a ground of reversal.

What already has been said in reference to the issues and the evidence in the case indicates the ground of the court's conclusion that the appellant is not entitled to a reversal because of the overruling of the motion for a new trial on the ground that the verdict of the jury was contrary to the evidence.

Affirmed.

PELHAM, J., not sitting.

GIBBS v. WRIGHT.

(Court of Appeals of Alabama. Nov. 28, 1911.)

1. LOGS AND LOGGING (§ 3*)—SALE OF TIMBER—FORM OF INSTRUMENT—STATUTES—WITNESSES.

Under Code, § 3355, providing that an instrument conveying title to real estate must be in writing, subscribed by the grantor or his agent possessing written authority, and attested by at least one witness, an instrument signed by defendant, but not witnessed, reciting that defendant had sold to plaintiff for \$75 all the poplar and pine from 14 inches up on certain real estate, and which plaintiff agreed to remove by a certain date, was not a deed conveying title to real property.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

2. LOGS AND LOGGING (§ 3*)—STANDING TIMBER—SALE—FORM OF INSTRUMENT.

Trees growing on land, being a part of the land, can only be conveyed by an instrument executed and witnessed in the form of a deed prescribed by Code, § 3355.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

3. LOGS AND LOGGING (§ 3*)—STANDING TREES—SALE—TIME.

Contracts for the sale of standing trees, specifying the time within which they must be removed, in general confer no right to cut and

remove trees after the time fixed; but, if the instrument actually conveys the legal title to the trees, the grantee will be allowed a reasonable time within which to remove them.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

4. LOGS AND LOGGING (§ 4*)—LICENSE TO CUT TIMBER—TRANSFER OF TITLE.

An owner of timber land executed a writing by which he "sold to W. for \$75 all the poplar and pine from 14 inches up on the M. place. He also agreed to get this timber off by the first day of September, 1909. S. Lumber Company is to have all the poplar at \$14 per thousand feet, this being the poplar timber contracted by me to the S. Lumber Company." Held that the instrument did not transfer the title to the timber to W., but was a mere license, which was to be exercised within the time stated, and not afterwards.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 13; Dec. Dig. § 4.*]

Appeal from Circuit Court, Colbert County; A. H. Alston, Judge.

Action by J. W. Wright against A. A. Gibbs. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

James H. Branch, for appellant. George P. Jones and Jackson & Deloney, for appellee.

DE GRAFFENRIED, J. There were two counts to the complaint in this case. In the first count it is alleged that the appellant sold on July 10, 1909, certain pine and poplar timber to appellee standing on appellant's land, and that appellant in September and October of that year wrongfully cut from the land a lot of said poplar timber, and, without appellee's consent, removed the said timber from the land, and the same was lost to appellee, to his damage, etc. The second count was an action in trover for the conversion of certain poplar trees of appellee by appellant. There were a number of pleas, but it seems to us that the only questions requiring our consideration are presented by the plea of the general issue. It appears from the evidence—and there is no material conflict in the testimony—that the appellee, desiring certain poplar and pine trees which were standing and growing on certain lands of appellant, paid him \$65 and received from him a certain instrument, which was in the following words: "I have received \$65.00—Barton, Ala., July 10th, 1909. This is to certify that I, A. A. Gibbs, have sold to J. W. Wright for \$75.00 all the poplar and pine from 14 inches up, on the Miller place. He also agrees to get this timber off by the 1st day of September, 1909. Sheffield Lumber Company is to have all the poplar at \$14.00 per thousand feet, this being the poplar timber contracted by me to the Sheffield Lumber Company. A. A. Gibbs." It further appears from the evidence that the appellant at the time the above instrument was signed and delivered owed the Sheffield Lum-

ber Company the sum of \$10, and that, having paid \$65 to appellant in cash, the appellee, with the knowledge and consent of appellant, paid the \$10 to the Sheffield Lumber Company, and thus fully paid the \$75 agreed upon as the price of said timber. It is further apparent from the evidence that from the date of the above instrument to September 1, 1909, the appellee was permitted by appellant to go upon the Miller place and cut and remove such trees as were covered by the contract, without molestation, but after that time appellee was not permitted to do so. The evidence further shows that subsequent to September 1st appellant cut a lot of poplar trees from the land and sold them against the protest of appellee.

[1] 1. It is manifest that the above instrument is not a deed conveying title to real estate. While many of the formalities which were required by the common law to be observed in conveying title to real estate have been dispensed with by our statutes, nevertheless an instrument conveying such title is one to which the law attaches much importance, and our statutes require that such instruments must be in writing, must be subscribed by the grantor or his agent possessing written authority, and must be attested by at least one witness, who must write his own name as such witness. Code, § 3355.

[2] 2. Trees growing upon lands are as much a part of the land as its soils or its minerals. The same formalities must be observed in making a valid conveyance of the title to trees growing upon land as must be observed in conveying the title to the land itself, and, as the above instrument was not witnessed, it is clear that it was ineffectual for the purpose of conveying the title to the trees which it describes. *Gulf Red Cedar Lumber Co. v. O'Neal*, 131 Ala. 135, 30 South. 466, 90 Am. St. Rep. 22.

[3] 3. The general rule is that contracts for the sale of standing trees specifying the time within which such trees are to be removed confer no right upon the licensee to cut and remove trees from the land of which they constitute a part after the expiration of the time fixed for their removal by the contract. *C. W. Zimmerman Mfg. Co. v. Daffin*, 149 Ala. 380, 42 South. 858, 9 L. R. A. (N. S.) 663, 123 Am. St. Rep. 58. In Alabama, when the instrument conferring such right of removal is in fact such an instrument as conveys the legal title to the trees whereby the title and ownership of the trees remain in the grantee after the expiration of the time limited in the conveyance for their removal, our courts are disposed to grant to the grantee a reasonable time within which to remove them. *Zimmerman Mfg. Co. v. Daffin*, supra. The above rule, in reference to conveyances of standing timber, was adopted by our Supreme Court, because, in construing deeds, "conditions subsequent are not favored in law, and must be strictly con-

strued because they tend to destroy estates and a vigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience. 4 Kent, 129; *Hoyt v. Kimball*, 49 N. H. 322. And, if it be doubtful whether a clause in a deed imports a condition or a covenant, the latter construction will be adopted." *Zimmerman Mfg. Co. v. Daffin*, supra.

4. When the reason of a rule ceases to operate, the rule itself becomes inoperative. While the instrument now under discussion purports to convey certain trees on the Miller place, it does not in fact do so, and as the legal title to the trees did not, by virtue of the contract of which it is written evidence, thereby vest in the appellee, we can see no reason for extending, in construing it, a doctrine which our Supreme Court has only applied to instruments possessing the dignity and formalities of a conveyance of the title to land. "In applying rules of construction, the language employed in the instrument, the circumstances under which the contract was made, and the purpose for which it was made, are to be taken into consideration." *Zimmerman Mfg. Co. v. Daffin*, supra.

[4] In the present case, the appellant was evidently from the very language of the instrument under some sort of an obligation to deliver the poplar timber mentioned in the contract to the Sheffield Lumber Company at fourteen dollars per thousand feet, because the appellee in the contract agrees to so deliver the poplar. When, under his agreement with the Sheffield Lumber Company, appellant was to deliver the poplar, we do not know, but in the contract with appellee he fixed the time within which the delivery was to be made, viz., by September 1st, and it was therefore within the contemplation of the parties that the poplar was to be cut and removed from the premises by September 1st. This is manifest, not only because the contract fixes September 1st for its removal, but because it also shows that appellee knew why it was to be done by that time, viz., that by that time it should be in the hands of the Sheffield Lumber Company, to whom appellant was under obligation to deliver it. It is also too plain to admit of argument that the pine was to be removed during the period granted appellee within which to remove the poplar. In our opinion the instrument created in appellee no title to the timber, but conferred upon him a license to cut and remove certain timber from the Miller place within a designated period, and not after that time. *Davis v. Miller-Brent Lumber Co.*, 151 Ala. 580, 44 South. 639.

It follows from what we have above said that in our opinion the appellant was entitled to the affirmative charge, which he requested the court in writing to give to the jury in his behalf.

Reversed and remanded.

NORTHERN ALABAMA RY. CO. v. LOWERY.

(Court of Appeals of Alabama. Nov. 30, 1911.)

1. COURTS (§ 62*)—TERMS—STATUTES.

Act November 23, 1907 (Loc. Laws Sp. Sess. 1907, p. 32), amending Code 1896, § 909, so far as the same related to the times of holding the circuit courts of Franklin county, was not affected by the adoption of the Code of 1907, and is valid.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 62.*]

2. EXECUTION (§§ 75, 125*)—DUTY TO ISSUE—CLERK OF COURT.

The clerk of the circuit court, on receiving a certificate of affirmance of a judgment from the clerk of the Supreme Court, is bound to speedily issue an execution on the judgment, and the sheriff is required by Code 1907, § 4098, to execute the same with diligence.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 164–170, 280, 281; Dec. Dig. §§ 75, 125.*]

3. SHERIFFS AND CONSTABLES (§ 111*)—LEVY ON EXECUTION—MOTIVE.

The law will consider and condemn the motives and acts of an officer with reference to the levy of an execution only when they are carried into an act which is in itself illegal.

[Ed. Note.—For other cases, see Sheriffs and Constables, Dec. Dig. § 111.*]

4. SHERIFFS AND CONSTABLES (§ 45*)—EXECUTION—LEVY—RIGHT TO FEES—STATUTES.

Code 1907, § 3275, provides that when any clerk receives payment of a judgment he must collect the costs and commissions; and section 3697 provides that sheriffs are not entitled to full commissions until after actual levy of execution on property of the defendant, and the money made or paid to plaintiff in execution, and then only on the amount actually collected or paid. Section 3698 declares that when the sheriff or coroner has levied execution, and before sale it is stayed by order of plaintiff, the officer making the levy shall receive half commissions; and section 3722 provides that sheriffs, for collecting money under execution, shall be entitled to certain prescribed percentages. *Held*, that a sheriff is not entitled to fees for collecting an execution, unless the sheriff or deputy actually collects the money on the execution, or unless he makes an actual valid levy on property of the defendant in execution, subject to levy and sale.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 69, 70; Dec. Dig. § 45.*]

5. SHERIFFS AND CONSTABLES (§ 28*)—RIGHT TO FEES.

A sheriff or constable claiming fees or costs is bound to point to a definite law authorizing it, and such laws will not be extended beyond their letter, since they may impose duties on officers for which no compensation is provided.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 45, 58; Dec. Dig. § 28.*]

6. SHERIFFS AND CONSTABLES (§ 45*)—EXECUTION—COLLECTION—FEES.

A sheriff is not entitled to commissions on money paid to a judgment creditor before execution is issued, or to fees after execution is issued, if the payment is made before the execution is served or levied.

[Ed. Note.—For other cases, see Sheriffs and Constables, Dec. Dig. § 45.*]

7. EXECUTION (§ 28*)—PROPERTY SUBJECT TO LEVY—RAILROAD ROADBED AND RIGHT OF WAY.

Under the rule that property of a public service corporation which is essential to it in the performance of its duties required by law to the public may not be sold under an execution against it, a section of a railroad's roadbed, track, and right of way was not subject to levy and sale on execution against it; the creditors' remedy, in case the corporation's assets had become so depleted that a resort to such property was required, being by the appointment of a receiver, and not by execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 135, 136; Dec. Dig. § 28.*]

Appeal from Circuit Court, Franklin County; C. P. Almon, Judge.

Action by W. D. Lowery against the Northern Alabama Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Bankhead & Bankhead, for appellant. Williams & Jones and B. H. Sargent, for appellee.

DE GRAFFENRIED, J. A large judgment was obtained against appellant in the circuit court of Franklin county, and from that judgment an appeal was taken to the Supreme Court. The judgment was affirmed by the Supreme Court, and a certificate of that fact was mailed by the clerk of the Supreme Court to the clerk of the circuit court of said county. The certificate of affirmance was received by the clerk of the circuit court on March 12, 1910, and on that day the said clerk issued an execution for the amount of the judgment and costs, and placed the same in the hands of appellee, who was the sheriff of said county. On the 15th day of March, 1910, appellee, as such sheriff, made an alleged levy of the execution on the following as the property of appellant: Six miles of railroad track, roadbed, and right of way thereto belonging along the said six miles of railroad track, commencing at the twenty-first mile post north of depot of said Northern Alabama Railway to the twenty-seventh mile post south of Isbell, Ala. On the 16th day of March, 1910, appellant met the said clerk in the city of Birmingham, and the amount of the judgment and all costs were paid to the clerk on that day, except that nothing was paid as commissions for the sheriff, accruing subsequent to the issuance of said execution on March 12, 1910. On the same day (March 16, 1910), the sheriff notified one Gavin, depot agent of appellant at Russellville, Franklin county, of the levy made by him as above stated. This suit was brought by appellee, as sheriff, against appellant for the commissions which he alleges appellant owes him in and about the collection of the amount due on said judgment.

[1] 1. In the case of Farmers' Union Warehouse Co. v. McIntosh, 1 Ala. App. 407, 56 South. 102, this court held that the act "to

amend section 909 of the Code of 1896, so far as the same relates to the times of holding the circuit courts of Franklin county, Alabama," approved November 23, 1907 (Loc. Laws Sp. Sess. 1907, p. 32), was not affected by the adoption of the present Code. It was also determined in that case that all of our constitutional requirements were complied with in the passage of the act, and that the act was valid.

[2, 3] 2. In the absence of instructions to the contrary from the plaintiff in the judgment, it was the duty of the clerk of the circuit court of Franklin county to speedily issue execution thereon, upon the receipt of the certificate of affirmance from the clerk of the Supreme Court. The larger the judgment, the more important the duty of issuing execution thereon; and we know of no law which authorizes an investigation into the purposes of a public officer, when he acts in accordance with the law and in the performance of a duty required by the law. The law condemns motives and intents only when they are carried into an act which is itself illegal. *Carter Bros. & Co. v. Coleman*, 84 Ala. 256, 4 South. 151. When the sheriff received the execution, it was his duty, in the absence of instructions from the owner of the judgment not to do so, to levy the execution upon sufficient property of the defendant in the execution, subject to levy and sale, to satisfy it, if he could find it. "He must execute the writ with diligence." Code, § 4098.

[4] 3. The following sections of the Code treat of the same subject-matter for which the common law made no provision, and, as they are in *pari materia*, they must be construed together:

"3275. When any clerk receives payment of a judgment, he must collect the costs and commissions of the sheriff, if execution has issued on such judgment."

"3693. The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

"3697. Sheriffs and coroners are not entitled to full commissions until after actual levy of execution on property of the defendant, and the money made or paid to the plaintiff in execution, and then only on the amount actually collected or paid.

"3698. When the sheriff or coroner has levied execution, and before sale it is stayed by order of the plaintiff, the officer so levying must receive only half commissions."

"3722. Sheriffs are entitled to receive the following fees for the following services: Collecting money under execution: For the first hundred dollars, five per cent.; for the second hundred dollars, four per cent.; and for collecting all sums over two hundred dollars, three per cent.; but no commissions must be charged on costs."

It is the plain purpose of the above statutes that, unless the sheriff in person, or by a deputy, actually collects money on an execu-

tion, or unless he makes an actual valid levy of an execution upon property of the defendant in execution, subject to levy and sale, he is entitled to no commissions. Section 3275, it is true, provides that when a clerk receives payment of a judgment he must collect the costs and commissions of the sheriff, if execution has issued on said judgment; but sections 3697 and 3698 clearly manifest the legislative intent that no commissions become *due* the sheriff until after an actual levy has been made as we have above stated.

[5] A person claiming fees or costs must point to a definite law authorizing it. The law will not be extended beyond its letter. The law may impose duties on officers for which it provides no compensation. *Torbert v. Hale County*, 131 Ala. 144, 30 South. 453.

[6] "The sheriff is not entitled to any commission upon money paid to a judgment creditor before execution is issued, and even after execution is issued payment to or settlement or compromise with the execution creditor, before execution is *served or levied*, defeats the sheriff's rights to commission." 35 Cyc. 1555. There seems to be no conflict among the courts of last resort upon the above subject.

[7] 4. It is the policy of the state of Alabama to *prohibit* the sale, under execution, of that part of the property of a public service corporation which is engaged in the *service* of the public which is *essential* to it in the performance of those duties which the law *requires* of it on behalf of the public. While, in a large sense, *such* property is the private property of the corporation, it is also true that, in a large sense, the *public* has an *interest* in such property. It is the policy of the state, through the medium of the public service corporation, to supply its citizens with many of the conveniences and necessities of the present age; and it will not permit *that* property of such servant of the public without which it cannot perform its public functions to be taken from it by a sale under an execution. When the assets of a public service corporation become so depleted that its creditors must resort to such property for the satisfaction of their demands, the remedy is not by a sale under execution, but by the appointment of a receiver, to the end that the creditors may receive satisfaction, and at the same time the existence of the corporation as an asset of the public remain. On such property the law says that an execution *shall not be levied*. *Gardner v. Mobile, etc.*, R. R. Co., 102 Ala. 645, 15 South. 271, 48 Am. St. Rep. 84; *Gue v. Tidesater Co.*, 24 How. 257, 16 L. Ed. 635; *Thompson on Corporations*, vol. 6, § 7854.

In the present case, the levy was made upon the *roadbed, track and right of way* of appellant. It needs, of course, no argument to support the proposition that the appellant, a common carrier of freight and passengers, could not perform any of its duties as such without a roadbed, without a track, or with-

out a right of way. The levy of the sheriff, being confined to these properties, was *prima facie* void, and, being *void*, he can claim nothing of appellant by reason thereof. He claims through that levy, and his right to recover in this suit is based thereon, and there is nothing in the evidence from which we are authorized to infer that there was *any* property of appellant, subject to levy and sale, included in the property alleged to have been levied upon. As the above statutes contemplate an actual levy by the sheriff upon property of some value of the defendant in execution which is subject to levy and sale, as a condition precedent to his right to claim commissions on money not actually collected by or paid to him, and as there is nothing to show that the sheriff made such a levy in this case, the appellant was entitled to the general affirmative charge which it requested the court in writing to give to the jury in its behalf.

Reversed and remanded.

BIRMINGHAM RY., LIGHT & POWER CO. v. HUNNICUTT.

(Court of Appeals of Alabama. Nov. 28, 1911.)

1. PLEADING (§ 21*)—COMPLAINT—REFUGNANCY.

In an action for injuries to a street car passenger, a count of the complaint alleged that the car was running at so high a rate of speed, that it swayed, lunged, or jerked from one side to the other to such an extent that one of the passengers was thrown against plaintiff and knocked him off the car unto the ground, and, after describing plaintiff's injuries, charged that such injuries were the proximate consequence of the negligence of defendant's employes in charge of the car in permitting it to become so overcrowded that the passenger was thrown against plaintiff knocking him off and injuring him. *Held*, that the several acts of defendant's employes were charged as co-operative causes, cumulative, and descriptive of the single acts of negligence counted upon, and the count was not demurrable as containing inconsistent and repugnant averments.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 44; Dec. Dig. § 21.*]

2. PLEADING (§ 192*)—COMPLAINT—DEMUR- RER.

When a complaint states a good cause of action, it is not subject to demurrer because of repugnant allegations that could be stricken on motion as surplusage.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 414; Dec. Dig. § 192.*]

3. CARRIERS (§ 314*)—INJURIES TO PASSEN- GER—ACTION—PLEADING.

Plaintiff, having alleged that he was a passenger on defendant's street car when the injury complained of was received, may declare on defendant's negligence in general terms.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 314.*]

4. CARRIERS (§ 314*)—INJURIES TO PASSEN- GER—ACTION—COMPLAINT.

A complaint for injuries to a street car passenger, alleging the relation of the parties, and then charging that defendant was negli-

gent, in that, while the car on which plaintiff was riding was crowded, plaintiff and others were obliged to stand on the running board and the car was negligently run at such a high rate of speed that it swayed, rocked, or lunged, so that plaintiff was thrown or knocked off and injured, stated a cause of action and was not demurrable.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 314.*]

5. APPEAL AND ERROR (§ 1040*)—REVIEW— RULINGS ON PLEADINGS.

Error, if any, in sustaining demurrers to pleas of contributory negligence, was not prejudicial to defendant, where it was afforded the full benefit of such defense under pleas on which issue was joined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

6. CARRIERS (§ 317*)—INJURIES TO PASSEN- GER—CONDITION OF OTHER PASSENGER—EV- IDENCE.

Where another passenger of a street car was thrown against plaintiff as the car, which was crowded, was running at a high rate of speed, and plaintiff was thrown from the car and injured, evidence as to the apparent condition of the passenger who struck plaintiff—whether drunk or sober—at the time of the accident, was admissible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295-1306; Dec. Dig. § 317.*]

7. CARRIERS (§ 321*)—INJURIES TO PASSEN- GER—INSTRUCTIONS.

Where each count of the complaint alleged that plaintiff was compelled to ride on the running board of defendant's street car because of its overcrowded condition, and that plaintiff was thrown therefrom and injured, he was bound to prove such allegation as alleged, and hence the court should have charged at defendant's request that, before the jury could find for plaintiff, they must be reasonably satisfied that plaintiff was compelled, on account of the overcrowded condition of the car, to ride on the running board.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.*]

8. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING PLEADING.

In an action by a passenger for injuries, the first count of the complaint alleged negligence in that the car was run at such a high rate of speed that it swayed and jerked so that one of the other passengers was thrown against plaintiff and knocked him off the car; the second count alleged negligence in general terms in the conduct of defendant's road; and the third count alleged negligence in running a car at a high rate of speed so that it swayed, rocked, or lunged so that plaintiff was thrown off and injured. *Held*, that a requested instruction that, if a passenger was not thrown against plaintiff as a proximate cause of defendant's negligence, the plaintiff could not recover, was properly refused as misleading in not being referable to all the counts of the complaint.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 253.*]

9. TRIAL (§ 244*)—INSTRUCTIONS—UNDUE PROMINENCE OF MATTER.

In an action for injuries to a street car passenger by being pushed from the running board by another passenger, while the car was running at a high rate of speed, a request to charge that, if such other passenger did not fall from the car as the proximate consequence of defendant's negligence, the jury must find

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for defendant, provided they also found from the evidence that there was room inside the car where plaintiff could have stood or sat, etc., was properly refused as singling out and giving undue prominence to a particular part of the evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 244.*]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Action by John Hunnicutt against the Birmingham Railway, Light & Power Company for damages for injury to him while a passenger. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The pleadings sufficiently appear from the opinion, as do the exceptions to evidence. The following charges were refused to defendant: "(5) Before you can find for the plaintiff in this case, you must be reasonably satisfied from the evidence in this case that plaintiff was compelled, on account of the overcrowded condition of the car upon which he was riding, to ride upon the running board of the car. (6) If you believe from the evidence in this case that Jim Ogletree did not fall from the car as a proximate consequence of the negligence of defendant's agents, servants, or employes, you must find for the defendant, provided you also believe from the evidence that there was room inside the car where plaintiff could have stood or sat." The pleas in the case set up the fact of contributory negligence, because plaintiff voluntarily rode upon the running board of said car, which was on the outside thereof, while the same was running at a high rate of speed, although he could have ridden inside of said car, had he chosen to do so, and also that he voluntarily assumed this position, when he could have gotten inside the car.

Tillman, Bradley & Morrow and John S. Stone, for appellant. Goodwyn & Ross, for appellee.

PELHAM, J. The appellee brought suit in the court below against appellant, a common carrier, operating cars propelled by electricity, to recover damages for personal injuries alleged to have been received by him while a passenger by being thrown, jerked, or knocked from the foot board or running board of one of appellant's cars, on which appellee alleges he was compelled to ride because of the overcrowded condition of the car.

[1] The first count of the complaint alleges the overcrowded condition of the car, the relation of passenger, etc., and avers "that said car was running at a high rate of speed so that the same swayed and lunged or jerked from one side to the other to such an extent that one of the passengers of the car was thrown against the plaintiff and he was knocked off the car upon the ground,"

and, after describing the injuries, contains the further allegation: "And the plaintiff avers that his said injuries were the proximate consequence of the negligence of the defendant's employes in charge of said car in negligently allowing or permitting the said car to become so overcrowded that the said passenger was thrown against the plaintiff, knocking him off and injuring him as aforesaid."

The defendant demurred to this count and assigned, among other grounds of demurrer, that the averments are inconsistent and repugnant and fail to apprise defendant wherein or how it violated any duty owed to the plaintiff. The several acts are charged as co-operative causes, cumulative and descriptive of the one act of negligence counted upon, and all together averred as having contributed to the alleged injury. The first or stating part is a description of the mode in which the injury was inflicted, and is averred by way of inducement, and contains no averment of the negligence relied upon. The specification of negligence which is averred as a ground of liability is incorporated as a distinct and independent averment and constitutes the concluding paragraph of the count. No other specification of negligence is made as such, but one cause of action is stated, and but one specification of negligence is made; and the defendant was clearly informed of the matter to be put in issue. The description of the mode in which the injury was inflicted may have been stated with unnecessary particularity, but, if so, is but descriptive of the cause of action, and the plaintiff would not be entitled to recover unless his proof made out the essential matters of description with equal particularity. *Smith v. Causey*, 28 Ala. 655, 65 Am. Dec. 372; *Lewman v. Andrews*, 129 Ala. 170, 29 South. 692; *L. & N. R. R. Co. v. Johnson*, 79 Ala. 436.

[2] And when the complaint states a good cause of action it is not subject to demurrer because of redundant allegations that could be stricken out on motion as surplusage. *Hayes v. Miller*, 150 Ala. 621, 43 South. 818, 11 L. R. A. (N. S.) 748, 124 Am. St. Rep. 93; *Highland Ave. & B. R. R. Co. v. Dusenberry*, 94 Ala. 413, 10 South. 274; *Kennon v. W. U. T. Co.*, 92 Ala. 399, 9 South. 200; *L. & N. R. R. Co. v. Hall*, 91 Ala. 112, 8 South. 371, 24 Am. St. Rep. 863; *G. St. Ry. Co. v. Hanlon*, 53 Ala. 70.

The second count of the complaint adopts that part of the first count of the complaint containing a description of the manner in which the injury was inflicted and alleges negligence in general terms upon the part of the defendant in the conduct of its business in carrying plaintiff as a passenger, and that by reason of such negligence and as a proximate consequence thereof plaintiff suffered the alleged injury and damage.

[3] That the plaintiff, having averred he was a passenger on defendant's car when the injury complained of was received, may declare in general terms on the negligence of defendant, is a settled rule. *Birmingham R. & P. Co. v. Moore*, 148 Ala. 115, 42 South. 1024; and list of cases collected and cited in this opinion.

[4] The third count also adopts the stating and descriptive part of the first count of the complaint and avers the negligence of the defendant, in that while the car was crowded, and plaintiff and others were compelled to stand upon the running board, the car was negligently run at such a high rate of speed that it swayed, rocked, or lunged so that plaintiff was thrown or knocked off and injured. The count states a good cause of action, and the defendant's demurrers to it were properly overruled.

[5] The contributory negligence of the plaintiff available to the defendant as constituting a legal defense that was sought to be set up by pleas numbered 3, 4, and 5 was covered by the numerous other pleas, and the defendant had the full benefit of the defense set up by these pleas under the pleas on which issue was joined. If there was error in the rulings sustaining these demurrers, it is without injury. *R. R. v. Hissong*, 97 Ala. 187, 13 South. 209; *George v. M. & O. R. R. Co.*, 109 Ala. 245, 19 South. 784; *R. R. v. Dobbs*, 101 Ala. 219, 12 South. 770; *Martin v. Butler*, 111 Ala. 422, 20 South. 352; *Thomas v. Drennen*, 112 Ala. 670, 20 South. 848.

[6] The appellant should have been permitted to show by the witnesses Viola Hinton and Andrew Jones the apparent condition of Jim Ogletree—whether drunk or sober—at the time of the accident. It was Ogletree who appellee contended fell, or was thrown, against him due to the motion of the car swaying or lurching in consequence of being run at such an unusually rapid rate of speed; thereby knocking appellee off and causing his injuries. The negligence counted on in one of the counts was the rapid running that caused a lurching or jerking of the car that threw the person against appellee, and the appellant was entitled to show the condition of the person thrown against appellee so that the jury could say whether it was due to the condition of the person or the rapid running and lurching of the car that appellee was knocked from the car by Ogletree's falling or being thrown against him, as it is a matter of common knowledge that a sober man is steadier on his feet and less likely to be thrown off his balance than a drunken man. Plaintiff's witnesses had testified that the car was running "faster than usual" and was swaying and lurching "more than usual" at the

time Ogletree fell or was thrown against plaintiff, and Ogletree's condition as to sobriety or drunkenness at the time was material, and the objections to the questions seeking to elicit this testimony should not have been sustained.

[7] Charge No. 5 requested by the defendant should have been given. Each count of the complaint contained the allegation that plaintiff was compelled to ride on the running board on account of the overcrowded condition of the car, and, while this was an allegation of the circumstances or description of the mode in which the injury was inflicted, it is a material allegation and must be proved as laid in the complaint to entitle the plaintiff to a recovery. The allegation was evidently made to avoid the general presumption, primarily, of negligence attaching to one who voluntarily chooses to ride upon a running board when there is room inside the car. *B. R. L. & P. Co. v. Bynum*, 139 Ala. 389, 396, 36 South. 736. In the case of *B. R. L. & P. Co. v. Moore*, 148 Ala. 115, 42 South. 1024, cited by appellee, the allegation that there was a wreck was not a material allegation requiring proof as a prerequisite to plaintiff's right of recovery. Plaintiff's injuries in that case were not attributed in any way to it, and no negligence alleged with respect thereto. The direct and proximate result of a collision between two cars was averred as the cause of plaintiff's injuries, and the only act complained of related to the collision; while in this case the act complained of is related to the crowded condition of the cars, and this is a material allegation, necessary to be proven. *A. C. G. & A. Ry. Co. v. Bates*, 149 Ala. 487, 43 South. 98.

Whether or not plaintiff was compelled to ride on the running board due to the overcrowded condition of the car was a question for the jury to determine under all the facts, and was properly submitted under the charges requested correctly stating this hypothesis.

[8, 9] Charge No. 6 is misleading as referable to each and every count of the complaint. It singled out and gave undue prominence to a particular part of the evidence, and the court cannot be put in error for refusing it. From what we have said, it will be seen that the trial court was not in error in refusing the other special charges and the general charge requested by defendant.

The rulings on the evidence other than those discussed are free from error. It is unnecessary to consider other assignments of error or the order overruling the motion for a new trial, as, for the errors committed by the trial court indicated above, the case must be reversed.

Reversed and remanded.

HINES v. TRIBBLE.

(Court of Appeals of Alabama. Dec. 21, 1911.)

1. CERTIORARI (§ 5*)—ADEQUACY OF LEGAL REMEDY.

Common-law certiorari will not lie to review a judgment where the remedy by appeal is adequate and complete.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. § 5.*]

2. JUSTICES OF THE PEACE (§ 194*)—REVIEW—CERTIORARI—EFFECT OF FAILURE.

In detinue in a justice's court, in which plaintiff gave bond pursuant to Code 1907, § 3780, with condition to deliver the property to defendant within 30 days after judgment, if he failed in the suit, and to pay the damages for the detention, error in rendering judgment for defendant without assessing the value of the property as required by section 3781 did not render the judgment void, and hence common-law certiorari would not lie to review it; the remedy by appeal being adequate.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 774, 775; Dec. Dig. § 194.*]

3. JUSTICES OF THE PEACE (§ 194*)—CERTIORARI—STATUTORY WRIT.

If the petition for a common-law writ of certiorari was sufficient to sustain a statutory writ, and the bond given complied with Code 1907, § 4714, as to the bond required to be given to procure a writ of certiorari to review a justice's judgment, the writ issued may be treated as a statutory writ with the effect of removing the case to the circuit court for a trial de novo, though, considered as a common-law writ, it was improperly issued because the judgment was merely erroneous, so as to be reviewable by appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 194.*]

4. JUSTICES OF THE PEACE (§ 208*)—REVIEW—JURISDICTION—TRIAL DE NOVO.

The case having been removed to the circuit court from a justice's court by a statutory writ of certiorari, if the record showed that the judgment was merely erroneous and not void, the circuit court should have tried the case anew, and not rendered judgment quashing the justice's judgment; the case being before it for trial de novo.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 807-817; Dec. Dig. § 208.*]

Appeal from Circuit Court, Jefferson County; John C. Pugh, Judge.

Certiorari by George Tribble against Ellen Hines to review a judgment of a justice of the peace. From a judgment quashing the justice's judgment, defendant appeals. Reversed and remanded.

Black & Davis, for appellant. C. D. Ritter, for appellee.

WALKER, P. J. [1] The petition for the writ of certiorari in this case in showing the rendition by the inferior court of a merely erroneous judgment in a cause of which it had jurisdiction of the subject-matter and of the parties, from which judgment an appeal lay, disclosed that it was not a case for the issuance of the common-law writ of certiorari, as in civil cases, when the remedy by appeal affords full and complete redress, the

common-law writ of certiorari may not properly issue. *Lawler v. Lyness*, 112 Ala. 386, 20 South. 574; *Independent Publishing Co. v. American Press Association*, 102 Ala. 475, 15 South. 947.

[2] Its showing that in the detinue suit, in which the petitioner as the plaintiff made the bond provided for by section 3780 of the Code of 1907, and thereby secured the delivery to himself of the property sued for, there was a judgment for the defendant, without any assessment of the value of the property, as required by section 3781 of the Code, was a showing of a mere error in the proceedings which was curable on a trial de novo on appeal. *Clem v. Wise*, 133 Ala. 403, 31 South. 986; *Jernigan v. Willoughby*, 159 Ala. 650, 48 South. 812; *McCullough v. Floyd*, 103 Ala. 448, 15 South. 848.

[3] As the petition could be regarded as sufficient to sustain a statutory writ of certiorari issued under it, and as the bond given to secure the issuance of the writ under the order made by the circuit judge on the presentation of the petition to him was in compliance with the requirement of the statute (Code, § 4714) as to the bond to be given to secure the issuance of the statutory writ of certiorari, the writ issued may be treated as the statutory writ of certiorari, having the effect of removing the case into the circuit court for a trial there de novo. *Guscott v. Roden & Co.*, 112 Ala. 632, 21 South. 313; *Wright v. Hurt*, 92 Ala. 591, 9 South. 386; *Webb & Stagg v. McPherson*, 142 Ala. 540, 38 South. 1009.

[4] The case thus being in the circuit court for another trial, and the record brought up not disclosing that the judgment rendered by the inferior court was void because of its lack of jurisdiction either of the subject-matter or of the parties, but showing only that it was merely irregular and erroneous, the court was in error in rendering the judgment quashing the judgment of the inferior court, instead of proceeding to try anew the case so removed to it, and to render the proper judgment in it.

Reversed and remanded.

SELLS v. PRICE.

(Court of Appeals of Alabama. Dec. 19, 1911.)

1. SALES (§ 1*)—REQUISITES OF CONTRACT—MEETING OF MINDS.

Where an owner of land merely showed a "share cropper" cribs in which to put rent corn and others in which to put his own corn, and neither had an agreement or understanding that corn placed in the cribs would be taken for rent nor assumed dominion over it after it was placed there, though the tenant believed that corn put in the cribs was to be taken for payment of his indebtedness, there is no such meeting of minds as will bind the landlord as for a sale and delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. ATTACHMENT (§ 164*)—SUFFICIENCY OF LEVY—ASSUMPTION OF DOMINION.

Where, upon the levy of an attachment against a share cropper, corn in the field was merely pointed out to the constable, and he arranged with the owner of the land who had sued out the attachment to gather such corn, there was not such an assumption of dominion as to constitute a levy, and where the owner did not later gather it, and it was lost and destroyed without his fault, he is not chargeable for its value as a set-off in an action for the rent due.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 464-479; Dec. Dig. § 164.*]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by W. H. Sells against I. N. Price. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The facts sufficiently appear in the opinion of the court. The oral charge is set out in the bill of exceptions in the following language: "In the oral charge the court instructed the jury that they were authorized to allow Price a credit for the corn in the field, if O'Neal arranged with Sells to gather it." It appears from the evidence that O'Neal was the constable who levied the attachment, and he testified that he did not levy on the corn in the field; that plaintiff, Sells, pointed to the corn in the field; and that he (the constable) appointed Sells to gather it; and Sells stated that when he went to gather it, the stock had destroyed it.

Tally & Fricks, for appellant. W. J. Martin, for appellee.

WALKER, P. J. The defendant pleaded by way of set-off that at the time of the bringing of the suit "plaintiff was indebted to the defendant in the just and true sum of, to wit, \$75, for corn sold and delivered to him, and for the further sum of \$38.25 for other corn grown by the defendant on the lands of plaintiff, which plaintiff wrongfully took from defendant and destroyed, or permitted to be destroyed."

[1] The defendant was a share cropper on the plaintiff's place in the year 1909. As to the first-mentioned item of set-off, the evidence was to the effect that the defendant gathered eight loads of corn, and put two of the loads in one crib as rent, and the other six loads in another crib on the plaintiff's land. The defendant himself testified that in the fall he asked the plaintiff where to put the corn, and plaintiff showed him a crib into which to put the rent corn and a different crib in which to put defendant's corn; that there was no arrangement under which the six loads of corn were put in the crib; that "Sells just told witness [the defendant] to put it there. He just understood it was put there to pay what he owed Sells." There was no evidence tending to show that the plaintiff assumed control or dominion

over the six loads of corn to which the defendant was entitled, or that he agreed to buy that corn, or to accept it as a payment on the debt. There was no evidence tending to show that the minds of the parties met in an agreement or understanding to this effect. The undisclosed understanding of one of the parties, not acquiesced in by the other, could not have the effect of rendering the latter chargeable as the purchaser of the former's property. The allegation of the plea that that corn was sold and delivered to the plaintiff was not sustained by evidence. This being true, the second charge requested by the plaintiff should have been given.

[2] The other subject of a claim of set-off was the corn which was in the field ungathered at the time the attachment was sued out. It was merely pointed out to the constable, who arranged with the plaintiff to gather it. The constable did not assume such dominion over that property as to constitute a levy of the attachment upon it. *Hamilton v. Maxwell*, 119 Ala. 23, 24 South. 769; *Abrams v. Johnson*, 65 Ala. 465. Under the part of the oral charge of the court to which the plaintiff excepted, the jury were authorized to allow the defendant a credit for the corn in the field if the constable, who had not made a levy upon it, arranged with the plaintiff to gather it. The mere making of such arrangement would not render the plaintiff liable for the value of that corn if he did not in fact assume control of it, or if it was lost or destroyed without his fault, but really as the result of the fault of the defendant himself in going away and leaving that part of his crop ungathered, as there was some evidence tending to show was the fact. In view of the pleading and evidence touching this subject of set-off, the court was in error in the part of its oral charge to which an exception was reserved.

Reversed and remanded.

COSMOPOLITAN FIRE INS. CO. v. GINGOLD.

(Court of Appeals of Alabama. Dec. 21, 1911.)

1. INSURANCE (§§ 594, 624*)—ASSIGNMENT OF CLAIM FOR LOSS—RIGHT OF ACTION.

In the absence of any provision in a fire policy requiring a transfer of a claim under the policy to be in writing, it may be by parol, and, the policy being a contract for the payment of money, an action thereon is properly prosecuted in the name of the party really interested, under Code 1907, § 2489, providing that actions on contracts for the payment of money may be prosecuted in the name of the party really interested, whether he has the legal title or not.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1455-1458, 1557-1571; Dec. Dig. §§ 594, 624.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. INSURANCE (§ 648*)—ACTIONS ON POLICY—ADMISSIBILITY OF EVIDENCE.

In an action by the assignee of a claim under a fire insurance policy, evidence as to whether other companies, having policies covering the same property, had paid claims under those policies, is inadmissible.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 648.*]

3. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSION OF WITNESS.

In an action by the assignee of a claim under fire insurance policies, a clerk of the local agent of defendant was examined as to the circumstances attending the attaching of slips on the face of the policies, and the making of certain indorsements on them, and was asked for what purpose the policies were put in his possession. *Held*, that the question was properly ruled out as calling for conclusion of the witness, and that the facts should have been brought out, leaving the jury to determine the purpose and effect.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.*]

4. INSURANCE (§ 664*)—TRANSFER OF TITLE—REMOVAL OF PROPERTY—CONSENT—ESTOPPEL TO DENY—EVIDENCE.

In an action on a fire policy, the evidence showed that the owner of insured personality took his policy to the agent who issued it, and handed it to the agent's clerk in the agent's presence, with a request for a consent to an assignment of interest to a partnership which insured had formed, and for a permit for a change of location; that the matter was referred to the agent in person who consented, but, after preparation by the clerk of the proper consents, the agent signed only the removal permit; that, when the owner called for the policy, it was given to him by the clerk, who stated, in the presence of the agent, that it was all right. *Held* that, in connection with evidence that the clerk acted as assistant to the agent, the clerk's testimony as to his making of the indorsement on the policy of a consent to a transfer of interest was competent as showing an adoption by the agent, binding on the insurer, of the indorsement, though unsigned, or as showing facts constituting an estoppel to deny consent to the transfer.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 664.*]

5. INSURANCE (§ 376*)—CONSENT TO TRANSFER OF INTEREST.

Insurance policies provided that the contracts would be void if there was any transfer of interest in the property, and that there could be no waiver of such provision, unless such waiver "shall be written upon or attached hereto." *Held*, that the written consent to the transfer of the policies need not be signed, but that it was sufficient if the agent indorsed such consent upon the policies, and returns them to the owner with the assurance that they are all right.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 376.*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by Sam Gingold against the Cosmopolitan Fire Insurance Company on two fire policies. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The complaint is in the usual code form, with the averment additionally that the policies were originally issued to one David Caplan, and on, to wit, October 17, 1907, so

transferred and assigned as to cover the property belonging to Rosen & Caplan. Plaintiff further avers that the interest of said David Caplan in said policies was sold, transferred, and assigned to Isaac Rosen, and by said Isaac Rosen transferred and assigned to Sam Gingold, this plaintiff, which policies of insurance were in force at the time the goods covered by them were damaged or destroyed by fire, and after loss had occurred said policies and claims thereunder were sold or assigned to this plaintiff.

Thompson & Thompson, for appellant. W. T. Hill, for appellee.

WALKER, P. J. This action was upon two fire insurance policies originally issued to one David Caplan, the averments of two of the counts of the complaint showing that the policies were so transferred and assigned as to cover property belonging to Rosen & Caplan, and that the interest in the policies was sold, transferred, and assigned to the plaintiff.

[1] The evidence for the plaintiff tended to show that he became the owner of the policies after the fire. In the absence of any provision in the policies requiring such a transfer of ownership of a claim under the policies to be in writing, it could be made by parol; and, the policies being contracts for the payment of money, an action on them is properly prosecuted in the name of the party really interested. Code, § 2489; Insurance Co. of North America v. Forchheimer & Co., 86 Ala. 541, 5 South. 870; 19 Cyc. 634.

A number of the rulings of the court in the admission of evidence are assigned as errors. For obvious reasons some of those rulings cannot be sustained.

[2] It was a wholly irrelevant inquiry as to whether other companies having policies covering the same property had paid claims under those policies, and evidence to this effect should not have been admitted over objections duly interposed by the defendant.

[3] A clerk in the employment of the local agent of the defendant was examined in reference to the circumstances attending the attaching of slips on the face of the policies and the making of certain indorsements on them. The witness having stated that he remembered that the policies were given to him, he was asked, "For what purpose were they put in your possession?" An objection to this question was overruled, and the witness was permitted to answer it. The question was calculated to elicit, and in fact did elicit, a statement of the conclusion or opinion of the witness on the subject. The facts of the occurrence should have been brought out, leaving it for the jury to determine its purpose and effect. It is not denied that there were other rulings made in admitting

evidence which are subject to criticism; but a detailed review of them is not deemed necessary, as the questions presented may be avoided in another trial.

[4] The principal contested question in the case was as to the legal sufficiency of the evidence to show that the indorsements above referred to became parts of the policies sued on. Each of the policies contained the following provisions: "This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void * * * if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance * * * whether by legal process or judgment or by voluntary act of the insured, or otherwise. * * * This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions or conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." On each of the policies offered in evidence was an indorsement, in part printed and the remainder written, the written part being in italics, as follows: "Consent by company to assignment of interest.—The Cosmopolitan Fire Insurance Co., of New York, hereby consents that the interest of *David Caplan* as owner of the property covered by this policy be assigned to *Rosen & Caplan*. Dated *Oct. 17th, 1907*. _____, Signature for Company." There was also on the back of each of the policies a printed form of "Assignment of Interest by Insured," which was dated October 17, 1907, but was unsigned, and the name of David Caplan was written in the space left for the name of the assignor, and the words "*Rosen & Caplan*" were written in the space left for the name of the assignee. To the face of each of the policies was attached a "removal permit," bearing the same date, which authorized the removal of the insured property from one location to another. It was not questioned that the removal permit slip became a part of each of the policies.

In reference to the indorsements found on the policies, there was evidence tending to show the following state of facts: The Underwriters Real Estate & Rental Company, a corporation, was the defendant's agent in

Birmingham, having authority to issue policies, and to grant removal permits and to consent, in behalf of the defendant, to an assignment of his interest by the insured. The policies sued on were issued in the defendant's name by that company as its agent. In October, 1907, David Caplan, the insured named in the policies, having removed the insured property to another location and formed a partnership in business with one Rosen, carried the two policies to the office of the agent, and handed them to one Hesterly, who was a clerk in the employment of the agent, and intrusted by it with much of the detail and clerical work of the business. George Reynolds, the managing officer of the agent company, and the person designated by that company to have charge of the agency for the defendant, was in the office at the time. Caplan informed Hesterly of his removal of the insured property and of his desire to transfer the policies to the firm of Rosen & Caplan. Hesterly mentioned to Reynolds, in the presence of Caplan, that the latter wanted a transfer of the policies, and Reynolds said, "All right." Caplan left the policies at the agent's office. A few days later he called there for them, and was informed by Hesterly that they were not ready. Hesterly filled out the blank removal permit slips and attached them to the policies, and also filled out, as above stated, the indorsements on the policies, and, after he had done so, placed the policies on the desk of Mr. Reynolds. Reynolds signed the removal permit slips, but the indorsements of "consent by company to assignment of interest" were not signed. Caplan again called for the policies about a week later, and they were delivered to him by Hesterly with the statement that they were all right; Reynolds being in the office at the time, and where he could see and hear what occurred.

Under the circumstances disclosed, the court did not err in admitting the testimony of Hesterly in reference to his making the indorsements on the policies, on the ground that he was not shown to be an agent of the defendant or to have any authority to act in its behalf. To justify the admission of that testimony, it is not necessary to determine whether the evidence as to the agency of Hesterly's employer and as to the duties intrusted to him by his employer was such that from the nature and scope of the business committed to the agent it might be implied, as necessary to the proper transaction and carrying on of that business, that the agent was authorized to appoint sub-agents, and that Hesterly was such a sub-agent, with authority to bind the principal by such dealings as he had with the policy holder in reference to the policies. *Insurance Company of North America v. Thornton*, 130 Ala. 222, 30 South. 614, 55 L. R. A. 547, 89 Am. St. Rep. 30; *Johnson v. Aetna Ins. Co.*, 123 Ga. 404, 51 S. E. 339, 107 Am. St. Rep. 92, 128. The evidence was such as to sup-

port an inference that Hesterly did the purely clerical work of filling out the blanks, and that in his dealings with the insured he acted as the clerk or assistant of the manager of the agency, so as to make the dealings really those of the agent itself; that Reynolds, having signed the removal permit blank attached to the policies left on his desk and having allowed the policies, with the indorsements on them filled out as above stated, to be returned to the policy holder in his presence with the assurance from the clerk that the policies were all right, could be regarded as having adopted those indorsements as his own, and as having, through the clerk as his mouthpiece, assured the policy holder that all had been done which was required to effect the purposes for which the policies had been left at the agent's office.

[5] The provisions above quoted do not prescribe the mode of evidencing the insurer's consent to a change in the beneficiaries further than that an agreement on that subject "shall be written upon or attached hereto." It is not required that such writing be signed by the agent. The result is to leave the form of the writing to the agent. When the holder of such a policy informs a duly authorized agent of the insurer of his desire to get the insurer's consent to a change of beneficiaries, and the agent makes or has made such indorsements upon the policy as those above quoted, and returns the policy in that condition to the policy holder with the assurance that it is all right, the consent of the insurer to such a proposed change may be regarded as "written upon" the policy within the meaning of the above quoted requirements on the subject. *L'Engle v. Scottish Union, etc., Ins. Co.*, 48 Fla. 82, 37 South. 462, 67 L. R. A. (N. S.) 581, 111 Am. St. Rep. 70. If the correctness of this conclusion could be regarded as questionable, yet it would have been proper to admit the evidence referred to as furnishing the basis of an estoppel upon the defendant to question the sufficiency of the consent to a change of beneficiaries so evidenced. *Dupuy v. Delaware Ins. Co. (C. C.)* 63 Fed. 680; *Manchester v. Guardian Assurance Co.*, 151 N. Y. 88, 45 N. E. 381, 56 Am. St. Rep. 600; 3 *Cooley's Briefs on Ins. Law*, 2617. The insistence in behalf of the appellant that the trial court should have given the general affirmative charge requested by it is based upon a construction of the evidence in the case much at variance with what has been said above on the subject. We are of opinion that the refusal to give that charge was proper.

It is not deemed necessary to a proper disposition of the case on another trial to review other rulings which have been assigned as errors.

Because of the errors above mentioned, the judgment must be reversed.

Reversed and remanded.

(129 La.)

No. 19,222.

STATE v. OTERI.

In re WATSON, Warden, et al.

(Supreme Court of Louisiana. Jan. 2, 1912.)

(Syllabus by Editorial Staff.)

1. INSANE PERSONS (§ 86*)—CRIMES—CONFINEMENT OF INSANE CRIMINALS.

Act No. 105 of 1896 requires that, when any convict serving a penitentiary sentence shall become insane, the warden and clerk of the board of control shall petition the district court where the penitentiary is located, showing the insanity of such convict, and praying for his interdiction and removal to the insane asylum. Act No. 264 of 1910, § 4, provides that, where a person has been committed to an insane asylum who becomes insane after his conviction for a crime punishable by imprisonment or death, he shall not upon regaining sanity be liberated. *Held*, that the only court having jurisdiction of a petition to have an insane person under death sentence removed to the insane hospital was the court having jurisdiction of the penitentiary wherein the convict was confined, and not that in which he was convicted, its jurisdiction ceasing after judgment of conviction and removal of accused to the custody of the penitentiary authorities.

[Ed. Note.—For other cases, see *Insane Persons*, Dec. Dig. § 86.*]

2. INSANE PERSONS (§ 86*)—CRIMES—CONFINEMENT OF INSANE CRIMINALS.

Act No. 264 of 1910, § 4, providing that one committed to the hospital for the insane, who becomes insane after his conviction for a crime punishable by imprisonment or death, shall not be liberated upon regaining his sanity, contemplates that there is a mode by which the sanity of a convict sentenced to death may be passed upon in the interval between his sentence and execution.

[Ed. Note.—For other cases, see *Insane Persons*, Dec. Dig. § 86.*]

Petition by Eugene B. Watson, Warden of Louisiana State Penitentiary, and G. Kilgore, Clerk and Secretary of the Board of Control of the State Penitentiary, for the removal of Frank Oteri, an insane convict, to the Insane Hospital. On application for certiorari, and mandamus to review a judgment sustaining an exception to the petition. Rule made absolute and mandamus issued.

See, also, 128 La. 939, 55 South. 582.

Walter Guion, Atty. Gen., and Henriques & Otero (G. A. Gondran, of counsel), for relators.

PROVOSTY, J. [1] Act 105, p. 153, of 1896, provides that:

"Whenever any convict serving a sentence in the penitentiary shall become insane, it shall be the duty of the warden of the penitentiary together with the clerk of the board of control to present a petition to the district court where the penitentiary is located setting forth the insanity of such convict and praying for his interdiction and removal to the Asylum for the Insane."

The warden and the clerk of the penitentiary presented a petition under the said act to the district court of the parish of East

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Baton Rouge, where the state penitentiary is located, representing that a convict named Frank Oteri, who had been tried and sentenced to death by the district court of the parish of Iberville, and was in the penitentiary awaiting execution of the sentence, had become insane, and asking that said convict be interdicted and removed to the Asylum for the Insane.

The district attorney for the parish of Iberville filed an exception to the jurisdiction of the court of East Baton Rouge, on the ground that the only court, if any, having jurisdiction of the matter was that of Iberville, by which the convict had been tried and sentenced. The court sustained the exception, and the matter is now before this court on application for writs of certiorari and mandamus to the judge of the district court of East Baton Rouge.

In justification of his ruling, the learned respondent judge says that the said Act 105 of 1896 was not intended to provide for cases where the convict has been sentenced to death, but only for cases where he has been sentenced to a term in the penitentiary. And this is true, to the extent that at the time the said act was passed convicts sentenced to death were kept in the parish jails until execution of the sentence, and were not sent to the penitentiary, and hence this law could not have been intended to have application to them. They are now sent to the penitentiary by virtue of Act 61, p. 107, of 1910, which requires the death sentence to be executed within the walls of the penitentiary by the warden or his deputy.

In the case of *State ex rel. Lyons v. Chretien*, Judge, 114 La. 81, 38 South. 27, this court held that a prisoner under sentence of death was without right to provoke an inquiry into his sanity; and the court added that in the case of convicts sentenced to the penitentiary special provision had been made by the Act of 1896 for the setting on foot of such inquiry, and that "reasoning from analogy a similar initiative should be left to the custodian of convicts sentenced to death."

Act 264, p. 454, of 1910, § 4, provides that:

"Where a person has been committed to the Hospital for the Insane, who becomes insane after his conviction for a crime punishable by imprisonment in the penitentiary or by death, he shall not upon regaining his sanity be restored to liberty," etc.

[2] This law evidently contemplates that there is some mode by which in the interval between sentence and execution the sanity of a convict may be pronounced; and, in the nature of things, the only court having jurisdiction is that having jurisdiction of the place prescribed by law for the detention of the convict. The jurisdiction of the court that tried and sentenced the convict necessarily ceases when the convict by operation of law passes out of its control and under that of

the officers of the penitentiary. See, to that effect, *Lyons v. Chretien*, Judge, supra.

Let the rule nisi herein heretofore issued be made absolute, and the writ of mandamus issue as prayed.

(129 La.)

No. 19,189.

STATE v. LOUVIER et al.

(Supreme Court of Louisiana. Jan. 2, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1036*)—APPEAL—PRESENTATION OF QUESTION IN LOWER COURT—EVIDENCE.

It is no ground for the reversal of a conviction that defendant allowed hearsay evidence to go to the jury without objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2639-2641; Dec. Dig. § 1036.*]

2. CRIMINAL LAW (§ 958*)—NEW TRIAL—PROCEEDINGS TO PRODUCE—SUFFICIENCY OF AFFIDAVITS.

The rule is well settled that the unsupported affidavit of the accused to a motion for a new trial, on the ground of newly discovered evidence, is insufficient; that it must be corroborated by that of the newly discovered witness, if possible; that the failure to furnish such corroborative affidavit must be explained or accounted for; and that the refusal of a new trial will not be disturbed, when neither the witness nor his affidavit is produced on the hearing of the motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2396-2403; Dec. Dig. § 958.*]

Appeal from Eighteenth Judicial District Court, Parish of Acadia; William Campbell, Judge.

Joseph Louvier and others were convicted of stealing a calf, and appeal. Affirmed.

C. B. De Bellevue (Percy T. Ogden, of counsel), for appellants. Walter Guion, Atty. Gen., and John J. Robira, Dist. Atty. (G. A. Gondran, of counsel), for the State.

MONROE, J. Defendants prosecute this appeal from a conviction and sentence for stealing a calf. The only bill of exception that we find in the record was taken to the overruling of a motion for new trial. It is therein alleged:

(1) That defendants were convicted on circumstantial and hearsay evidence; and (2) that they had discovered new and material evidence after the trial.

The trial judge, in signing the bill, gives the following reasons for overruling the motion, to wit:

"The evidence in said case was conclusive as to the guilt of said defendants, and was positive, although some hearsay evidence went to the jury, without any objection on the part of the attorney of said defendants; but the evidence was ample for conviction, and which was positive and direct evidence. As to the question of newly discovered evidence, to prove that the said calf was seen after said parties were charged with the stealing, that point was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

brought out before the jury, and evidence of one of the witnesses named in the motion was admitted by the district attorney, on a motion for continuance, said witness being one Lejeune, the same person, and was also proven by another witness at said trial."

[1, 2] It is no ground for the reversal of a conviction that the defendant has allowed hearsay evidence to go to the jury, without objection. Marr's Cr. Jur. of La. § 419. The motion for new trial does not state that the newly discovered witnesses were within the jurisdiction of the court, or that there was no other witness by whom the fact referred to in the motion could have been proved. And the record shows that counsel for defendants moved for a continuance, on the ground that one of their witnesses, Portalis Lejeune, was absent, and that, if present, he would testify that the calf in question was seen two days after it was said to have been stolen, whereupon the district attorney admitted that, if present, he would so testify. Again, the affidavit of the accused is wholly uncorroborated, and the rule is well settled that the unsupported affidavit of the accused to the motion is insufficient, and must be corroborated by the affidavits of others—of the newly discovered witnesses themselves, if possible; that the failure to furnish the affidavits of the newly discovered witnesses must be explained or accounted for; and that the refusal of a new trial will not be disturbed, when neither the witnesses nor their affidavits are produced on the hearing of the motion. Marr's Cr. Jur. of La. p. 831, and authorities there cited.

Judgment affirmed.

(129 La.)

No. 19,154.

STATE v. BAGLEY.

(Supreme Court of Louisiana. Jan. 2, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1182*)—APPEAL—DISPOSITION OF CAUSE—AFFIRMANCE.

Every appeal must have a basis, and when, in a criminal trial, no bill of exceptions has been reserved, no motion in arrest of judgment made, nor any assignment of error alleged, and no error appears on the face of the record, the appeal having no basis upon which to rest, the judgment will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3205; Dec. Dig. § 1182.*]

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

B. B. Bagley was convicted of keeping a grog and tippling shop and of retailing intoxicants, and appeals. Affirmed.

Blanchard & Scheen, for appellant. Walter Guion, Atty. Gen., and J. M. Foster, Dist. Atty. (G. A. Gondran, of counsel), for the State.

BREAUX, C. J. The defendant was proceeded against on the charge of keeping a grog and tippling shop and of retailing intoxicants.

From a sentence condemning him to pay a fine of \$350, costs, and to serve 90 days on the public road, and, in default of payment, to serve an additional 90 days, he appealed.

Defendant filed a motion for a bill of particulars.

The district attorney complied with the bill of particulars.

It does not appear that any objection was filed to the answer of the prosecuting officer as insufficient.

There is no bill in the record.

It is well settled in jurisprudence, when no bill of exceptions is taken, no motion in arrest filed, nor an assignment of error, no error appearing on the face of the record, the verdict and the judgment will not be disturbed.

That being the case here, it only remains for us to affirm the judgment.

For reasons stated, the judgment is affirmed.

(129 La.)

No. 18,657.

BONNABEL v. METAIRIE CYPRESS CO.

(Supreme Court of Louisiana. Dec. 11, 1911.

Rehearing Denied Jan. 15, 1912.)

(Syllabus by Editorial Staff.)

1. LANDLORD AND TENANT (§ 229*)—RENT—ATTACHMENT—CONDITIONS PRECEDENT—NOTICE OF DEMAND.

Where, though the lease required the lessee to pay rent notes on the 1st of the succeeding month, and made all of them at once payable if any one of them was not promptly paid, the lessor uniformly for some 17 months permitted the lessee to pay the notes from 3 days to about a month after they were due, the lessor should have presented the notes for payment before suing out provisional seizure in connection with a suit on the notes, especially where the notes were not payable at a particular bank or place.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 948-974; Dec. Dig. § 229.*]

2. COSTS (§ 42*)—EFFECT OF TENDER.

Where, in an action on overdue rent notes, the money tendered by the tenant at trial to satisfy the notes was not deposited in court and the tender was not a legal tender, the costs of the suit on the notes should be taxed to defendant.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 137-164; Dec. Dig. § 42.*]

Appeal from Twenty-Eighth Judicial District Court, Parish of Jefferson; Prentice E. Edrington, Judge.

Action by Alfred Bonnabel against the Metairie Cypress Company, accompanied by a provisional seizure. From a judgment for plaintiff, defendant appeals. Affirmed on main demand, and set aside as to provisional seizure.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

H. L. Favrot (Lewis R. Graham, of counsel), for appellant. L. H. Marrero, Jr., for appellee.

PROVOSTY, J. [1] For disposing of this case, a detailed statement of the facts is not necessary. A mere general outline of them will suffice. Plaintiff made a lease to defendant, and defendant executed notes for the monthly installments of the rent, payable at the end of each month; that is to say, on the 1st of the succeeding month. The contract contained the stipulation that all the notes should become due in case any one of them was not paid promptly. At the institution of this suit, 20 of these notes had been paid, and 18 were unpaid, of which 3 were past due. The demand is for the aggregate amount of the unpaid notes, \$3,490, and is accompanied by provisional seizure.

On receiving notice of this suit, defendant promptly tendered payment to plaintiff of the three past-due notes, and plaintiff refused to accept.

The stipulation for the prompt payment of the notes was honored by the parties more in the breach than in the observance. The note for March, 1908, was paid April 3, 1908; that for April, May 1st; that for May, June 4th; that for June, July 2d; that for July, August 3d; that for August, September 23d; that for September, October 6th; those for October and November, December 2d; that for December, January 24, 1909; that for January, February 11th; that for February, March 27th; that for March, April 29th; those for April, May, and June, August 9th; that for August, September 8th; and that for September, October 11th. Defendant contends that, having consented in the past to this lax mode of dealing, plaintiff was precluded from suing out a provisional seizure without at least making an amicable demand of payment.

In the case of *Standard Brewing Co. v. Anderson*, 121 La. 935, 46 South. 926, this court held, quoting syllabus:

"Where, month after month, the lessor has been receiving payment for the rent a few days later, without objection, if he desires in the future to hold the lessee strictly to payment on the day the rent falls due, he must give him notice to that effect; otherwise, the lessee will not be in legal default from delaying the usual time."

That decision is conclusive of the present case.

Defendant's manager testifies that on two occasions he offered to pay this accrued rent to plaintiff, and that each time plaintiff put him off. Plaintiff denies this. But plaintiff does not pretend to have presented the notes to defendant for payment. The notes were not payable at any bank or other designated place, which made it all the more necessary that, in view of the past course of dealing between the parties, plaintiff should present

them for payment before suing out provisional seizure.

[2] The costs of the main demand must fall on defendant, as the tender made was not a legal tender, and the money was not deposited in court. As all the notes are now past due, the judgment must be for the full amount sued for.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed in so far as it condemns defendant to pay the amount sued for and the costs of the main demand, and that it be set aside in so far as it maintains the provisional seizure and condemns defendant to pay the costs of same; and it is further ordered, adjudged, and decreed that the plaintiff pay the costs of the said provisional seizure, as well as those of the present appeal.

(129 La.)

No. 19,157.

ROUSSEL v. DORNIER et al.

In re ROUSSEL.

(Supreme Court of Louisiana. Nov. 27, 1911.
Rehearing Denied Jan. 15, 1912.)

(Syllabus by the Court.)

ELECTIONS (§ 154*)—NOMINATIONS—REVIEW OF PROCEEDINGS BY COURTS.

In the absence of any statute giving them jurisdiction, the courts have no power to interfere with the judgments of the committees and tribunals of established political parties in matters of party government and discipline. The same rule applies to primary election laws. Under the existing primary laws of Louisiana, no appeal to the courts is authorized until after the returns of the election have been promulgated, and after the proper committee has acted on the protests of candidates; and the functions of political committees as to nomination papers in proper statutory form are purely ministerial. The courts have jurisdiction to compel the performance of such ministerial functions, and to prevent usurpation of power by such committees.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 136; Dec. Dig. § 154.*]

Action by Christopher Roussel against Joseph B. Dornier and others. Application by plaintiff for writs of mandamus and certiorari. Application dismissed, with costs.

Benjamin R. Forman and E. H. Farrar, for relator.

LAND, J. Relator and Joseph B. Dornier, of the parish of St. James, filed with the chairman of the Democratic parish committee their respective notifications of their intention to become candidates at the next ensuing primary election for the Democratic nomination for the office of sheriff of said parish. Relator filed his protest before said committee against that body receiving or filing the said notification of Dornier, and against his name being printed on the tickets to be distributed by said committee at said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

primary election, on the ground that said Dornier, having acted as a deputy registrar of voters in and for the parish of St. James, was prohibited from becoming a candidate by the provisions of Act 98 of 1908, reading as follows, viz.:

"The registrar of voters and his clerks appointed under the provisions of this act shall be bona fide voters of the parish, and shall not be eligible to any elective office, state, parochial or municipal, during their term of office and for three months after the expiration thereof, or after their resignation, if they should resign."

The Democratic parish committee by a majority vote refused to consider the protest of the relator. Thereupon the relator filed a petition in the twenty-seventh judicial district court for the parish of St. James reciting the facts, and applying for writs of injunction, prohibiting said committee and the members thereof from allowing said Dornier to become a candidate and from printing his name on the ballots to be used at the next primary election for the Democratic nomination for sheriff of said parish; and praying that said injunction be perpetuated, and the action of the committee in the premises be vacated and annulled. For answer to a rule nisi, Dornier and the majority members of the committee excepted on the ground that the court was without jurisdiction *ratione materię*; and, under reservation, excepted that the petition disclosed no right or cause of action; and, under further reservation, that the provisions of the act of 1908, above quoted, are unconstitutional.

Our learned Brother below sustained the exception to the jurisdiction of his court in the premises.

Thereupon the relator instituted the present proceedings to compel the respondent judge to entertain jurisdiction of his injunction suit, and to grant the injunction as prayed for therein by the relator.

As part of his answer, the respondent judge has annexed the written reasons assigned by him for refusing the application of the relator for a preliminary injunction. The judge held that there is no provision of the primary laws that empowers or requires a party parish committee to pass upon the eligibility of candidates for nomination; or that authorizes the courts to declare ineligible a person who has applied in due form, at the proper time and to the proper authorities, to become a candidate for nomination. The judge cited *State ex rel. Trosclair v. Parish Committee*, 120 La. 620, 45 South. 526; *State ex rel. Burke v. Foster*, 111 La. 939, 36 South. 32, and other authorities.

The only question at issue before us is the question of jurisdiction. It is conceded by counsel for relator that the primary laws confer no authority on the courts to interfere in a case of this kind. But it is argued with great earnestness that the relator is entitled to an adequate remedy by due process of law under article 6 of the Constitu-

tion of 1898; and that article 109 of the same instrument gives the country district courts jurisdiction in all cases where the title to office, or other public position, or civil or political rights, are involved.

In the *Trosclair Case*, supra, it was held that the functions of a parish committee, under the compulsory primary law of 1906 (Act No. 49 of 1906) in respect to written notifications of candidacy, are purely ministerial, and that such committee was without jurisdiction to question the truth of the declaration of an applicant that he was a member of the Democratic party. The court said, *inter alia*, that:

"The act confers no jurisdiction whatever on any person or committee to refuse to receive or to vacate any application made in due form under the statute."

It necessarily follows that the particular ground of ineligibility urged by the protestant is immaterial. If the functions of the Democratic parish committee are ministerial, it follows that said committee had no jurisdiction to hear and determine the protest made by the relator. We see no good reasons to overrule the doctrine of the *Trosclair Case*. If the committee had no such jurisdiction, it is evident that the district court is without power to compel the committee to hear and determine the protest of the relator. There is no provision in the primary law for an appeal to party committees or to the courts, until after the promulgation of the result of the primary election. *Trosclair Case*, 120 La. 625, 45 South. 526. The statutory remedy of an aggrieved candidate is by protest filed with the chairman of the committee ordering the primary, within five days after the promulgation of the returns; and by appeal to the courts from an adverse decision of the committee. Section 25, Act No. 100, 1908. In *State ex rel. Burke v. Foster*, Judge, 111 La. 939, 36 South. 32, the court after citing 10 A. and E. Ency. Law (2d Ed.) pp. 660, 661, said:

"Hence, as far as party nominations are concerned, the decision of disputes rests with the party whose nomination is claimed. The Legislature may invest jurisdiction in certain public officers or the courts. If such jurisdiction be not vested, the decision rests with the party, and the courts cannot interfere in the matter."

In the same case, it was held that article 109 of the Constitution of 1898 did not apply to party nominations.

In the case of *State of La. v. Judge*, 13 La. Ann. 89, the court said:

"The contesting of votes is not a judicial function, only so far as made such by special statutes. Indeed some may have gone so far as to question whether this is not wholly a matter of administration which cannot with propriety be referred to the judicial tribunals at all. At any rate it is clear that such tribunals cannot usurp any greater control over this business than is specially imposed on them by law. In the absence of a statutory authorization, they are without jurisdiction of the matter, *ratione materię*."

This case affirmed the general rule that "courts of equity have no inherent power to try contested elections" (15 Cyc. 397); and its doctrine has been uniformly followed by the Supreme Court of this State. See *Collins v. Knoblock*, 25 La. Ann. 263; *State ex rel. Moncure v. Dubuclet*, 28 La. Ann. 703; *State ex rel. Woodruff v. Police Jury*, 41 La. Ann. 848, 6 South. 777. The reason underlying these doctrines applies with greater force to party government and nominations, the general rule as to which has been stated as follows:

"In the absence of any statute giving them jurisdiction, the courts have no power to interfere with the judgments of the committees and tribunals of established political parties in matters involving party government and discipline." 15 Cyc. 330.

The same rule applies to primary election laws. 15 Cyc. 332.

Considering that articles 16 and 17 of the Constitution of 1898 divide the government into three distinct departments, legislative, executive, and judicial, and forbid each department from exercising powers properly belonging to either of the others, it may be presumed that the lawmaker in the enactment of articles 6 and 109 referred to cases within the inherent powers of the courts.

It is therefore ordered that the relator's application be dismissed, with costs.

(129 La.)

No. 19,146.

STATE v. NOLAN.

(Supreme Court of Louisiana. Jan. 2, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1158*)—APPEAL—QUESTIONS OF FACT.

Art. 85 of the Constitution provides that in criminal cases the Supreme Court shall review only questions of law. Questions of fact are for the jury, or the judge, and, where there is any evidence at all in the case, their findings of fact cannot be reviewed by this court (as relates to guilt or innocence of the accused).

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3061-3066, 3071, 3074-3084; Dec. Dig. § 1158.*]

2. STATUTES (§ 118*)—SUBJECTS AND TITLES—WORK ON PUBLIC ROADS.

Act No. 51 of 1906 has only one object, which relates to work on the public roads by defendants who heretofore were condemned to imprisonment only.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 158-160; Dec. Dig. § 118.*]

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

W. W. Nolan was convicted of unlawfully retailing intoxicating liquors, and appeals. Affirmed.

Joseph H. Levy, for appellant. Walter Guion, Atty. Gen., and J. M. Foster, Dist. Atty. (G. A. Gondran, of counsel), for the State.

BREAUX, C. J. A bill of information was filed against the defendant charging him with unlawfully retailing intoxicating liquors.

He was tried and found guilty and sentenced to pay a fine of over \$300 and to 90 days work on the public roads.

He has appealed.

There are two bills of exceptions in the record.

The first bill contains a full statement of the case, and in addition reserved several legal points for review by this court.

Defendant filed a motion for a bill of particulars, to which the district attorney stated in answer that he would comply with the request of the learned counsel of the defendant and would not prove that other beer than the Piltzner beer was sold by defendant.

The bill of exceptions further states that all the evidence of the state consisted of an internal revenue license and the testimony of a witness named Warren, who was (it is stated in the bill) a detective and a stranger in the community, who testified that he bought Piltzner beer from the defendant; that he knew it was Piltzner beer from the taste of the liquor; that he could tell, by drinking, the difference between several brands of beer, without seeing a label thereon.

The defendant, on the other hand, as a witness, denied that he had ever sold any liquor at all to this witness on the day mentioned or on any other day.

The bill of exceptions relates at some length and particularly that defendant is an honest and industrious man, who has been employed in different branches of industry, and was well considered in the community; that he went into the liquor business after a decision of the Supreme Court, sanctioning, as defendant understood, the sale of near beer, and after having obtained a license to sell "near beer"; and that was the only drink he sold.

He further stated in the bill of exceptions: That a negro boy, his helper, corroborated his testimony before the court on his trial. That the police had visited his establishment, made searches therein, and found no intoxicants in the saloon.

That several persons who patronized him testified that they had never been able to buy anything stronger than beer at the bar he kept.

As to the witness Warren, who was specially employed to detect the illegal selling of liquor, and who had been denounced, the defendant testified against him, as a witness on the trial; a brew master and a saloon keeper testified that all he said about what he could do by merely tasting liquor was untrue; that they themselves could not distinguish brands by merely drinking beer of different makes.

That the court held that he believed the

testimony of the witness Warren, and erred in thus believing the witness.

[1] Learned counsel for defendant argues on behalf of his client that the court of the first instance has generally erred in weighing the evidence.

We can only say that the evidence was heard by the learned judge; that it rested with him to weigh the evidence and to decide the questions of fact presented.

The questions brought up by the bills are exclusively questions of fact.

The evidence of fact, though reduced to writing and made part of the record, will not be examined to the end of determining whether it authorized the conviction. *State v. Peterson*, 2 La. Ann. 921; *State v. Nelson*, 3 La. Ann. 497; *State v. Snow*, 30 La. Ann. 401; *State v. Ryan*, 30 La. Ann. 1176; *State v. Beatty*, 30 La. Ann. 1266; *State v. Crawford*, 32 La. Ann. 526; *State v. Bird*, 38 La. Ann. 497.

We are the interpreters of the law; as such, we interpret them as written. This does not invest in the court the authority of assuming appellate jurisdiction of questions of fact.

Questions of law which may arise in case one is convicted without evidence are not before us in any shape. That presents another issue entirely, which is not before the court. There was evidence heard, and the objection is that the court erred in weighing it.

The present Constitution is as emphatic upon the subject as was the prior Constitution.

"The Supreme Court shall have appellate jurisdiction only in criminal cases on questions of law alone." Article 85.

Were we to set aside the verdict and judgment on the ground urged, it would become necessary in appealable cases to pass upon the guilt or innocence of the defendant.

As to the extreme case which the counsel for defendant puts of an accused convicted upon no evidence at all—if that were possible—if the verdict were rendered arbitrarily without justice or law, he would not be without the possibility of some remedy.

That is not the case here.

After having heard the evidence offered, he was found guilty. The weight of the testimony was determined by the proper authority. The decision is final.

[2] By the second bill of exceptions, it appears: That defendant, through learned counsel, filed a motion to set aside and vacate that part of the sentence compelling him to work on the public roads on the ground that Act 51 of 1906, under which the sentence was imposed, was unconstitutional for the reason that the title contained two dis-

tinct objects, and the body of the act also contained two objects.

That this act was unconstitutional on the further ground that it was an attempt to sweepingly amend all of the criminal statutes and municipal ordinances without reenacting each statute or ordinance and publishing them at length.

These two grounds are considered together.

As for the first, there is no necessity of excluding any of the clauses in the act as expressing a dual object. The title expresses the state's one object, to wit:

In all prosecutions, "sentences to imprisonment, or to imprisonment without qualification, and of all sentences for violation of ordinances shall mean imprisonment with labor, and, in carrying out the same object, it is to regulate the employment of such imprisonment."

The objects are germane, virtually the same. They denote the power granted to the court to condemn to imprisonment with labor instead of, as heretofore, to imprisonment exclusively.

Both in the title and in the body of the act, there is one purpose, to wit, authority to the courts to condemn defendants to work on the public roads.

The decisions cited by learned counsel are not controlling. *State v. Ferguson*, 104 La. 249, 28 South. 917, 81 Am. St. Rep. 123; *Bosler v. Steele, Sheriff*, 13 La. Ann. 433.

The court, in these cited cases, found that there were two objects.

In the first decision cited, one of the objects was said to be the encouragement of trade and the other the sale of tickets.

The court held that, these being two separate objects, the act referred to in that case was unconstitutional.

In the second decision cited, one of the objects related to the payment of expenses in criminal cases, while the other relates to the payment of fines and forfeiture to the State Treasurer.

The court held that the objects were distinct under the guise of paying expenses in criminal prosecutions. It might extend to an interference with the collection of revenues of the state.

In the case before us for decision there is, as before stated, only one object. That one object relates to work on the public roads by defendants who heretofore were condemned to imprisonment.

It was possible to adopt the provisions which were adopted in the act assailed in this case without the necessity of enacting two or more laws in order to cover all that was necessary to make the act effective.

The last stated is merely supplementary to other statutes previously adopted.

For reasons stated, the judgment appealed from is affirmed.

(129 La.)

No. 18,341.

RODRIGUEZ v. PREVOST et al.

{Supreme Court of Louisiana. June 5, 1911.

On Rehearing Jan. 29, 1912.)

(Syllabus by the Court.)

WATERS AND WATER COURSES (§ 153*)—EASEMENTS—TRANSFER OF PROPERTY.

The purchaser of a part of a plantation takes the property subject to an apparent servitude of drain.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 158-160; Dec. Dig. § 153.*]

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; James R. Parkerson, Judge ad hoc.

Action by Duvillier Rodriguez against Arthur Prevost and others. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 120 La. 1050, 46 South. 19.

Allen & Pecot, for appellant. Percy Smith and Borah & Himel, for appellees.

LAND, J. In August, 1894, the plaintiff purchased from Mrs. Alix Prevost a tract of land containing 108.62 arpents, forming the western portion of the Alix plantation. A right of way 30 feet in width through the entire depth of the tract so conveyed was reserved by the vendor for the benefit of said plantation. This right of way led to a public road that had been used for many years for plantation purposes.

After the death of Mrs. Prevost, the defendants having become the owners by inheritance of the Alix plantation, and having acquired another tract of land also lying north of plaintiff's property, instituted suit in July, 1905, against the plaintiff herein, to recover the strip of land covered by said right of way, and also damages. The plaintiff herein denied the claim of the defendants to the ownership of said strip of land, and, reconvening, enjoined the defendants from draining their lands by artificial means over the property of the plaintiff.

That litigation resulted in a judgment in favor of the plaintiff herein as to the ownership of the strip of land and one of nonsuit on his reconventional demand. See Prevost v. Rodriguez, 120 La. 1050, 46 South. 19.

The present suit was instituted for the purpose of restraining the defendants from exercising the right of drainage over the lands of the plaintiff by means of a ditch cut through a ridge or elevation which traverses the northern portion of plaintiff's plantation. Plaintiff alleged that about seven years before the filing of this suit defendants, without permission or authority, cut a ditch through said ridge or elevation, so as to connect with the ditch which plaintiff had cut for the benefit of his own property, thereby causing a diversion of the natural drainage to such an extent as to over-

flow plaintiff's plantation, to his great damage and injury.

Defendants admit that they opened or deepened a drainage ditch through the ridge or elevation on plaintiff's tract of land, but defend on the following grounds:

(1) Natural drainage.

(2) Ditch was used for drainage of their lands when plaintiff purchased the tract below.

(3) Prescription *acquirendi causa* of 10 and 30 years.

(4) Agreement that defendants should have the right to drain the Alix plantation through said ditch.

There was judgment in favor of the defendants, sustaining the alleged servitude of drain, and for \$400 for damages to crops caused by the closing of the drainage ditch by the plaintiff.

The locus in quo was surveyed by an engineer appointed by the court, and it is evident from the levels ascertained by him, that the depression north of the plaintiff's land naturally drained toward the east and southeast, and not over the plaintiff's property. The land in that immediate section is flat and nearly level, and most difficult to drain in any direction. The crown of the elevation running across the northern part of plaintiff's tract is 12 inches above the lowest level of said depression. The difference in the depth of the drainage ditch between the same points is 3 inches. The report of the expert shows that the owners of the Alix and other plantations, in their efforts to drain their lands, have, as a general rule, not followed the depressions, but have cut through the elevations, and drained towards the parish canal, constructed years ago by the police jury with the aid of contributions from the landowners of the vicinage. Ditch No. 1, in dispute, cuts through the elevation on plaintiff's tract and drains into the parish canal. This ditch follows the roadway reserved for the use of the Alix plantation. As already stated, the plaintiff purchased a part of the same plantation in 1894, from Mrs. Prevost, his mother-in-law.

Plaintiff said, on cross-examination, that in 1898 he permitted the Prevosts to open and use said ditch, and for seven years made no objection, but that prior to 1898, the ditch had been confined to the south side of said elevation. On the other hand, the three Prevosts and the witness Brown testified positively that the drainage ditch, on the edge of the roadway, had, throughout its whole length, existed for many years, and had been used for drainage purposes. This testimony on this point is corroborated by that of other witnesses. This ditch was deepened by the Prevosts in the year 1898 as already stated, and the plaintiff made no objections until the year 1905. Several witnesses for the plaintiff testified that the ditch, prior to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

plaintiff's purchase, extended to the north line of the tract now owned by him. The extension of the ditch through and beyond the elevation could have had no other purpose than the drainage of the lands to the north.

It is shown by the testimony of two surveyors that the general slope of the prairie is towards the south in the direction of the parish drainage canal. One of these surveyors, who had taken the levels for the purpose of ascertaining how the waters could be prevented from overflowing the public road immediately south of the plaintiff's premises, testified that the only practicable system of drainage was in a southerly direction into the parish canal. We gather from his statements that the land is low, wet, and nearly level, and is drained by canals and a multitude of ditches and cross-ditches. Under such circumstances slight depressions running across the natural slope towards the south are not factors of importance in the matter of drainage. A practical planter, in draining his fields, would in all probability so locate his ditches as to follow the natural fall of the body of his land, rather than the slight depressions tending in other directions. The owners of the Alix plantation must have had, for years, a drainage ditch running south through the tract subsequently sold to the plaintiff. The slight elevation of one foot presented no difficulty in the way of the extension of the ditch into the depression for the purpose of draining the land to the west and northwest.

A ditch along the roadway through the plantation might well serve the double purpose of draining the road and the contiguous lands. Therefore the testimony for the defense that the ditch in question was used for drainage purposes at and before the purchase of the plaintiff is probable in itself, and seems to have been given credit by the trial judge. From our examination of the record, we are not prepared to say that the judgment below is contrary to the evidence.

If the drainage ditch existed on the locus in quo at the time of the sale to the plaintiff, he took the property subject to the apparent servitude of drain. See *Lallande v. Wentz & Pochelu*, 18 La. Ann. 289, and the authorities there cited.

The objection that at the date of such sale the Alix plantation did not include *all* of the lands abutting the northern boundary of the tract sold to the plaintiff is without force, because the contiguous portion of said plantation was subject to the servitude of drain in favor of the lands to the west and northwest.

Judgment affirmed.

On Rehearing.

This case involves only issues of fact, and a reconsideration of the evidence has not

changed our former conclusions. It is admitted that the drainage ditch in question had existed for eight years, with at least the tacit consent of the plaintiff, before the institution of the present suit. The two Prevosts, reputable witnesses, testified positively that said ditch had existed for much more than ten years before this suit was filed. Admitting that the evidence on this point is conflicting, the trial judge gave credit to the witnesses for the defense.

It is therefore ordered that our former decree herein be reinstated and made the final judgment of this court.

(129 La.)

No. 18,874.

HAMMOND LUMBER CO., Limited, v.
SMART, Sheriff, et al.

(Supreme Court of Louisiana. Jan. 29, 1912.)

(Syllabus by the Court.)

TAXATION (§ 98*)—PLACE OF TAXING—MOVABLES.

Movables brought from another state or country into this state after January 1st of the current tax year are assessable in the parish or district of their location. The same rule applies to movables brought from one taxing district to another taxing district of this state, provided they have not been assessed in the former.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 196–198, 200; Dec. Dig. § 98.*]

Appeal from Twenty-Fifth Judicial District Court, Parish of Livingston; George J. Woodside, Judge.

Action by the Hammond Lumber Company, Limited, against W. L. Smart, sheriff, and the Parish of Livingston. Judgment for plaintiff, and defendants appeal. Reversed.

Walter J. Gulon, Atty. Gen., R. G. Pleasant, Asst. Atty. Gen., and W. H. McClendon, Dist. Atty. (S. Dan Corkern, of counsel), for appellants. B. B. Purser, for appellee.

LAND, J. Plaintiff was assessed in the parish of Livingston for the year 1910 with "8 miles of railroad and 8 teams of oxen, and 8 wagons," at a total valuation of \$15,000. The petition alleged that said property was carried into the parish of Livingston on February 17, 1910, and that the same property was assessed in the parish of Tangipahoa for the year 1910, and plaintiff has duly paid the taxes thereon. The evidence shows that the steel rails for the eight miles of railroad came from Mississippi about February 1, 1910. The oxen and wagons came from the parish of Tangipahoa. There is no evidence that the same teams and wagons were assessed in said parish.

Counsel for plaintiff in his brief states his contention as follows:

"The question therefore is whether property brought into the parish of Livingston from out-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

side the taxing district on a date subsequent to January 1, 1910, is a proper subject for taxation for that year."

This question has been already answered in the affirmative by this court as to a contractor's outfit, consisting of mules, scrapers, etc., brought from Texas into this state in the latter part of April of the current tax year. See *Construction Co. v. Tax Collector*, 108 La. 435, 32 South. 399, 58 L. R. A. 349.

As to the oxen and wagons brought from the parish of Tangipahoa, the question is *res nova*.

Section 11 of Act 170 of 1898 provides that:

"All movable property shall be assessed in the parish or district where it is located."

The contention of plaintiff is that movables brought into the parish after January 1st of the current tax year cannot be assessed therein for taxation. If this be true, such movables can be assessed only in the taxing district in which they happen to be on January 1st of the current year.

Such a construction would require the assessor to keep an account of all the movables in his taxing district on the first of the year, otherwise an assessor could not possibly assess movables moved out of his district after January 1st of the current year. Again, as article 233 of the Constitution forbids suits to collect taxes, and provides that taxes on movables shall be collected by seizure and sale by the tax collector of the movable property of the delinquent, it is difficult to conceive how the tax collector could seize movables outside of the limits of his district. In short, it seems to us impracticable to assess and collect taxes on movables in a taxing district from which they have been removed on and after January 2d of the tax year. In *Bunkie Brick Works v. Police Jury*, 113 La. 1062, 37 South. 970, the land had been assessed to the owner according to law, and later he constructed thereon buildings

and improvements. About June 20th of the same year the assessor made an additional assessment of the buildings and improvements constructed or in course of construction. In that case we held that the revenue laws contemplate an assessment on the basis of values and conditions existing on the 1st day of January of each year, quoting from *Insurance Co. v. Board of Assessors*, 49 La. Ann. 401, 21 South. 913, as follows:

"The very motion of assessment involves the fixing of values of a certain date, since there is no mode of making the valuation vary with the increased or diminished value during the current year and were there, such varying valuation would be destructive of established principles of uniformity."

In *Palfrey v. Tax Collector*, 106 La. 699, 31 South. 148, land with growing timber thereon was assessed, and subsequently the owner sold the timber, and thereupon the timber was assessed to the purchaser. The court held that the assessment of the land necessarily included the growing trees thereon. In all of these cases, property subject to taxation was in the taxing district on January 1st of the current tax year. It is evident that the doctrine of these cases has no application to movables not in the taxing district on January 1st of the current tax year.

The constitutional mandate is that "all property shall be taxed in proportion to its value," and there is nothing in our revenue laws that would warrant the conclusion that the lawmaker ever contemplated that movables should escape taxation by their removal to another taxing district in the state.

It is therefore ordered that the judgment below be reversed, and it is now ordered that the demands of the plaintiff be rejected, and the rule herein sued out be discharged, with 10 per cent. damages on the amount of taxes and interest as attorney fees, and that plaintiff pay costs in both courts.

The CHIEF JUSTICE concurs in the decree.

(129 La.)

No. 18,665.

**ELLERSLIE PLANTING CO., Limited, v.
BLACKMAN.**

(Supreme Court of Louisiana. Jan. 2, 1912.)

*(Syllabus by the Court.)***HUSBAND AND WIFE (§ 264*) — COMMUNITY
PROPERTY—EVIDENCE.**

Where a married woman intervenes, and claims as her own movable property which her husband has pledged, as belonging to him, for a community debt, and it appears that the property was acquired by the husband, she must show, clearly and with certainty, that in so acquiring her husband acted as her agent, in her name, and for her account, and that the property was paid for with her paraphernal funds, of which she retained the administration; otherwise, there can be no recovery.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 916; Dec. Dig. § 264.*]

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Charles Austin O'Neill, Judge.

Action by the Ellerslie Planting Company, Limited, against Warren O. Blackman, in which Mrs. Fannie Maddox Blackman intervenes. From a judgment for intervener, plaintiff appeals. Reversed, and demands of intervener rejected.

Borah & Himel, for appellant. James R. Parkerson and Mark M. Boatner, for appellee Fannie Maddox Blackman.

Statement of the Case.

MONROE, J. Plaintiff brings this suit on a note for \$2,525.18, given by defendant for the price of two mules and for advances, made by it (plaintiff) for the purpose of his (defendant's) crop of 1909, and on an open account for a balance of \$1,019.11, due for advances on the crop of 1910. The contract for the advances for the crop of 1909 declares that defendant is the owner of ten mules, and other movable property, "without which this contract would not have been made," and that said ten mules are specially pledged and pawned the more effectually to secure said advances. Upon the proper allegations, affidavit, and bond, the mules were seized, under a writ of sequestration, and thereafter, defendant making no appearance, there was judgment against him, by default, as prayed for. Mrs. Blackman, defendant's wife, intervened, however, alleging that she is "the owner of the eight mules described and designated in plaintiff's petition"; that she acquired them, by purchase, with money inherited from the estate of her mother, and "rented" them to defendant for \$200 a year; and that defendant was without authority to pledge or pawn them. Wherefore she prays that she have judgment for said eight mules, and for damages. Mrs. Blackman testifies that her mother died 29 years ago, and that she inherited certain real estate from her; that 19 years ago she was married, and 15

years ago received \$3,750 as the proceeds of the real estate inherited from her mother; that she immediately afterwards told her husband to buy mules and make a living, and that she would pay for them, and that it was done; that the mules so purchased were young; that she does not know from whom they were bought, save three, that were bought from her husband's cousin; that she put the money in bank to her credit, but has no canceled checks; that she does not know when she entered into the contract whereby she leased the mules to her husband; that it has been going on about 10 or 12 years; that the rent was paid; that she does not know how; that, if it had been paid in money or check, she would have known it; that it was paid in money; that she does not know what amounts were paid, or when, and that she gave no receipts and kept no account; that her husband "continued to run the business," and that she never rented any lands or farmed; that the mules seized were not the same that were originally bought, but there had been trading and re-trading, buying and selling.

Mr. Wells, a witness called by intervener, testifies that she (intervener) got some \$2,000 from her mother's estate and bought two mules, but he does not know whether she owned any mules when she moved (from Rapides) to St. Mary parish; that the two mules were bought three or four years after Mrs. Blackman's marriage, and that he does not know whether it was she or her husband who bought them. Mr. D. H. Blackman (brother-in-law of intervener) testifies that she (intervener) received between \$3,500 and \$4,000 for the property inherited from her mother's succession; that he thinks she bought stock and farming utensils; that they (she and her husband) took eight mules with them to St. Mary; that "it was always understood that the property belonged to her; the money was used out of the estate to buy the mules with." The testimony so given was objected to, and on cross-examination the witness said that he was not present when any stock or utensils were bought and did not know who bought them.

Opinion.

The intervener fails to make out her case. The two witnesses called in her behalf, save, perhaps, that they may have known that she received something from the estate of her mother, testify from hearsay. She herself says that she told her husband (say, 15 years ago) to buy mules and make a living, and that she would pay for them, but that, since then, there has been buying and selling, trading and re-trading (in none of which does she appear to have participated), and that the mules which she now claims are not the mules which were then purchased, and which appear to have been purchased by her hus-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

band, in his own name, and used and held out as his own, until they died, perhaps, or were sold, or traded for others, which, in turn, were sold, died, or traded for others. No one from whom mules were bought or to whom mules were sold by the husband has been called to testify that they were bought or sold as the property or for the account of the wife, and the burden rested upon her to prove that her husband, acting as her agent, bought or otherwise acquired them (i. e., the mules that are here in dispute) in her name and for her account.

"Although we have held" (this court has said) "that the agency of the husband is not incompatible with the wife's separate administration, yet such agency must be clear and certain, and the administration must be distinctly conducted in her name and for her account," *Trezvant v. Holmes*, 38 La. Ann. 146 (syllabus).

"Property purchased with the paraphernal funds of the wife only becomes her separate property while she keeps the administration of her separate estate, and when the title is taken in her own name, either as a purchase with funds which she administers herself, or as a dation en paiement, made to her by the debtor of a separate and paraphernal debt." *Rousse v. Wheeler and Wife*, 4 Rob. (La.) 114 (syllabus).

See, also, *Dominguez v. Lee et al.*, 17 La. 300; *Hanna v. Pritchard*, 6 La. Ann. 734; *Succession of Wade*, 21 La. Ann. 344; *Tally v. Heffner*, 29 La. Ann. 583; *Succession of Merrick*, 35 La. Ann. 296; *Succession of Pierce*, 119 La. 732, 44 South. 446; *McWilliams v. Stair*, 128 La. 752, 55 South. 343.

It is therefore ordered, adjudged, and decreed that the judgment appealed from, in favor of the intervener, be annulled, avoided, and reversed, and that her demands be rejected, at her cost in both courts.

(129 La.)

No. 18,758.

NATIONAL PACKING CO. v. DAVIS & SCHARFF GROCERY CO., Limited.

(Supreme Court of Louisiana. Jan. 15, 1912.)

(Syllabus by the Court.)

FACTORS (§ 31*)—ACCOUNTING FOR PROCEEDS.

Defendant, having received and sold goods at prices quoted by the plaintiff, thereby agreed to pay such prices, and cannot avoid the obligation by the plea that the prices charged were in excess of current market quotations.

[Ed. Note.—For other cases, see *Factors*, Cent. Dig. §§ 34–36; Dec. Dig. § 31.*]

Appeal from Nineteenth Judicial District Court, Parish of Iberia; James Simon, Judge.

Action by the National Packing Company against Davis & Scharff Grocery Company, Limited. Judgment for plaintiff for less than the amount claimed, and it appeals. Reversed and rendered.

Weeks & Weeks, for appellant. Burke & Burke and Ventress J. Smith, for appellee.

LAND, J. Plaintiff sued the defendant for a balance of \$4,614.12, alleged to be due for packing house products sold and delivered since November 1, 1907. The petition alleges a balance of \$5,285.35 due on merchandise account, but remits the sum of \$671.23 for overcharges in weight made on shipments prior to November 1, 1907.

The defendant for answer averred systematic overcharges, both in weights and prices, from about April, 1906, to October, 1907, to the aggregate amount of \$5,739.60, for which the defendant prayed judgment in reconvention.

The judgment of the court, based on the report of experts, was in favor of the plaintiff for a balance of \$704.80, with interest and costs. Plaintiff has appealed.

In September, 1903, the defendant entered into a "jobber's contract" with the Hammond Packing Company, of Louisiana, having its home office at Chicago, Ill. The instrument was drafted in Chicago, Ill., and it was stipulated that all questions arising under the contract should be governed by the laws of that state. The salient stipulations of the agreement may be briefly stated as follows:

The goods, until sold, were to remain the property of the packing company, and were to be held by the defendant as its factor, and subject to its order. The defendant was to receive the goods, pay freight or other charges thereon when not prepaid, sell and handle the same without expense to the packing company, except the commission or brokerage provided in the contract, and to account for the full value of every article shipped. The company's weights at the time of shipment were to govern deliveries. The company guaranteed such weights, but no claim for shrinkage would be entertained. All goods used by defendant were to be billed to itself the same day they are taken from the stock of the company. Sales were to be made in each case by the defendant on its own account, at the prices quoted by the company. Unsold portions of every consignment, at the expiration of 30 days from date of shipment, were to be charged to the defendant at the prices then current.

On March 3, 1907, the defendant made a similar "jobber's contract" with the plaintiff company, which succeeded the Hammond Packing Company. Both of these Louisiana corporations were branches of the National Packing Company of New Jersey, which had an office in Chicago.

Both contracts were made by the defendant with the Louisiana corporations.

Each contract contained the following stipulation:

"You shall bill to yourselves all goods used by you on the same day they are taken from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

our stock. Sales shall be in each case made on your account at the prices quoted you by us."

In other words, the defendant was to charge itself for all goods used or sold at the prices quoted by the packing company. Unsold portions of consignment, at the expiration of 30 days from shipment, were to be charged to defendant at the then current prices. The contract in its very nature required the fixing of prices by the packing company for every consignment shipped to the defendant.

The defendant accepted the goods at the prices quoted by the packing company, charged itself with the quoted prices as the goods were sold, and paid on the basis of such prices from year to year. The contention of the defendant as to overcharge of prices is set forth in his answer as follows, to wit:

"That the agents of the plaintiffs systematically, beginning from a period during or about the month of October, 1906, and extending to or about the month of October, 1907, overcharged the defendants for the goods shipped, both with reference to their weight and with reference to the market quotations, which were to be the basis of the prices to be charged, thus making entries against your defendants, with fraudulent design, showing greater bulk of goods than those actually shipped, and showing higher quotations with reference to the price than those actually prevailing."

Shortage in weight is admitted, to the extent of 7,700 pounds, of dry salt shoulders, charged at \$671.12. It appears that there was a shortage of stock in the New Orleans Branch, and some employé of the plaintiff, in order to cover up such shortage, raised the weights of certain products billed to defendants. This shortage was discovered and settled before the institution of this suit.

The experts appointed by the court found the amount of excessive charges by the New Orleans branch, over and above "Chicago prices," to be \$4,000.99. Such prices were taken from invoices sent by packing companies to the Chicago office of the National Packing Company, covering car loads of goods shipped directly to defendants on the orders of the plaintiff sent through the Chicago office. Several witnesses for the plaintiff testified that the prices in such invoices were not definitive, but subject to adjustment between the packing companies and the National Packing Company after sales of the goods; and that such invoices did not govern the prices charged by the plaintiff as selling agent. They further testified that the business between plaintiff and the National Packing Company was on a consignment basis, with a minimum price for sales of goods; and that it was the duty of the plaintiff company to sell at higher prices, in order to meet the expenses of the branch agency in the city of New Orleans. It is evident, as a business proposition, that the plaintiff company could not afford to sell to local dealers

at "Chicago prices," or at prices invoiced by the packing companies to the National Packing Company of New Jersey.

As a matter of fact, during the period stated in the answer, goods were consigned by plaintiff to defendant on prices quoted, from time to time, by the former, and the defendant accepted the goods and charged itself with the prices quoted by the plaintiff. This was the practical construction by the parties of the clause of the contract reading:

"Sales shall be in each case made on your own account at prices quoted you by us."

The defendant was under no obligation to accept the goods, if the prices quoted were not satisfactory, and was at liberty to cancel the contract at any time, and to order the goods elsewhere. The defense as to overcharge of prices was evidently an afterthought. After a full investigation and checking of accounts, the defendant verbally promised to pay the balance found due the plaintiff, and as late as January 13, 1908, wrote to the plaintiff as follows:

"Owing to bad weather the planters around here have been delayed from one to two weeks; consequently we will be unable to fulfill our promise to liquidate our account by the 13th as promised. We will be able to mail you a check for \$3,000 by the 20th and the balance if the weather is fairly good by the 25th."

It is therefore ordered that the judgment below be reversed, and it is now ordered that the plaintiff, the National Packing Company, Limited, do have and recover of the defendant, the Davis & Scharff Grocery Company, Limited, the full sum of \$4,614.12, together with 5 per cent. per annum interest thereon from judicial demand until paid, and costs of suit in both courts.

(129 La.)

No. 18,836.

GOODSON v. VIVIAN OIL CO.

(Supreme Court of Louisiana. Jan. 2, 1912.
Rehearing Denied Jan. 29, 1912.)

(Syllabus by the Court.)

MINES AND MINERALS (§ 58*) — MINERAL LEASE — VALIDITY — "CONTRACT" — "COMMUTATIVE CONTRACT."

A so-called mineral lease for 10 years, based on a royalty, in which the lessee does not obligate himself to develop the premises for oil and gas, and in which the lessee reserves the right at any time to terminate the lease after finding oil or gas in paying quantities, is void, as to the lessor, for want of consideration.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 58.*

For other definitions, see Words and Phrases, vol. 2, pp. 1345, 1513-1534; vol. 8, pp. 7615-7616.]

Appeal from First Judicial District Court, Parish of Caddo; Thomas F. Bell, Judge.

Action by W. M. Goodson against the Vivian Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Thigpen & Herold, for appellant. John B. Files, for appellee.

LAND, J. Plaintiff sued to cancel an alleged mineral lease on the ground of want of mutuality in the covenants, and on the further ground of abandonment. There was judgment for the plaintiff, and the defendant has appealed.

The instrument, of date December 11, 1909, granted to the defendant the exclusive right to drill and explore for oil, gas, and other minerals on a certain tract of land containing 35 acres more or less, with the right of using sufficient water, gas, and oil therefrom for conducting the operation of drilling, with the further right of laying pipe lines for the conveyance of oil, gas, and water across the premises, and with such further rights and privileges as were reasonably requisite for the conduct of such operation. It was further stipulated as follows:

"This grant and option is executed for the consideration, on the conditions and for the terms as follows, to wit:

"First. There is hereby granted to said company the exclusive right to begin the drilling of an oil or gas well on said premises within six months from date hereof. All pipe lines shall be buried below plow depth when requested by first party. It being understood that if actual operations for the beginning of an oil or gas well shall not have been begun on or before the expiration of six months from this date, this grant shall be considered as having expired and shall be wholly at an end.

"This grant, so accepted by the company shall be a mineral lease covering said above described lands, under which said company shall have the exclusive right to drill, mine, bore or explore the said lands for oil, gas and other minerals for a period of ten years and as much longer thereafter as oil, gas or other minerals shall be produced in paying quantities; and from such product as may be developed and produced from said lands, the said W. M. Goodson and wife shall receive royalties as hereinafter provided."

"Third. If oil or gas be found in paying quantities, then the said Vivian Oil Company shall deliver as a royalty to the said W. M. Goodson and wife, a one-eighth part of all the oil saved from that produced, such delivery to be made in tanks with connections by W. M. Goodson and wife provided or into any pipe line that may be connected with the well or wells, and if any well on said premises produce gas in paying quantities, then the said W. M. Goodson and wife shall be paid at the rate of \$100.00 per year for each and every well from which gas may be sold or used off the premises, such payments to be made at Vivian State Bank, Vivian, Louisiana.

"Fourth. . . .

"Fifth. . . . If the said company shall avail itself of the right herein granted to drill on said lands and thereby convert this option into a complete contract of lease and shall find oil or gas in paying quantities, it then shall have the right at any time to terminate said lease and to remove its machinery and property therefrom.

"Sixth. In consideration of the right granted by the said W. M. Goodson and wife to the Vivian Oil Company to drill and explore on said land within six months from the date

hereof, and in consideration of the said W. M. Goodson and wife granting to the said Vivian Oil Company, the Vivian Oil Company pays with the signing of this grant unto the said W. M. Goodson and wife the sum of \$150.00 the receipt of which said amount and the sufficiency of which as a consideration for the rights herein granted is hereby acknowledged."

Defendant drilled a well in the premises in March, 1910. This well, when it came in, spouted mud, water, and gas. On the same day the pipe was plugged, and the defendant moved its drilling machinery to another tract, to save some other lease by commencing the work of drilling thereon. The plug inserted in the well on plaintiff's land blew out, and the final result was a well, which produced nothing but water.

On June 5, 1910, Goodson wrote to the defendant as follows:

"I thought that I would notify you that your lease will end on the 11th of this month, and you have made no well yet, for the boys who drilled there say that it is no well and when I leased this land to J. C. Childs it was not for gas and they tried to make a gas well out of it and failed and I would like to hear from you at once."

The defendant, on June 7, 1910, wrote in reply that, in accordance with the terms of the lease, \$100 had been deposited to the credit of Goodson in the Vivian State Bank, covering gas royalty on Goodson No. 1, brought in as a gasser on March 10, 1910. Goodson refused to accept this payment, and, in September, 1910, objected to defendant's resuming drilling operations on the premises, and a few days later instituted the present suit.

The agreement in question is styled in the instrument a "grant and an option"; that is to say, a *grant* on the part of the plaintiff, and an *option* on the part of the defendant. The option was exercised within six months by beginning to drill a well, and the grant became a so-called mineral lease. The defendant nowhere in the instrument obligates itself to exploit the land for oil and gas, and, in the event it should do so, reserves the right, at any time, to terminate the lease, and to remove its machinery and property from the premises.

"A contract is an agreement by which one person obligates himself to another to give, to do or permit, or not to do something, expressed or implied, by such agreement." C. C. art. 1761.

"Commutative contracts are those in which what is done, given or promised by one party is considered as an equivalent to, or a consideration for, what is done, given or promised by the other." C. C. art. 1768.

As the defendant did not obligate itself to do anything, it is evident that the plaintiff received no consideration for the so-called mineral lease. In *Murray v. Barnhart*, 117 La. 1023, 42 South. 489, where the lessee obligated himself to complete a well on the premises within one year from the date of

the agreement, but reserved to himself the right to retire from the contract at any time on the payment of two dollars, it was held that the obligation of the lessee was purely potestative. In the same case, the court said that the development of the land for oil and gas was the exclusive purpose and object of the contract.

In the case at bar, there is *no obligation* on the part of the lessee to exploit the land for oil and gas, and there is *no consideration* for the reserved right to terminate the lease at any time, in the event of the finding of oil and gas in paying quantities.

The plaintiff had the legal right to treat the agreement as a nudum pactum, and to refuse the *gratuity* tendered by the defendant. The shallow well was of no benefit to the plaintiff.

The Louisiana cases cited by the learned counsel for the defendant do not cover a case of this kind, where there is *no obligation* to exploit the land, and *no consideration* for the right to terminate the contract at any time. The civil law requires a *serious consideration*, while the common law is content with a *nominal consideration*. The difference in this respect between the two systems is so wide that common-law cases have no application. See *Murray v. Barnhart*, supra. The contention that the agreement was intended as a *continuing option* for 10 years is repelled by the language of the instrument, which clearly differentiates the option from the lease.

Judgment affirmed.

(129 La.)

No. 18,616.

ALEXANDER v. NEW ORLEANS RY. & LIGHT CO.

(Supreme Court of Louisiana. Jan. 15, 1912.)

(Syllabus by the Court.)

1. STREET RAILROADS (§ 70*)—STREET CARS—SEPARATE ACCOMMODATIONS.

Act No. 64 of 1902, requiring street railway companies to provide separate accommodations for the white and colored races, is properly interpreted to mean that the position of the movable partition in a car may be changed as occasion may require; that is to say, should it be found that, at a particular time, there is more space assigned to the one race and less to the other than is needed for the accommodation of the respective classes of passengers, the officer in charge of the car may move the partition to meet that condition and may require the passengers to move their seats accordingly. But, where a passenger has found a seat in the compartment assigned to his race, the officer has no right, by moving the partition, to put him in the wrong compartment, when there is no seat to be found in the compartment thus newly established for his race.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 70.*]

2. CARRIERS (§ 283*)—CARRIERS OF PASSENGERS—OBLIGATION.

The obligation of a carrier of passengers is to carry them safely and protect them from insult and injury, and a fortiori, from injury at the hands of its own officers and employés.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1119-1124; Dec. Dig. § 283.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Joseph Alexander against the New Orleans Railway & Light Company. Judgment for plaintiff, and defendant appeals. Amended and affirmed.

George W. Flynn, for appellant. Dart, Kernan & Dart, for appellee.

Statement of the Case.

MONROE, J. Plaintiff sues for damages resulting from an assault committed upon him by a street car conductor, in defendant's employ, whilst he (plaintiff) was a passenger on the car.

Plaintiff, who is a negro longshoreman, boarded a Tulane Belt car, at Carrollton, at about half past 7 o'clock in the morning, in order to get to his work. All the seats were then occupied; the two rear seats on each side being occupied by negroes, and the screens being in front of the rear cross-seats. At Calhoun street a negro woman vacated one of the cross-seats and plaintiff took her place. A few squares down, the other occupant of the cross-seat left the car, whereupon the conductor moved the screen to the back of the seat and told plaintiff to get up, at which plaintiff demurred, as, with the change in the position of the screen, there was no vacant seat in that part of the car assigned to people of his race. He, however, vacated, but, retiring to the platform, he informed the conductor that he had wronged him and that he would report the matter to the company, and he proceeded to take the conductor's number and the number of the car. The conductor then struck him in the face with his bell punch, cutting a gash an inch long, from which the blood flowed freely, and, when the car reached Canal street, plaintiff got off, returned to his home and changed his shirt, and then went to the office of the defendant, where he was referred to the company's surgeon, who dressed his wound. He testifies that his face was bandaged for two weeks and remained disfigured for some three weeks more, so that he did not like to go to his work. We, however, find no sufficient reason, arising from his wound, for such an extended holiday. Defendant produced one witness who tells a story somewhat different from the foregoing, but he also states that, when the conductor requested plaintiff to vacate his seat, the screen was in front of him, and, upon the whole, our conclusions, as to the facts,

are as above stated. Plaintiff says that he was earning from \$8 to \$10 a day, and that he expended \$15 or \$20 for "medicines" on account of his injury. The evidence shows that there were two negro men standing on the platform at the time of the occurrence in question, and possibly a few white men, for whom there were no seats. There was judgment in the district court in favor of plaintiff awarding him \$50, and he has appealed and complains that the amount is insufficient.

Opinion.

[1, 2] The law (Act No. 64 of 1902) requires street railway companies, carrying passengers, "to provide equal, but separate, accommodations for the white and colored races, by providing two or more cars, or by dividing their cars by wooden or wire screen partitions," and further provides that:

"No person * * * shall be permitted to occupy seats in cars or compartments other than the ones assigned to them on account of the race they belong to.

"Sec. 2. * * * That the officers of such street cars shall have the power and are hereby required to assign each passenger to the car or compartment used for the race to which such passenger belongs. Any passenger insisting upon going into a car or compartment to which, by race, he or she does not belong shall be liable to a fine * * * or * * * be imprisoned, * * * and any officer of any street railway insisting on assigning a passenger to a car or compartment other than the one set aside for the race to which said passenger belongs shall be liable to a fine * * * or * * * imprisonment; and, should any passenger refuse to occupy the car or compartment to which he or she is assigned by the officer of such street railway, said officer shall have the power to refuse to carry such passenger on his car. * * *"

Defendant, with a view of complying with the law thus quoted, has provided its cars with wire screen partitions, which can be moved so as to give the large and smaller spaces in the cars to the white or colored people, as occasion may require, and we think the law is properly interpreted to mean that the position of the partition may also be changed as occasion may require; that is to say, should it be found that, at a particular time, there is more space assigned to the one race and less to the other than is needed for the accommodation of the respective classes of passengers, the officer in charge of the car may move the partition to meet that condition, and may require the passengers to move their seats accordingly. But where, as in this case, a passenger has found a seat in the compartment assigned to his race, the officer has no right, by moving the partition, to put him in the wrong compartment, when there is no seat to be found in the compartment thus newly established for his race; and still less has the officer the right to assault the passenger who complains of such treatment. The obligation of de-

fendant is to carry its passengers safely and protect them from insult and injury, and, a fortiori, from injury at the hands of its own officers and employes. We concur with plaintiff in the view that the amount awarded him is insufficient.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by increasing the amount for which defendant is condemned to \$250, and, as thus amended, that said judgment be affirmed. Defendant to pay all costs.

(129 La.)

No. 18,797.

FRISCO LAND CO., Limited, v. NEVINS.
(Supreme Court of Louisiana. Jan. 2, 1912.
On Application for Rehearing, Jan. 29, 1912.)

(Syllabus by the Court.)

TAXATION (§ 710*)—SALE—REDEMPTION—PAYMENT OF TAX COLLECTOR.

Under section 62, Act No. 96 of 1882, a tax collector was authorized to receive the redemption price of property sold for taxes, only when the purchaser at the sale could not be found. This section has no application to a case where the purchaser was a resident of the parish in which a tax sale was made, and there is nothing to show that a tender in the usual form could not have been made to him.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1436, 1437; Dec. Dig. § 710.*]

Appeal from Seventh Judicial District Court, Parish of West Carroll; J. S. Taylor, Judge, ad hoc.

Action by the Frisco Land Company, Limited, against P. J. Nevins. Judgment for plaintiff, and defendant appeals. Reversed on rehearing.

McCloskey & Benedict, for appellant. M. H. O'Connell and Davis, Browne & Browne, for appellee.

LAND, J. This is an action to establish title to real estate as provided by Act No. 38 of 1908, where two or more persons claim by recorded title, and neither of them are in actual possession of the premises.

The land in dispute, consisting of several sectional subdivisions, containing a total area of 240 acres, was assessed to Thomas P. Kenny, the original entryman for the taxes of the year 1881. The taxes were not paid, and on May 20, 1882, the property was exposed at tax sale and adjudicated to Simon Witowski, and a few days later a formal tax deed to the purchaser was duly executed and recorded. The plaintiff claims title from Simon Witowski through mesne conveyances.

Defendant claims title by deed executed in October, 1881, by the sole heir of Thomas P. Kenny, and also by deed executed in 1887 by Kenny's widow.

The defense is an alleged redemption of the property from the tax sale, on April 27,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep's Indexes

1883, by Peter J. Nevins, as owner, by payment of the proper amount to the sheriff and tax collector of the parish of West Carroll. The fact of this payment is not disputed, but it is contended by the plaintiff that as the tax purchaser was a resident of the parish, the deposit of the redemption price with the sheriff and tax collector was not authorized by law, and therefore did not affect the title of the tax purchaser.

The tax sale was made under Act No. 77 of 1880, which contains no provision for the payment of the redemption price to the tax collector. Section 47 of said statute, reads as follows:

"That from the date of the recording of said tax deed of sale, all the rents and revenues of the property therein conveyed shall belong to the purchaser, and shall be paid to him; and all taxes thereon, shall after that date be assessed to and shall be paid by him, until the said property be redeemed. If redeemed, the person redeeming shall pay all the taxes assessed upon said property subsequent to the tax sale."

Act No. 96 of 1882, § 62, provided:

"That the tender required from the owner of property adjudicated to a purchaser for taxes due, in accordance with article 210 of the Constitution, may be made to and deposited with the tax collector, or ex officio tax collector, making said sale or his successors in office; provided the same be made within the term provided by said article; provided further that the said tender and deposit with the aforesaid officer can be made only when the purchaser cannot be found."

It necessarily follows from the text of the law that the tender must be made to the purchaser, when he can be found.

It is admitted that the purchaser at the tax sale was, in 1882, a resident of the parish of West Carroll, and had been residing in said parish since 1870. A tender of payment may be made, "either to the creditor himself or at his dwelling." C. C. art. 2168.

"When the tender is for money due, it must be made to the creditor himself or at his actual or chosen domicile, by the debtor or his agent, in the presence of two witnesses residing in the place, by tendering to such creditor the sum which is due to him, with the interest." C. P. art. 407.

There can be no deposit or consignment of the amount due until after a tender to the creditor and his refusal to accept the same. The act of 1882 dispenses with this tender to the tax purchaser *only* in cases where he cannot be found. The evidence before us presents no such exceptional case. The tax purchaser resided in the parish, and there is no evidence that he could not be found when the deposit was made with the tax collector.

See *Prater v. Craighead*, 118 La. 639, 640, 43 South. 258. The receipt of the tax collector contains no recital that the tax purchaser could not be found. In short, there is no evidence whatever to show that a tender could not have been made to the tax purchaser at his usual place of residence in the parish of West Carroll. It follows that the deposit of the money with the tax collector was unauthorized, and had no legal effect. The notation of the so-called redemption on the conveyance book was likewise unauthorized, and had no legal effect.

It is argued that the presumption is that the tax collector delivered the deposit to the tax purchaser. There is no averment in the answer that the tax purchaser received the price of redemption. The evidence shows that the tax purchaser and his vendees have paid the taxes on the property since 1882. The defendant has also paid taxes on the same property since 1882. The continued claim of ownership by the tax purchaser is inconsistent with the hypothesis that he acquiesced in the redemption by accepting the deposit placed in the hands of the tax collector. Both parties seem to have stood squarely on their respective claims of ownership.

The exception of no cause of action, filed in this court is without merit. It was not necessary for the plaintiff to allege that the tax purchaser had not received the deposit placed in the hands of the tax collector by the defendant. The burden was on the defendant to allege and prove a redemption of the property from the tax sale.

We see no good reasons for remanding this case. The letter of defendant's agent is no evidence against the plaintiff, and, besides, shows on its face that the tax purchaser was present in the parish at the date of the alleged redemption.

Judgment affirmed.

On Application for Rehearing.

MONROE, J. A reconsideration of this case has led the court to the conclusion that the interests of justice will be best subserved by affording the defendant a further opportunity in the matter of his defense, and, more particularly, to show that the amount paid in redemption of the property inured to the benefit of the tax purchaser.

It is therefore ordered that the judgment heretofore rendered in this case be set aside, that the judgment appealed from be annulled, avoided, and reversed, and the case be remanded to the district court for such further competent evidence as the parties may offer.

(129 La.)

No. 18,535.

RICHARD v. RICHARD.

(Supreme Court of Louisiana. Jan. 15, 1912.)

*(Syllabus by the Court.)***1. WILLS (§ 148*)—NUNCUPATIVE WILL—VALIDITY.**

Where a nuncupative will by public act is not dictated by the testator, or written by the notary, in the presence of the witnesses required by law, where one of the subscribing witnesses did not understand the language in which the will is written, and where what was done was not done without turning aside to other acts, the will is void.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 358-366; Dec. Dig. § 148.*]

2. DESCENT AND DISTRIBUTION (§ 69*)—ACTION BETWEEN HEIRS—SETTING ASIDE DONATION.

In order to establish the equality between heirs of the same degree, which is the cardinal principle of the Louisiana law of inheritance, an heir may sue his coheir to set aside a donation, disguised as a sale, from the common ancestor to such coheir.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 208-212; Dec. Dig. § 69.*]

3. DESCENT AND DISTRIBUTION (§ 69*)—DISGUISED DONATION—SETTING ASIDE.

A conveyance, purporting to be a sale, for a recited consideration of cash and notes, will be held to be a disguised donation where the evidence shows that no cash was paid, and that the notes were retained by the putative vendee, and were soon afterwards made the subject of a formal donation to him by the putative vendor.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 208-212; Dec. Dig. § 69.*]

Appeal from Sixteenth Judicial District Court, Parish of St. Landry; B. H. Pavy, Judge.

Action by Gerasime Richard against John Percy Richard. Judgment for plaintiff, and defendant appeals. Affirmed.

John N. Ogden and R. Lee Garland, for appellant. Lewis & Lewis, for appellee.

Statement of the Case.

MONROE, J. Plaintiff brings this suit in behalf of his minor child, Zule Richard, who, by representation of her mother, is coheir with defendant (her uncle) of the estate of her grandfather, H. Valsin Richard, lately deceased, and he seeks to annul four instruments in writing executed by decedent in favor of defendant, to wit: (1) A notarial act of sale of date January 15, 1909, purporting to sell 187½ arpents of land; (2) a notarial act of date April 15, 1909, purporting to donate two promissory notes of \$1,000 each; (3) a notarial act (executed contemporaneously with said donation) of lease for 10 years of all the property owned by decedent, not included in the sale of January 15th; (4) a will, of even date with the two instruments last mentioned, whereby decedent bequeathed the disposable

portion of his estate to defendant and appoints him his executor with seisin. The petition alleges that all of said instruments were executed by decedent "in pursuance of the purpose, which he had formed, to divert his entire estate from petitioner's said daughter, and invest the said John Percy Richard with its sole ownership and possession;" that the instrument first mentioned was a "purported or pretended sale of a simulated character" for \$500 cash, and \$2,000, in two notes of \$1,000 each, with a stipulation to the effect that the vendor should retain the "use and occupancy" of the property, and that it should be delivered to the vendee only upon his death, and that it is void, not only for nonpayment of the price and nondelivery of the property, but because it was intended as a substitute for a last will, and that, if intended as a donation inter vivos, it is void for nondelivery of the thing donated; that the act of donation is stricken with nullity, not only because the two notes which are the subject thereof are the notes which were executed by the purchaser as in part payment of the price fixed in said void act of sale, but, because said donation constituted part of the plan, illegally, to deprive the minor of her share in her grandfather's estate; that said lease is void because it was intended thereby to dispose of the use of all the property remaining to decedent for ten years after his death, thereby substituting the lease for a testamentary disposition, the pretended lessor being, at the time of its execution, in articulo mortis, and the consideration moving to him being so inadequate as to prove said lease to have been a simulation; that said last will is void, not only because it constitutes part and parcel of a purpose on the part of "deceased to deprive petitioner's daughter of any share in the estate," but also because it was not dictated to, or written down by, the notary in the presence of the witnesses, and because one of the witnesses could neither speak nor understand the language in which said will is written. A preliminary injunction was issued to restrain defendant from disposing of the movable property of the estate pending the suit. The answer of defendant is, in effect, a denial of the allegations of the petition, and an affirmation of the validity of the instruments attacked. There was judgment in the district court in favor of plaintiff as prayed for, and defendant has appealed, but no argument, oral or written, has been presented to this court in his behalf. The evidence shows that, when the instruments in question were executed, decedent was prostrated with an illness with which he had been suffering for some time and of which he died in the month of May following their execution.

Defendant and his wife were living with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

him and had been so living for a number of years, during which decedent had frequently assisted defendant financially, and defendant does not appear to have had any means or any remunerative occupation when the instruments here in question were executed.

There was no cash paid by the purchaser in the *sol disant* sale, nor do we think that any equivalent for cash passed to the decedent, and the notes, which are said to have represented the balance of the purchase price, are shown to have been delivered by the notary to the purchaser, and to have been retained by him until April 15th following, when the act by which they were donated to him was executed, upon which occasion he produced them and handed them to the decedent, who immediately returned them to him. The stipulation in the act of sale concerning the delivery of the property reads as follows (quoting literally):

"It is hereby specially stipulated and agreed as a part condition of this sale, and to which vendor retains and purchaser grants, that the said H. Valsin Richard retains for himself the general usufruct and usage and benefits of the foregoing described lands herein conveyed for his natural life; that the same as were it his own and for his natural lifetime. The delivery of the aforesaid land shall be taken possession of by the said J. P. Richard only after the death of the said H. Valsin Richard."

The facts in regard to the donation have been stated. The lease purports to be for 10 years at \$50 a year of the "plantation" (as it is called) upon which the parties were living containing 125 arpents of land, together with the buildings and improvements and all the movable property, animals, and farming implements thereon or thereto attached. It is conclusively shown that the will was neither dictated by the decedent nor written down by the notary in the presence of the witnesses; that one of them did not understand the language in which it is written; that it was written in a room other than that in which the decedent was lying in bed; and that whilst one of the witnesses did not reach the house until after it had been written, and hence was not present while it was being written, the other two were, perhaps, in and out of the room whilst writing was being done, the supposed testator being in another room.

A. D. Richard, one of the witnesses referred to, had been, for some time, assisting in nursing the decedent, rendering certain services at stated intervals during the day, and he testifies that, when he reached the house upon the occasion in question, the notary and J. E. Richard (another of the subscribing witnesses) were in the kitchen; that the notary said that he was ready for the witnesses; that they all (notary and three witnesses) then went into the room where the decedent was, the notary taking his pen and ink and the will, which was

already written; that the notary read the will to the decedent, and told him that it was his will, and he wanted him to sign it; and that, as the decedent was unable to help himself in the bed, he (the witness) dressed him up and helped until he signed it. And his testimony proceeds as follows:

"Q. Did Mr. Valsin, during any of the time that you were there as a witness to the will, say anything to Mr. Ogden [the notary] with reference to the will? A. No, sir; not that I heard of. Q. Was that will dictated by Mr. Richard or any of its provisions in your presence? A. No, sir. Q. Did he make any reference whatever to making a will in your presence? A. Not in my presence; no, sir. Q. Did he appear to know what he was signing or doing? How did he appear when he signed the will? A. Well, as usual, drowsy. He didn't seem to notice anything. Q. Didn't make any remark about the will? A. None at all. Q. Had the donation been signed already at that time? A. Yes, sir; the donation had been signed. Q. You were a witness to the donation? A. Yes, sir. Q. Did you see anything between the parties when the donation was made? A. Not more than seeing Percy hand over the papers to the old man, claiming that they were the notes he had against him, and, after the donation was signed, turned the notes over to Percy. Q. Then, at the time the donation was made, Percy had the notes in his possession? A. He was the one who handed them to the old man in the bed, when he came in to sign. Q. And the old man handed them back to him? A. Yes, sir. Q. Was anything said at that time before the old man? A. No, sir. Q. How long before the will was the donation made? A. Well, about an hour—hour and quarter—I suppose; at least when it was signed. I don't know how long it was—may be—but it was signed before the witnesses seen it—an hour and a quarter."

Neither of the other witnesses pretend that A. D. Richard was present at any time prior to the moment of which he speaks—I. e., after the will had been written—and both of them admit that the writing of the will was done in another room than that in which the decedent was lying, and it appears that they were in and out whilst it was being written. An effort was made to show by them that before the will was written the decedent told the notary what he wanted done, and that, after the will was read to him, the decedent was asked whether it was satisfactory, and that he answered in the affirmative. The testimony of both witnesses is, however, confused and unsatisfactory. One of them demonstrated on the trial that he knows so little of the English language that he could not have known whether he understood or misunderstood anything that may have been said between the decedent and notary; and the latter was not called to the stand.

Opinion.

[1] Reversing, in part, the order in which we have considered the facts, and dealing first, with the questions of law presented by the attack upon the will, we are of opinion that the will is void, because not dictated by the testator or written by the notary in the presence of the witnesses required by law;

because one of the subscribing witnesses was incompetent by reason of his not understanding the language in which the will was written; and because what was done was not done without interruption or turning aside to other acts. C. C. art. 1578; *Breaux v. Gallusseaux, Executor*, 14 La. Ann. 233, 74 Am. Dec. 430; *Succession of Dauterive*, 39 La. Ann. 1094, 8 South. 341.

[2, 3] The sale was not simulated in the sense of not being intended to convey title to the property, but, considered in connection with the donation, which followed, must be regarded as a donation in disguise. In *Dupuy v. Dupont*, 11 La. Ann. 226, where a similar state of facts was presented and the sale had been set aside by the district court, as a disguised donation, *Spofford, J.*, as the organ of this court (*Voorhies and Buchanan, JJ.*, dissenting), said:

"It would have been more formal to have declared the sale a disguised donation to the daughter, and decreed that she should collate the property, in a partition to be made hereafter among the heirs of Dupuy. The advantage which a father bestows upon his son, though in any other manner than by donation or legacy, is likewise subject to collation. Thus, where a father has sold a thing to his son at a very low price, or has paid for him the price of some purchase, or has spent money to improve the son's estate, all that is subject to collation. C. C. 1838, art. 1328 [1248]. As there is enough in the record to show that the decree, as rendered by the district judge, will produce substantially the same result as a more formal judgment, it need not be disturbed."

In *Laycock v. Bird*, 13 La. Ann. 173, being an action to set aside a sale of land and slaves, as a donation in disguise, the court found that there was a price paid, which, though very low, exceeded one-half the real value of the property; and said:

"So there was no lesion beyond moiety nor such proof as is required by article 2419 [2444] of the Code to set aside a sale in toto as a simulation or disguised donation. The contract seems to have been a real one, although, perhaps, made to give the vendee an indirect advantage over his coheir. The plaintiff's remedy, if any she has, is, not by an action in the present form, but by an application to have her coheir collate when a partition takes place."

In *Montgomery v. Chaney*, 13 La. Ann. 207, being also an action by forced heirs to set aside, as a donation in disguise, a sale by their ancestor to a coheir of certain slaves, the court, *inter alia*, said:

"Equality between heirs of the same degree is the cardinal principle of the Louisiana law of inheritance. No deviation is allowed from this rule, save within a narrow limit and by pursuing the forms prescribed by law. If a father desires to prefer one child to another in the distribution of his property, he is bound to state his design, expressly, by declaring that the gift or legacy is intended 'as an advantage or extra portion,' or 'using equivalent terms. C. C. art. 1311,' [1233]. The sales of immovable property or slaves, made by parents to their children, may be attacked by the forced heirs, as containing a donation in disguise, if the latter can prove that no price has been paid, or that the price was below one-fourth of the real value of the immovables, or slaves sold, at the time of the sale. C. C. art. 2419 [2444]. * * *"

There can be no doubt, therefore, that, quoad, the sale here attacked, this action falls under C. C. art. 2444, and is properly brought; and, as the donation of the notes was merely complementary of the disguised donation of the real estate, the two will fall together.

Whether the lease should be regarded as falling under C. C. art. 2444, or under C. C. art. 1248, is a question which the defendant has not raised, and, as we are inclined to think that the interests of both litigants will be best subserved by restoring all the property in dispute to the succession, thereby facilitating a partition, without further complication, we shall leave it undetermined. The judgment appealed from is accordingly affirmed at the cost of the defendant and appellant.

(129 La.)

No. 18,749.

VANNATTA et al. v. BUSBEY et al.

(Supreme Court of Louisiana. Jan. 2, 1912.
Rehearing Denied Jan. 29, 1912.)

Appeal from First Judicial District Court, Parish of Caddo; E. W. Sutherlin, Judge.

Action between S. A. Vannatta and others and M. P. Busbey and others. Judgment for plaintiffs, and defendants appeal. Transferred to the Court of Appeal.

Alexander & Wilkinson, for appellants.
Herndon & Herndon, for appellees.

MONROE, J. So far as appears from the transcript, the amount or value in dispute in this case is less than that required to vest this court with jurisdiction of the appeal. The case is therefore ordered to be transferred to the Court of Appeal, Second Circuit, on appellants' complying with the law (Act No. 56, of 1904) authorizing such transfer; otherwise, and in default of such compliance, the appeal is dismissed.

WRIGHT v. STANFORD. (No. 15,565.)
(Supreme Court of Mississippi. Jan. 29, 1912.)
Costs (§ 137*)—SECURITY FOR COSTS—FAILURE TO GIVE—DISMISSAL.

Where plaintiff filed his bond for costs 61 days after the order requiring it to be filed within 60 days, as required by Code 1906, § 940, providing for dismissal for failure to do so, and defendant on the first day of the term, 4 months later, filed his plea, and 5 days later plaintiff filed his replication, a motion by defendant, made 2 days later, to dismiss because of the failure to file the bond within the 60 days, was improperly granted; no prejudice to defendant being shown.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 137.*]

Appeal from Circuit Court, Tippah County; C. L. Crum, Special Judge.

"To be officially reported."

Action by J. C. Wright against F. M. Stanford. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

On January 17, 1910, the plaintiff filed his declaration in the circuit court for damages for slander. On the first day of the July term (July 4, 1910), an order was entered requiring the plaintiff to give security for costs within 60 days. On September 3, 1910 (61 days later), plaintiff filed his bond, which was approved by the clerk. On the first day of the January term, 1911, defendant filed his pleas to the declaration, and 5 days later the plaintiff filed his replication to said pleas. Two days thereafter the defendant filed his motion to dismiss the suit, "because no bond was filed within the time limited by law and the order of the court." The court sustained the motion, and the plaintiff appealed.

Section 940 of the Code contains the following provisions: "The plaintiff or complainant may be required * * * to give security for all costs accrued and to accrue in the suit within sixty days after the order of the court made for that purpose. * * * If the security be not given the suit shall be dismissed and execution issued for the costs that have accrued; but the court may, on cause shown, extend the time for the giving of the security."

Thos. E. Pegram, for appellant. Spight & Street, for appellee.

WHITFIELD, C. The appellee did not move to dismiss the suit for the want of security for costs promptly, as he should have done. On the contrary, he filed his pleas on the first day of the January, 1911, term of circuit court. Five days later the appellant filed his replications to said pleas, and two days after this appellee, for the first time, filed his motion to dismiss the suit because no bond had been filed within the time limited by law and the order of the court. The bond was filed sixty-one days, just one day too late, after the order requiring security to be given. In *Kittle v. Railroad*, 92 Miss. 381,

45 South. 867, the court said: "In all cases where it is not shown that the failure to comply with the order of the court as to time has operated injuriously to the rights of other parties to the litigation, the cost bond should be allowed to be filed at any time before the actual dismissal of the suit."

Applying this principle in the light of the facts of this case, we think the court erred in dismissing the suit.

PER CURIAM. The above opinion is adopted as the opinion of the court and for the reasons therein indicated the judgment is reversed, and the cause remanded.

ALABAMA & V. RY. CO. v. LOWRY.
(No. 15,445.)

(Supreme Court of Mississippi. Dec. 4, 1911.
Suggestion of Error Overruled Jan. 15, 1912.)

CARRIERS (§ 277*)—INJURIES TO PASSENGERS—WANTONNESS—EVIDENCE.

In an action against a carrier for the wrongful refusal of its conductor to accept a check for a corpse, given to a passenger accompanying the corpse by the station agent on purchase of a ticket, evidence held not to show such willful or wanton misconduct of the conductor as to justify the awarding to the passenger of punitive damages.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 277.*]

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

"To be officially reported."

Action by J. W. Lowry against the Alabama & Vicksburg Railway Company and another. From a judgment for plaintiff, awarding compensatory and punitive damages, defendant named appeals. Reversed and remanded.

The appellee took passage over the Illinois Central Railroad at Grenada, Miss., via Jackson, and over the appellant's road, the Alabama & Vicksburg Railway, to Meridian. He took with him the body of his child, and purchased a full ticket at Grenada through to Meridian for the corpse. The agent at Grenada took up the ticket and gave him a check through to Meridian, and gave the appellee a duplicate check. At Jackson, appellee changed cars for Meridian, and the conductor on the Alabama & Vicksburg Railway declined to accept the check as transportation for the corpse, but demanded cash fare, which the appellee paid, amounting to \$2.90.

The rules of the Illinois Central Railroad, operating from Grenada to Jackson, contain the following provision: "One adult first-class ticket must be presented for the transportation of a corpse, regardless of the age of the deceased, and a corpse must not be received for shipment except accompanied by an escort holding proper transportation to destination. The word 'corpse' must be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plainly written on the face of the local, and on each coupon of interline ticket. * * * Corpses may be checked to points on and via the following lines only: [Here follow the names of a number of railroads, but not the name of the appellant, Alabama & Vicksburg Railway.] Stamp the escort ticket, or indorse with pen and ink: 'This ticket will not be honored for passage unless presented with excess baggage check Form —,' * * * If a corpse is destined to a point on other lines than those mentioned above, lift the coupons and check only to the junction point of such lines, instructing the escort to present duplicate at such point and arrange for the care of the corpse beyond, in accordance with the rules of lines over which ticket reads to destination."

The joint rule of the Alabama & Vicksburg Railway and the Illinois Central Railroad contains the following provision: "Rules and regulations. 25. Transportation of Corpses in Baggage Cars.—A corpse, presented with requisite certificates issued in conformity with the rules of the national, state and local boards of health, will be transported in baggage cars, provided an escort traveling by the same train accompanies the corpse to its destination. Such escort will be required to present, for the transportation of the corpse, one adult first-class ticket (the contract and each coupon of which must be plainly stamped 'Corpse,') in addition to the ticket for said escort. The ticket for the transportation of a corpse must be either a regular one-way ticket or the return portion of a round-trip ticket."

One of the rules of the Alabama & Vicksburg Railway is as follows: "534. They must not receive a corpse without a physician's certificate that it is free from contagion. Must be securely enclosed in a box, accompanied by a first-class ticket, which must be handed to the conductor. Must also be accompanied by a passenger. See Form 9393."

The appellee, who was complainant below, claims that the conductor was rude and insulting in his manner when refusing to take the excess baggage check for the corpse, and demanded the payment of cash fare therefor. This is denied by the defendant, and it is claimed that the conductor, acting only within the rules of the company, could not, under said rules, accept a check, but could accept only a first-class full-fare ticket.

Appellee brought suit against the Illinois Central and Alabama & Vicksburg Railway Companies for \$2.90 actual damages and \$5,000 punitive damages. The Illinois Central Railroad demurred, and the demurrer was sustained, and the suit dismissed as to that road. The appellee recovered a verdict against the appellant for \$500, and from a judgment for that amount this appeal is taken.

The appellee testified in part as follows: "Q. When he reached you, Mr. Lowry, just

in your own way, tell the jury all that occurred and how it occurred. A. When he got to me, why I gave him the regular ticket that I had. Q. That was for your wife? A. Yes, sir; that was for my wife. I showed him the check, and the certificate given by the undertaker, and signed by the physician at Grenada, and also paid \$2.90, my fare. Q. That was your fare? A. That was my fare. Q. From where? A. From Jackson to Meridian. And he said that the check couldn't be honored on this road, and I told him I paid for the corpse through from Grenada to Meridian, had it checked through, that was the check for it; and he says, 'Well, see, I can't honor that check at all.' Says, 'Some roads do one way, and some another.' And says, 'I can't honor that.' In my condition, I didn't know what to do. I had my baby in my arms there, and, being under a strain as I was, I didn't know what to do. I paid him then. Q. Tell how he talked. A. He was very abrupt about it, in the way he demanded it. * * * Q. Tell how he talked (speaking of the conductor). A. He was very abrupt about it, in the way he demanded it. He demanded another fare, which was \$2.90. He said a corpse took a regular fare—no half fares, but a regular fare. Q. Mr. Lowry, tell the court and jury what Mr. Wilson's manner was at the time he demanded this additional fare from you. A. It was a very abrupt manner. Q. What was the tone of his voice? A. Well, he demanded that I pay another fare, in a very harsh and gruff manner. I had my baby in my arms, and I didn't know what would occur if I didn't pay it. Q. Just detail, Mr. Lowry, everything that occurred there when Mr. Wilson reached where you were in the car and got the fare. Detail everything that occurred between you and Mr. Wilson, and everything how it occurred. A. When he got to me, I gave him the regular ticket I had from Grenada to Meridian, and paid him \$2.90, and showed him my duplicate check that I had from Grenada to Meridian for the corpse, and also this certificate that was given by the undertaker, and he wouldn't accept the check, said I had to pay another fare, and that would be a regular fare, not half fare but a regular fare, for a corpse, and he said it in a very rude way and manner, and I paid him the \$2.90. I had my baby in my arms, and I paid him the \$2.90 rather than to have any further trouble. Q. What was Mr. Wilson's appearance at the time? Did he appear to be in a good humor, or was he mad, or how? A. He looked like he was mad, yes, sir; talked like that way. Q. Did his manner in which he talked to you about this fare indicate to you that he was mad? (Objected to and withdrawn.) Q. You say he appeared to be mad? A. Yes, sir. Q. How was that appearance indicated? A. By his actions, words, looks—his talk."

On cross-examination the appellee testified in part as follows: "Q. Mr. Fewell: Mr. Lowry, tell the court and jury what Mr. Wilson's manner was at the time he demanded this additional fare from you? A. It was a very abrupt manner. Q. What was the tone of his voice? A. Well, he demanded that I should pay another fare, in a very harsh and gruff manner. I had my baby in my arms, and I didn't know what would occur if I didn't pay it. Mr. Bozeman: We object to that, and move to strike it out. That is a mere speculation on the part of the witness, and not a fact at all. The Court: Go ahead. (To which action and ruling of the court the defendant then and there excepted.) Mr. Fewell: How long was he talking to you, Mr. Lowry? A. It wasn't very long. Q. Can you approximate it? A. About two or three minutes, I suppose. Q. You had the baby in your arms? A. Yes, sir. Q. You say, too, you sat down by somebody else. Who was that? A. Mrs. Harris. Q. Mrs. Robert Harris, here? A. Yes, sir. Q. When the conductor came through, you were sitting next to her? A. Yes, sir. Q. She was sitting next to the window, and you next to the aisle? A. Yes, sir. Q. Now, Mr. Lowry, when Mr. Wilson came to you, you say that you gave him the ticket. Now, that was your wife's ticket, was it? A. Yes, sir. Q. And that was the ticket that you have identified here as Exhibit A to your testimony? A. Yes, sir. Q. Now you had no ticket for yourself, Mr. Lowry from Jackson to Meridian? A. No, sir; I did not. Q. So Mr. Wilson asked you for the cash fare for yourself, did he? A. Yes, sir. Q. And you paid him that? A. I paid him the cash fare. Q. \$2.90? A. Yes, sir. Q. Up to that time everything was pleasant was it? A. Well, I suppose so, on the train; but it wasn't with me. Q. I am not referring to your grief now, that your child being dead? A. Yes, sir. Q. I am talking about the dealings between you and Mr. Wilson. As between you and Mr. Wilson there was no disagreement or controversy up to that time? A. No, sir. * * * Q. You then showed Mr. Wilson this little red check here, marked 'Duplicate,' did you? A. Yes, sir. Q. And that was the check you held for the corpse? A. Yes, sir. Q. What did Mr. Wilson say when you showed him that? A. He said he couldn't accept it. Q. Did you make any reply to that? A. I told him that I had bought the two regular tickets. I had to buy two tickets in order to check the corpse through. You can't check a corpse on one ticket. You have to have two regular tickets. I had to give up one of them for the check, the duplicate check. Q. You told him that? A. I told him that. Q. What did he say in answer to that? A. He said he couldn't honor it. Q. Told you it wasn't good on that road, as you said a while ago, didn't

he? A. Yes, sir; he said some roads had one way of doing, and some had another, and said he couldn't accept it. Q. Did he tell you it was required on the Alabama & Vicksburg road you should have a first-class and full-fare ticket for the corpse, or pay a full cash fare? A. Yes, sir; he made me pay the full cash fare. He said that you couldn't take a corpse on a half fare; it had to be a regular ticket. Q. And you couldn't take it on the Alabama & Vicksburg road on a check; that the check wouldn't pass? A. Yes, sir; he said that the check wouldn't pass. Q. Did he tell you, Mr. Lowry, that he (the conductor) had no authority to carry the corpse on this ticket that you had here, and that he would have to ask you to pay the fare on it? A. Yes, sir; he made me pay the fare for the corpse. Q. Well, when you paid the fare, he went on collecting for other fares, did he—went on by you? A. Well, after we had the conversation; yes, sir."

Cross-examination by counsel for appellant: "Q. That was during what we call the Christmas travel? A. Yes, sir. Q. Well, now, Mr. Lowry, Mr. Wilson, is a man with a low, quiet, manner and address, isn't he? A. At times, I suppose, sir. Q. I am talking about at that time? A. No, sir; he was not. Q. Mr. Wilson didn't say to you that if you didn't pay this fare that he would put you off, did he? A. No, sir; he didn't say that in words; he intimated it, though. Q. You don't mean to tell the jury that Mr. Wilson was mad and abrupt and abusive about this thing, do you? You don't mean to tell the jury he was abrupt in asking you for this cash fare? A. Yes, sir; I considered him very abusive. Q. What did he say that you construed to be abusive? A. In the manner in which he demanded the other \$2.90 fare; the way he spoke it."

A. S. Bozeman and R. H. Thompson, for appellant. Fewell & Cameron, for appellee.

WHITFIELD, C. The testimony in this record falls far short of showing a cause of action warranting the imposition of punitive damages.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment is reversed, and the cause remanded.

THOMPSON et al. v. THOMPSON et al.
(No. 15,440.)

(Supreme Court of Mississippi. Dec. 18, 1911.
Suggestion of Error Overruled
Jan. 15, 1912.)

1. INSURANCE (§ 715*)—MUTUAL BENEFIT INSURANCE—CONTRACT—APPLICATION.
If the certificate, or the constitution or by-laws, of a fraternal benefit company, refer

to the application, so as to fairly show that the parties intended that it should be a part of the certificate, it will be so treated.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1853; Dec. Dig. § 715.*]

2. INSURANCE (§ 715*)—MUTUAL BENEFIT INSURANCE—CONSTRUCTION OF CERTIFICATE.

Provisions in the constitution and by-laws of a fraternal benefit association, that on receipt of the application and fees a benefit certificate shall be issued under seal "and made payable as the member may direct in his application," and that if the statements in the application for membership upon which a benefit certificate was issued shall be untrue in any respect the certificate shall be void, have the effect to make an application for membership a part of the certificate.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1853; Dec. Dig. § 715.*]

3. INSURANCE (§ 819*)—MUTUAL BENEFIT INSURANCE—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence in an action on a fraternal benefit certificate held to show that the letters "ren" were erased from the word "children" after the policy was delivered, leaving the designated beneficiary of a part of the certificate described as "child," instead of "children."

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 819.*]

Appeal from Chancery Court, Hinds County; G. G. Lyell, Chancellor.

"To be officially reported."

Action by W. S. Thompson and others against J. L. A. Thompson and another. From a decree for defendants, plaintiffs appeal. Reversed, and decree rendered for complainants.

Complainants and J. L. A. Thompson are the children of one Susan Thompson, and defendant B. J. Thompson (the son of J. L. A. Thompson) is the grandson of said Susan Thompson. Susan Thompson took a policy of insurance in the United Woodmen Benefit Association, a negro fraternal insurance society, on March 18, 1907; the amount being for \$1,000. Her application for the policy contains the following questions and answers: "Q. To whom shall the policy be made payable? A. J. L. A. Thompson \$200.00 and B. J. Thompson \$50.00; other to children. Q. What kin to you is the person to whom the policy is made payable? A. Children and grandson." The policy, as issued, contained the following provisions: "No. 4. The beneficiary is J. L. A. Thompson and B. J. Relationship, children and grandson." The letters "ren," in the word "children," are erased by drawing a line through them. There is a dispute in the testimony as to when this erasure was made, and whether with the consent or knowledge of the insured, who could not read and write. The policy remained in the hands of Vina Thompson, the wife of J. L. A. Thompson, until the death of the insured, which occurred on June 22, 1910, while she was in good standing, when it was delivered to J. L. A. Thompson. The society acknowledged its indebtedness for the full amount, \$1,000, and

paid the money into court for distribution among the contestants.

J. L. A. Thompson and B. J. Thompson, the defendants, demanded the entire sum of money, while the appellants demanded \$750 for their part. Suit was instituted, and the chancellor entered a decree for defendants, awarding them the entire sum of \$1,000, and granted an appeal. The appellants claim that J. L. A. Thompson erased the suffix "ren" to the word "children" after the policy was delivered to him and after the death of Susan Thompson. J. L. A. Thompson denies that he ever did it at all. The Supreme Banker of the society testified that the letters "ren" had been stricken off the word "children" after the policy was issued, and that the records of his office showed the words "children and grandson" as the beneficiaries. The appellees claim that the letters "ren" were erased before the policy was received by Vina Thompson, and that it was the intention of the insured to leave all the proceeds to the appellees, but not to limit their portion thereof to \$250. Other facts appear in the opinion.

Cassedy & Butler and W. J. Latham, for appellants. Wells & Wells, for appellees.

WHITFIELD, C. The application in this case directed that the policy should be made payable to "J. L. A. Thompson \$200.00 and B. J. Thompson \$50.00," in figures, "other to children." It further stated that the relationship was children and grandson. The certificate or policy stated that the beneficiary was "J. L. A. Thompson and B. J. Thompson," without anything more. It stated the relationship to be, as originally written, children and grandson; but through the letters "ren" a line was drawn, erasing those letters, leaving the relationship in the certificate to stand child and grandson.

[1] It is not necessary, to make the application a part of the certificate, that there should be an express reference in express words to the application, making it expressly a part of the contract. If there be in the certificate, or in the constitution or by-laws, such reference to the application as upon any fair construction makes it plain that it was the intention of the parties that the application should be a part of the certificate, then the court will so treat it. This is a fair result of all the authorities to which we have been referred on this point.

[2] Section 19 of the constitution and by-laws provides as follows: "On receipt of application and fees, the Supreme Banker shall enter the name and such other facts as may be deemed necessary upon a register. The roll of each camp or circle, to be kept by itself and returned to the financial secretary." It further provides that a benefit certificate shall be issued under seal "and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

made payable as the member may direct in his application." Paragraphs 1 and 17e of the policy refer to the schedule and require the member to warrant the truth of her answers therein. Section 23 of the constitution and by-laws provides that, "if the statements or declaration in the application for membership shall be in any respect untrue upon which a benefit certificate was issued, the benefit certificate shall be null and void and of no effect." This section 23 thus in effect writes the application into the certificate as a part of it. We are clearly of the opinion that these provisions in the constitution and by-laws, to which we have just above referred, on any fair construction under the authorities, make the application in this case a part of the contract of insurance—a part of the certificate.

[3] This leaves the case to turn upon the testimony as to whether this certificate was really issued as stated in the application, or whether there has been a change made in the beneficiaries in it, under the certificate without the consent or since the death of the assured—in other words, since the vesting of the right under the policy. Three witnesses, two sisters and one brother of J. L. A. Thompson, testified positively and emphatically that they saw J. L. A. Thompson erase the letters "ren" from the word "children" in the certificate after the death of the assured. J. L. A. Thompson himself, his wife, and one other witness not related, and not interested, as she testifies, testify that the certificate, with the letters "ren" erased, was in that form when the certificate was sent back for collection, after the death of Susan Thompson, the assured. J. A. Q. Williams, the secretary of the association, testified that the certificate had been altered by the erasure of the letters "ren" from the word "children" in the certificate, and that that erasure occurred after he had issued the certificate, and that the policy was issued in accordance with the application as to names of beneficiaries, but not as to amounts; that he first got information of this change in a letter written to him in the fall of 1910, which letter directed how the checks should be made, calling attention to the alteration. The evidence showed that the assured died on the 22d day of June, 1910. The first knowledge, therefore, received by Williams of the alteration, being in the fall of 1910, was after the death of the assured.

The evidence shows that the checks were first sent to Dr. Cowan, payable as indicated in the application. The policy was in the hands of J. L. A. Thompson, and, because the checks were not payable as the policy indicates, Cowan, who never had the policy, at J. L. A. Thompson's direction, returned the checks to Williams. Controversy thus got up as to the beneficiaries to whom the money should be paid, and the order paid the money into court, leaving the parties'

rights to be determined by the court. Williams, on December 5, 1910, wrote to J. L. A. Thompson, stating that the money would be paid into court, and that he believed each child would get a part of it. J. A. Q. Williams, in a letter dated December 22, 1910, to Latham & Atwood, attorneys for appellants, stated that the reason the company did not put in the certificate the amounts to be paid, \$200 to J. L. A. Thompson and \$50 to B. J. Thompson, was because, as he says, "we refuse to write that on the policy, as we promise to pay whatever is collected, not to exceed \$1,000." There is in the record a certified copy from the record book of policies and beneficiaries, kept in the office of J. A. Q. Williams, of the order, United Woodmen Benefit Association. This was the record kept by the company at Holly Springs. That record shows, under entry of March 13, 1907, as follows: "Susan A. Thompson; children and grandson, J. L. A. Thompson, B. J. Thompson." In other words, this record entry, made at the time of the application and the issuance of the policy, shows the beneficiaries to be the children and grandson, just as the application shows, without, however, showing the amounts, for the reason indicated in the letter above referred to from Williams to Latham & Atwood.

Here, then, we have three witnesses on one side, swearing positively that the letters "ren" were stricken out by J. L. A. Thompson, after the death of the assured, and three witnesses on the other side, swearing to the contrary in effect; J. L. A. Thompson swearing that he never made any such alteration, and his wife and one other witness, Fannie Magee, testifying that they (J. L. A. Thompson's wife and Fannie Magee) saw this policy when they got it out of the post office, and looked to see to whom it was payable, and that the policy was in the same condition then as to the erasure of the letters "ren" that it is now, the result of which, of course, would be, if true, that J. L. A. Thompson did not make the alteration thereafter. J. L. A. Thompson also testifies that he read this policy over to his mother, who could not read or write, and that she said it was all right; that he was her oldest son, and she would just make it payable to him and his son, B. J., and that she made no objection to its being so paid; and that the policy at that time appeared just as it does now. J. L. A. Thompson, however, is the only witness who testifies to this fact. It further appears in evidence that Susan Thompson had another policy in what is known as the Jacob's Order, and that policy was payable to her husband and all her children.

In this confused and contradictory state of the testimony of the witnesses in the case, looking to their interest and all the other circumstances of the case, we feel far safer in the effort at reaching the truth of this case in accepting the certified copy of the

record book of policies and beneficiaries, kept in the office of J. A. Q. Williams, at Holly Springs, than in relying upon this utterly contradictory mass of testimony given by the witnesses. That was a contemporary register, which was kept according to the provisions of the constitution and the by-laws, on which it was the duty of the proper authorities to enter the name of the beneficiaries; and the beneficiaries named in their record are all the children and the grandson. Much as we dislike to reverse a chancellor on the facts, we are constrained to hold that this piece of record evidence should have controlled the judgment of the chancellor, in view of the utterly contradictory nature of the testimony of the witnesses in the case. This record, made at the time the application was sent in, showing, as the constitution and by-laws required, on its face the names of the beneficiaries to whom the policy was to be issued, speaks the truth, as we believe, concerning this matter. If, as insisted by the appellees, the letters "ren" were stricken out in the lifetime of Susan Thompson, it is incredible that the beneficiaries in the policy could have been written in the official record as they are. We think it is far safer to rely on this contemporary record, which no one had interest to falsify, than upon the testimony delivered by the witnesses in the case, under the peculiar circumstances of the case.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the decree of the court below is reversed, and a decree will be entered here for the appellants.

HILL et al. v. WOODWARD et al.
(No. 14,599.)

(Supreme Court of Mississippi. Dec. 18 1911.)

1. TENANCY IN COMMON (§ 30*)—RIGHTS AND LIABILITIES OF TENANTS.

A tenant in common, on the refusal of the administrator of the deceased cotenant to contribute to the payment of taxes, permitted a sale of the land and purchased at the tax sale, and thereafter paid taxes assessed, sometimes in his own name and sometimes in the name of himself and the cotenant. Prior to the death of the cotenant, the land was assessed to the two tenants. *Held*, that the heirs of the cotenant were not divested of title to the property.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 96; Dec. Dig. § 80.*]

2. EMINENT DOMAIN (§ 70*)—RIGHT TO COMPENSATION—ACQUISITION OF RIGHT OF WAY—PUBLIC POLICY.

The public policy of the state cannot override the guaranty in Const. 1890, § 17, prohibiting the taking of private property, except for public use, on due compensation being first made.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 174, 175; Dec. Dig. § 70.*]

3. PARTITION (§ 12*)—PROPERTY SUBJECT TO PARTITION—RAILROAD RIGHT OF WAY.

Where a railroad company obtained a deed of a right of way from a tenant in common and constructed its line of road, the heirs of the cotenant could, under Code 1906, § 3521, authorizing the partition of land held by tenants in common, sue for the partition of the entire property, including the right of way, and public policy did not prohibit partition of the land as against the company.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 38-51; Dec. Dig. § 12.*]

4. RAILROADS (§ 73*)—RIGHT OF WAY—TITLE ACQUIRED.

The ownership of a railroad company in its right of way is subject to the use of the property for railroad purposes, whether the title is obtained by private purchase or through eminent domain proceedings.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 179-182; Dec. Dig. § 73.*]

Appeal from Chancery Court, Calhoun County; I. T. Blount, Chancellor.

Suit by E. E. Woodward and others against J. W. Hill and others for partition. From a decree granting relief, defendants appeal. Affirmed.

The facts disclosed by the record are in substance as follows:

In 1871 Aulston Woodward and T. T. Enochs purchased, by joint deed from J. W. Drake, certain lands in Calhoun county, Miss., the subject of this controversy, and thereby became tenants in common of said land. At that time the land was of little value, being situated in a river swamp, and being what is known as wild or uncleared land, and being entirely without any improvements at all. Taxes were paid on the land until about the year 1885; the land being assessed to Enochs and Woodward until 1881, and after that time to Enochs and estate of A. Woodward, the latter having died in the year 1881. These taxes were paid by Enochs, and it is claimed by the appellants that there was a verbal agreement between the two, about the year 1875 or 1876, that Enochs was to take the property as his own, in settlement of taxes and other claims against it; but no writing to this effect was drawn up, and the assessment was never changed. In the year 1885, Woodward's administrator (his son, J. H. Woodward) having refused to contribute towards the taxes, Enochs advised him that he was going to let the land sell for taxes and buy it in, and thus obtain title to the land in himself. Accordingly in 1886 the land was sold for the taxes of 1885, and Enochs bought it in. He obtained a tax deed from the deputy sheriff and tax collector, but the same was never placed of record. This tax sale was made five years after the death of Aulston Woodward. Between the date of the tax sale and the death of Enochs, in August, 1899, the taxes were paid on the land by Enochs, the assessment sometimes appearing as Enochs and Woodward, and other years in the name of T. T. Enochs. Enochs

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

devised the land, on his death, to his daughter, Mrs. Alice Shell, who paid taxes on it until she sold it in 1900 to J. W. Hill, through whom all the other appellants derived their claim of title. The appellees are heirs at law of Aulston Woodward, and claim the land in controversy as tenants in common with the appellants, and on June 11, 1908, filed their bill in chancery for a partition and sale of the premises and for an accounting. The Southern Railway Company is made a party defendant to the bill, as this company had purchased a right of way through the property and constructed its line of railway. The town of Vardaman had been built adjacent to the railroad on the property here in controversy, and lots were sold to a large number of purchasers, who were also made parties defendant.

The defendants offer three defenses to the suit: First. That Aulston Woodward before his death conveyed the property by verbal agreement to T. T. Enochs, his cotenant, in liquidation of certain indebtedness due Enochs by Woodward. Second. That in recognition of his title to said property Enochs had paid taxes on same, and in accordance with the custom then prevalent in that county, in order to perfect his title, had allowed the property to sell for taxes and bought it in his own name, and thus held it adversely to other claimants, and his title had ripened by adverse claim, many years before the bringing of this suit. Third. That the complainants were estopped from setting up any claim of interest in this land, because said land was not included in a partition suit of the lands of Woodward heirs, and because J. H. Woodward, who was the agent and attorney in fact of the Woodward heirs, had made no objection to the tax sale and purchase of the land thereat by Enochs, or to the subsequent sale of the premises at public auction, when lots were bought by the various defendants. The Southern Railway Company, which was made a party defendant by the amended bill, claims that a partition of the property should not apply as against said railroad, because of public policy. This feature of the case is discussed fully in the opinion of the court.

The chancellor found for the complainants. The decree contained the following special findings of fact: (1) That complainants are not barred by any statute of limitation; (2) that complainants are not estopped from asserting their claim to an interest in the land; (3) that Aulston Woodward was a tenant in common with T. T. Enochs at the time of the death of the former; (4) that Aulston Woodward's undivided half interest in the land descended to complainants; (5) that complainants have been tenants in common with Enochs until the death of the latter in 1899; (6) that no statute of limitations began to run against the complainants during the lifetime of T. T. Enochs; (7) that there was no adverse possession or holding of this

land by T. T. Enochs during his lifetime, against complainants; (8) that complainants are tenants in common with defendants; (9) that they are entitled to the relief prayed. The court further ordered that the clerk be appointed a commissioner to sell the land in controversy, including the right of way purchased by the railway company, and to report back to the board on a subsequent date, and to take and state an accounting. The chancellor granted an appeal from this decree.

Haman & Bates, Creekmore & Stone, and A. T. Stovall, for appellants. Luckett & Guyton and Dunn & Patterson, for appellees.

MAYES, C. J. [1] The title of appellees to the land in controversy, to the extent claimed by them, is established so clearly as to put it beyond the realm of controversy. The only question in the case which requires discussion is the question raised by the railroad company as to the right of appellees to have partition as against them. It is argued that the railroad company secured deeds granting to it a right of way over the land, and that it has constructed its line of railway on same, and is now using the property in the operation of its road from Okolona, through the town of Vardaman, to Calhoun City, which is the terminus of the road, and is eight or ten miles west of the town of Vardaman. The facts show that the railroad company secured by its deeds only a one half interest in the property; the other half interest belonging to appellees. On account of the small quantity of land, taken in connection with its charter, and because of the numerous complainants and defendants, the chancellor very properly ordered a sale of the land for partition, which order of sale also included that part occupied by the railroad company. On behalf of the railroad company it is argued that no partition should have been ordered as against it, because such judgment is contrary to public policy. In support of this contention counsel cite many cases. We shall discuss those cases later on in this opinion.

[2] Under section 17 of the Constitution of 1890 it is beyond the power of the state or any corporation to take or damage the property of any person, even for a public use, without due compensation being first made. The railroad company has constructed its roadway on land to which it has not the complete title. It has thus taken private property for a public use without having compensated the owners thereof to the extent of their interest, and has not procured their title, in the face of the fact that the records in the clerk's office fully disclose same. No public policy of the state can be allowed to override the positive guaranties of the Constitution, or divest persons of

their title to property, except in the way which the law provides.

[3] Section 3521 of the Code of 1906 authorizes the partition of land held by joint tenants, tenants in common, etc., and the railroad is of that class of tenantry. The statute makes no exception when one of the tenants in common happens to be a railroad. In support of the contention of counsel that public policy forbids the partition of this land as against the railroad company, our attention is first called to the case of *Weston et al. v. Foster*, 7 Metc. (Mass.) 297. But the question involved in the above case was not the same as the one involved in this case. In the *Foster Case*, supra, the court merely held that as the railroad company had only an easement in certain property of which partition was sought, and no title, it was not a necessary or proper party to the proceedings.

Our attention is directed by counsel to 21 Amer. & Eng. Ency. of Law, p. 1163, and 30 Cyc. p. 178. The text merely states that there are certain kinds of property of which the court will refuse to make a partition on the grounds of public policy; that the courts have refused to decree partition of a railroad, on the ground that any division of the property would impair its usefulness, in which the public has an interest. The notes to the text in both of above volumes cite the case of *Railway Co. v. Railroad Co.*, 38 Ohio St. 614. An examination of that case shows that the facts of that case make of it a different case from the one now before the court. It appears from the above case that one railroad corporation purchased from another an undivided interest in the latter's railroad. Before this could be done in the state of Ohio a statute allowing it was necessary, and the Legislature of the state passed an act in relation to insolvent railroad companies which authorized the sale and purchase. The act provided that the sale could be made, provided it be done *without impairing the usefulness of the selling road*. In this way a tenancy in common was created, followed by a subsequent attempt on the part of the purchasing road to partition the road. The Ohio court held that there could be no partition of this property, either under the statute or in equity. The court said: "The statute authorized the sale of an undivided interest in the road between Newark and Columbus by the Central Ohio Company to the Steubenville & Indiana Company, 'if the same could be done without impairing the usefulness thereof' to the Central Ohio Company. This condition was unquestionably inserted in the statute upon considerations of public policy. In the deed of conveyance it was recited that the sale did not impair the usefulness of the section to the vendor company. It was not meant, either by the statute or the deed, that the exclusive use of the section was preserved

to the Central Company, but that in the joint use of the section reasonable facilities were and would be afforded the Central Company for conducting its business over this line of the road; in other words, that one-half of the capacity of the road was sufficient to supply the necessities of the vendor company. * * * It was the use of an undivided road, not the half of the road when divided, that was thus secured to the vendor; and this, not for a time limited at the pleasure of the purchaser, but for all time. This is inferable from the fact that no further power to alienate existed in either party, save such only as might result from the power to create debts. * * * The Legislature did not contemplate or intend that a partition of this property should be made, but, on the other hand, did intend a perpetual joint use of the highway." In the last case the selling road could not make the sale until authorized so to do by the Legislature of the state, and when that body authorized the sale it stipulated that it could only be done when the sale did not impair the usefulness of the road. The court held that the partition would impair its usefulness, and that any attempt so to do was in violation of the act, and refused to order it. The above case does not hold that public policy forbids the partition of land on which a railroad is situated, when the railroad company has become a tenant in common with others whose title has never been parted with by them.

In the case of *Pittsburgh Ry. Co. v. Fish*, 158 Ind. 525, 63 N. E. 454, it appears that the town of Winamac, Ind., undertook to sell a small portion of the roadway of the railroad company for the purpose of satisfying a lien claimed by the town as against the property of the railroad for certain local improvements assessed against same, and which the railway company failed or refused to satisfy, and the court said: "When the public grants a franchise to a railroad corporation, and gives it the right of eminent domain, it does so upon the theory that benefits will be returned. Hence it is that the public has an interest in the exercise of such a franchise that a court of equity, in the absence of a specific statutory provision, will not suffer disturbed, when private right may find another adequate remedy. Accordingly it has been held that such property of a railroad company as is essential to the operation of the road, and in carrying forward its corporate purpose, will not be ordered sold by piecemeal to satisfy a statutory lien; but in lieu of an order of sale the court will award the plaintiff a personal judgment, to be collected as ordinary judgments at law are collected." The above case was decided as it should have been, but we fail to see that it supports the contention of railroad in this case. No question of the failure of the railway to procure title, in the first in-

stance, to the land on which it had established its line, was involved in the above case. Ample remedy was left the creditor to collect his debt, without destroying the public usefulness of the railroad. The creditor had no vested property rights in the road. He had only the right to pursue such remedies for the collection of his debt as the law allowed, and if ample remedy was afforded him, without disturbing the rights of the public, the creditor had no cause of complaint. But in this case the appellees own an interest in the land itself. They owned it before the road was constructed, and they still own it.

The case of *Gooch v. McGee*, 83 N. C. 59, 35 Am. Rep. 558, deals with the sale of corporate property under execution. The case merely holds that, when a public corporation acquires real estate for corporate purposes under eminent domain powers, such real estate can only be sold under execution subject to the performance of the duties and obligations imposed by law on the corporation. The case of *Connor v. Tennessee Central Ry. Co.*, 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687, turns on the same principle of law. Connor attempted to enforce a contractor's lien by selling a specific part of the roadbed of the railway company to which it was claimed the lien attached, and the court held that this could not be done; that the debt must be collected in the ordinary way and by ordinary processes, by the appointment of a receiver, or collected from the tolls or income, and, if this should prove insufficient, then the decree should subject the entire property and its franchise to sale as an entirety.

It seems useless to further discuss the authorities relied on by counsel. Not one of them have any application to the facts of this case. All the cases relied on by counsel deal with the collection of a debt after the railroad has acquired title to its roadway in some way known to the law; and when this is once done the railroad acquires the ownership, subject to the burden imposed that it will always be used so as to promote a public use of same.

[4] A railroad corporation does not acquire an absolute title to its roadway. It does not acquire a title that it may sell or dispose of at pleasure, without reference to the right of the public to use same. The ownership of the railroad company of its roadbed is different from that of an individual or a private corporation. The basis on which the grant to it of eminent domain powers rests is the fact that its property is to be used for a public purpose. The right of the public to have it so use its property is imposed on the railroad property the very instant it obtains title, whether the title is obtained by private purchase or through eminent domain proceedings. Because of this fact, and because a judgment creditor

can obtain no higher equities in a judgment debtor's property than the debtor himself had, the courts have refused to allow a judgment creditor to destroy the public usefulness of a railroad by levying on a part of its roadway and selling it for the payment of a debt, thus destroying the unity and usefulness of the road. Under the terms of its creation it is bound to run its road for the public use. It cannot rid itself of this burden. It cannot sell its road by piecemeal itself, and no judgment creditor can do so. But no public burden can be imposed on land where the public has never acquired any title, and therefore no right to have it used for the public good. Before the public burden can be imposed on the land, the title must be acquired. If a railroad locates its roadway on property belonging to an individual, as long as the individual owns the property, the railroad may be dealt with as any other trespasser or tenant in common.

The case of *Beck v. Railroad Co.*, 65 Miss. 172, 3 South. 252, has already settled the question involved in this case so far as this state is concerned. This court, speaking through Judge Campbell, said: "The proposition that a railroad company may build upon the land of one who does not object, and thereby secure the right of way, subject only to liability to his claim for damages, is not maintainable in this state, whatever may be held elsewhere. A parol license may shield from liability for trespass; but it is revocable, and, when revoked, is no longer a protection. The only way to secure the right of way is by grant from the owner, or by condemnation proceedings, or by the statute of limitations. If the road is built without securing the right of way, the owner, who has not precluded himself, may recover damages for the trespass, and may recover the land occupied by ejectment, or may enjoin in chancery the use of the land. The fact that the charter authorizes either the landowner or the company to institute proceedings for condemnation does not in any manner abridge the rights of the landowner. He is not bound to take the initiative as to such proceedings. If a company desires the right of way, it must take steps to secure it. If it does not, it must answer for every invasion of the rights of the landowner."

In the state of Mississippi a fee-simple title to land means absolute and unqualified ownership as against railroads and all persons whomsoever. It means that such land cannot be taken from the owner, except by due process of law and upon due compensation being paid therefor. It means that with this title go all the incidents of the title, one of which is to have it partitioned as against a tenant in common, either in kind or by sale, controlled only by such method of partition as will protect the best interest of all parties; but partition may be had, it matters not who the tenants in common are.

Affirmed.

EATON et al. v. BROADERICK.

(No. 15,566.)

(Supreme Court of Mississippi. Jan. 29, 1912.)

1. WILLS (§ 610*)—CONSTRUCTION—NATURE OF REQUEST.

Where a testator directed that the cotton on hand should be sold as soon as possible and the money turned over to his wife, the proceeds of the cotton were bequeathed to her absolutely.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1379-1385; Dec. Dig. § 610.*]

2. WILLS (§ 866*)—RULE OF DESCENT.

Personal property not disposed of by the testator's will is distributed under the statute of descent and distribution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2200-2203; Dec. Dig. § 866.*]

3. WILLS (§ 615*)—CONSTRUCTION—ESTATES DEVISED.

Where a testator's will directed that his land should not be sold until after his wife's death, and that then it should be sold at public auction, and that notes due him should be collected and the money remain in his wife's hands until her death, the wife, by necessary implication, took a life estate in the land, and was entitled to a life income in the proceeds of the notes.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 615.*]

4. TENANCY IN COMMON (§ 29*)—IMPROVEMENTS.

Where a will directed that no child should interfere with another's improvements upon the testator's land, and that each child owned the improvements which he himself had made, and that the land should be divided equally among the children after the death of the widow, who took a life estate, the children, who take as tenants in common, were entitled to the improvements they made without being charged rent thereon.

[Ed. Note.—For other cases, see Tenancy in Common, Dec. Dig. § 29.*]

Appeal from Chancery Court, Tishomingo County; J. Q. Robins, Chancellor.

"To be officially reported."

Action by Roscoe Broaderick against John Eaton and others for the construction of the will of J. M. Eaton, deceased. From a decree for complainant, defendants appeal. Reversed and remanded, with directions.

On June 6, 1896, J. M. Eaton died, leaving as his heirs at law his widow, Emaline Eaton, and his children, John, Tobe, and Wister Eaton, and another son, Bill Eaton, who afterwards died, leaving a wife and children, and Roscoe Broaderick, a grandson, both of whose parents died before the death of J. M. Eaton. Broaderick, who was complainant in the court below, on becoming of age, filed a bill in chancery on the 20th day of March, 1911, making the other heirs parties defendant, asking a construction of the will of J. M. Eaton. Said will is as follows: "My will is that the land remain unsold until after Ma's death and then to sell the land at public auction and noboddy alloud to bid on the land but the children, and one not to bid against another and not bid over one dol-

lar per acre. The notes to be collected and the money to remain in Ma's hands untill her death, the boys having the authority to collect them. One of the boys to be Roscoe's and Wister's guarden and to see that they have a good horse or mule when they become of age. I want all of the notes turned over to the boys, Tobe, John and Bill, and Ma, and not to tell nobody how much the notes is and who they are on. The cotton on hand to be sold as soon as possible and the money turned over to Ma. No child shall interfere with another's improvements, all of the improvements that he has done is his. I don't want any of my old customers bothered but let them pay as much as they can and make new notes untill Ma's death and then the matter must be close up and a final settlement be made. The land to be divided by the tax receipt in equal number of acres and Roscoe to share the same as the rest of the children."

The chancellor gave a written memorandum of his opinion, which is as follows:

"The court is of the opinion, on the hearing of this cause on the petition to construe the will, that some parts of the will are so vague, uncertain, indefinite, and conflicting as to make them void. But there are some provisions that are sufficiently certain and definite, and the will will not therefore be declared as entirely void, but only noneffective as to those provisions that are so unintelligent and inconsistent. The court is of opinion that it is clear that the testator did not desire his land divided until after the death of his widow, whom it is agreed is meant by "Ma" in the will. It is also clear that he intended the beneficiaries under his will should have the benefit of all improvements such beneficiary or devisee had made or should make on the land occupied by him, and that each devisee should be allotted, as far as practicable in the final division or partition of the land, the land on which he had placed such improvements, and if this could not be done he should be allowed or credited with such improvements. This can be settled in accordance with the desire and will of the testator in the final settlement of the estate and partition of land, or its proceeds after the death of the widow.

"It is equally clear that the testator did not contemplate a division among the devisees and legatees of the notes due at the time of his death to his estate. He certainly, however, contemplated that the proceeds of such notes should be preserved until after the widow's death and then divided. It is also clear that he contemplated that each one of his children and Roscoe Broaderick, the sole representative heir and distributee of his sole deceased child, should take an equal value of land and as nearly as practicable of equal acreage, not counting im-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

provements made by any devisee, and that they should likewise take an equal division of said proceeds of said notes. His method of dividing the land is uncertain, indefinite, and inconsistent, and entirely impracticable, and will have to be disregarded, and the provisions directing the manner of such division are void.

"I think the terms of the will give the proceeds of the cotton on hand at his death to his widow absolutely. He makes no definite and certain disposition as to any money or other personal property than the said cotton and notes, and therefore all such money and personal property would pass under the statute of distribution absolutely to his widow, his children, John Eaton, Tobe Eaton, Wister Eaton, and his grandson, Roscoe Broaderick, each one-seventh, and Mrs. Eleanor Eaton, widow of Bill Eaton, and Bolivar Eaton and Lillian Eaton, only children of Bill Eaton, each one-third of one-seventh.

"No executor is named by the testator to carry out the provisions of his will, and it will be necessary to appoint an administrator cum testamento annexo. No intelligible disposition is made of the rents and profits of the land during Mrs. Eaton's (Ma's) life, and the land therefore descends to the devisees as tenants in common, and each is entitled to his proper proportion of such rents and profits from the real estate during the life of his widow. He has, however, provided that the occupants shall have his improvements, and so the tenant in common occupying such should not be charged with rent on his improvements, but should account for reasonable rent of the land, unless all occupy or use practically the same amount. The administrator cum testamento annexo will have to collect and apportion the rents. He should also have the custody of the notes due at decedent's death and the proceeds of any that have been collected, and administer under the direction of the court. The proceeds of any money on hand (not loaned out) and the personality should also be administered by him, and distributed as soon as practicable, as above directed.

"An accounting will be necessary to fix and determine the interest of the parties, and to fix the amounts and disposition made of the personal property, and ascertain the amount of the money and notes, and what of these have been collected, and who is accountable for same; and a master will be appointed to take and state such account. Probably one of the sons may desire to administer. For the present a bond of \$2,000 is fixed for such administrator. This can be changed on the coming in of the report of the master."

A decree in accordance with this opinion was entered, and a master appointed to take and state an account, and an appeal granted to either party desiring same.

Candler, Bennett & Sweat and W. L. Ellege, for appellants. W. J. Lamb, for appellee.

WHITFIELD, C. This case presents for construction the will of J. M. Eaton. The reporter will set out this will in full.

[1,2] We concur with the chancellor in so far as he held that the proceeds of the cotton on hand at the death of the testator were bequeathed to the widow absolutely, and also in so far as he held that any money or other personal property than the cotton and the notes passed under the statute of descents and distribution to the widow and his children and grandchildren according to that statute.

[3] We do not concur in his construction as to the title to the land or the proceeds of the notes. We are clearly of the opinion that the will vested a life estate in the widow in the land, and in the proceeds of the notes by necessary implication.

[4] We also concur in the chancellor's holding that the tenants in common who made improvements should keep those improvements, and, if possible, have allotted to them the land on which such improvements may have been erected, without being charged with rent on his improvements. The land will be divided at the death of the mother, the widow, as directed in the will.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the decree is reversed, and the cause remanded, to be proceeded with in accordance with the foregoing opinion.

ASCHER & BAXTER v. EDWARD MOYSE & CO. et al. (No. 14,853.)

(Supreme Court of Mississippi. Jan. 29, 1912.)

1. STATUTES (§ 159*)—IMPLIED REPEAL.

Two statutes seemingly repugnant must be so construed, if possible, that the latter shall not repeal the former, but that both may stand; but, where there is a repugnancy, the older statute is repealed by implication only to the extent of the repugnancy.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. § 159.*]

2. STATUTES (§ 161*)—IMPLIED REPEAL.

Where a later statute covers the whole subject of earlier statutes, and embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier statutes but to cover the whole subject and prescribe the only rules in respect thereto, it repeals all former statutes on the subject, though the former statutes are not in all respects repugnant to the later statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.*]

3. STATUTES (§ 161*)—IMPLIED REPEAL.

The rule that a later statute, covering the whole subject of a former statute and em-

bracing new provisions, impliedly repeals the prior statute, is subject to the qualification that, where the later statute expresses the extent to which it is intended to repeal the prior statute, as by a clause repealing all laws in conflict therewith, it excludes any implication of a more extended repeal.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 161.*]

4. GAMING (§ 69*)—BUCKET SHOPS—STATUTES.

Laws 1908, c. 118, § 1, punishing the maintenance of a place of business in the state to carry on dealings in futures on margins, deals alone with bucket shops and places in the state maintained to receive orders for dealings in futures on margin, and punishes persons engaging in such business either as principal or agent.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 69.*]

5. GAMING (§ 3*)—IMPLIED REPEAL OF STATUTE.

Laws 1908, c. 118, prohibiting contracts for the purchase and sale of commodities on margin, making such contracts unlawful, prohibiting any person from operating any place of business where such contracts are entered into, and providing that money lost in such transactions may be recovered by the parents, wife, children, executor, or administrator of the person sustaining the loss, etc., does not impliedly repeal Code 1906, §§ 1201, 1202, 2303, condemning dealing in futures, and providing that such contracts shall not be enforced, and that any person losing money by reason of such contract may sue for the loss, because the act of 1908 does not deal with the whole subject relating to futures, but prohibits the establishment of bucket shops in the state, where such unlawful contracts may be made, and an action may be maintained under section 2303.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 3.*]

6. GAMING (§ 14*)—CONTRACTS—PUBLIC POLICY.

It is the public policy of the state, as evidenced by legislation, to condemn contracts commonly known as contracts dealing in futures; and a contract for the payment of differences in price arising out of the rise and fall of the market price above or below the contract price is a wager on the future price of a commodity, and is invalid.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 14.*]

7. STATUTES (§ 224*)—CONSTRUCTION—LEGISLATIVE INTENT.

The court, in construing a statute, will presume that the Legislature was familiar with prior statutes and with judicial constructions placed thereon.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 224.*]

8. CONTRACTS (§ 144*)—CONSTRUCTION—EXTRATERRITORIAL FORCE.

A state statute has no extraterritorial force, and cannot make unlawful a contract entered into in another state, nor subject a party thereto to punishment; but it may prevent the courts from enforcing contracts made outside of the state, when contrary to the policy of the state.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 724-727; Dec. Dig. § 144.*]

9. GAMING (§ 12*)—STATUTES—CONSTRUCTION.

The proviso of Laws 1908, c. 118, § 2, declaring that nothing in the act prohibiting

dealings in futures shall apply to transactions by mail or telegraph between persons in the state and persons outside of the state, where neither is represented in the state by any broker, was inserted on the erroneous idea that such a provision was necessary to render the act constitutional, and it does not render dealings in futures valid when conducted by such class of persons.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 12.*]

10. APPEAL AND ERROR (§ 1175*)—QUESTIONS REVIEWABLE—DISPOSITION OF CASE ON MERITS.

The Supreme Court is a court of review, and it will not, as a general rule, pass on the merits of a controversy, unless determined in the lower court; and where the lower court erroneously dismissed a bill on the ground that complainant could not sue, the Supreme Court will not determine the merits, but the cause will be remanded to the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

Smith, J., dissenting.

Appeal from Chancery Court, Hinds County; G. G. Lyell, Chancellor.

Suit by Ascher & Baxter against Edward Moyse & Co. and others. From a decree of dismissal, complainants appeal. Reversed and remanded.

The appellants filed a bill in chancery on January 15, 1910, against the appellees Edward Moyse & Co., cotton brokers in New York City, the State Bank & Trust Company, a banking institution domiciled at Jackson, Miss., and M. A. Lewis, an alleged debtor of said Moyse. The gravamen of the bill is that, beginning on December 31, 1909, the appellants entered into various contracts for the purchase of future cotton from said Moyse; that it was never the intention of either party that actual cotton should be bought, sold, or delivered, but that it was a gambling contract, and was carried on by depositing margins against a decline in the market; that such margins were deposited with the State Bank & Trust Company of Jackson, Miss.; that the money so deposited was kept to the account of Moyse with the said State Bank & Trust Company, to be drawn against by Moyse, who carried out appellants' contracts on the New York Cotton Exchange. The bill further alleges that the appellants had deposited \$3,000 with said bank, and had remitted direct \$600 from the time the dealings first began, and suit was brought for these amounts, which, it is claimed, they lost by said speculative future transaction. It is further alleged that \$3,500 of this amount is still in the hands of said bank, which amount the bill seeks to subject to the payment of appellants' claim.

Watkins & Watkins, for appellants. Green & Green, for appellees.

McLEAN, J. Upon the very threshold of the discussion of the questions presented by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

this record, we express our unbounded appreciation of the exceedingly able arguments, both oral and printed, made and submitted by counsel for both appellants and appellees. These briefs and arguments have been of inestimable value, not only in diminishing the labors of this court, but in simplifying what otherwise might be regarded as a difficult question.

[1, 2] The first question presented is whether chapter 118 of the Laws of 1908 repeals the provisions of the Code of 1906 relative to dealing in futures, and especially whether section 2303 of the Code is repealed. It may be profitable in the first place to refer to what may be regarded as the general rules or canons of construction relating to repeals. The act of 1908 does not contain any express repeal of any former laws, and consequently, if the Code provisions are repealed, they are repealed only by implication. In *McAfee v. Southern Railroad Company*, 36 Miss. 669, *Richards v. Patterson*, 30 Miss. 583, and *Southern Railroad Company v. City of Jackson*, 38 Miss. 334, the rule is laid down by this court that a repeal of a statute by implication is not favored in the law, and that where two statutes are seemingly repugnant they must be so construed, if possible, that the latter shall not be a repeal of the former by implication; and it was further said in *Commercial Bank of Natchez v. Chambers*, 8 Smedes & M. 9, that the two acts, seemingly inconsistent and repugnant, must be so construed, if possible, that both may stand and harmonize. See, also, *Ex parte McInnis*, 54 South. 260, where the authorities are collected and cited. The leading case in America upon this subject is the case of *Wood v. United States*, 16 Pet. 342, 10 L. Ed. 987, and one which, perhaps, has been followed more than any other authority. In that case the question arose whether the sixty-sixth section of the act of 1799 (Act March 2, 1799, c. 22, 1 Stat. 677) had been repealed, or whether it remained in full force and effect. That eminent jurist, Mr. Justice Story, speaking for the entire court, says: "That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the more narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy."

The rule announced in *Wood v. United States*, supra, has been frequently reaffirmed by that court (see *Chew Heong v. United States*, 112 U. S. 549, 5 Sup. Ct. 255, 28 L. Ed. 770, U. S. v. *Mathews*, 173 U. S. 388, 19 Sup. Ct. 413, 43 L. Ed. 738, and *Red Rock*

v. Henry, 106 U. S. 601, 1 Sup. Ct. 434, 27 L. Ed. 251), and generally by the various state courts. See 10 L. Ed. (Extra-Annotated Edition) 183; *Notes to Wood v. U. S.*, 16 Pet. 342-366. Endlich on the Interpretation of Statutes, in considering this question, says, in section 210, that "it is a rule founded in reason, as well as in abundant authority, that, in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it, the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law, so positive as to be irreconcilable by any fair, strict, or liberal construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject." In 36 Cyc. p. 1073, the rule is thus laid down: "Where two legislative acts are repugnant to, or in conflict with, each other, the one last passed, being the latest expression of the legislative will, must govern, although it contains no repealing clause. But it is not sufficient to establish such repeal that the subsequent law covers some, or even all, of the cases provided for by the prior statute, since it may be merely affirmative, or cumulative, or auxiliary. Between the two acts there must be plain, unavoidable, and irreconcilable repugnancy, and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy. If both acts can, by any reasonable construction, be construed together, both will be sustained. Two statutes are not repugnant to each other unless they relate to the same subject. Furthermore, it is necessary to the implication of a repeal that the objects of the two statutes be the same. If they are not, both statutes will stand, although they may refer to the same subject. When two statutes cover, in whole or in part, the same subject-matter, and are not absolutely irreconcilable, no purpose of repeal being clearly shown, the court, if possible, will give effect to both. Where, however, a later act covers the whole subject of earlier acts, and embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier acts, but to cover the whole subject then considered by the Legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject-matter, even if the former acts are not in all respects repugnant to the new act. But in order to effect such repeal by implication it must appear that the subsequent statute covered the whole subject-matter of the former one, and was intended as a substitute for it. If the later statute does not cover the entire field of the first, and falls

to embrace within its terms a material portion of the first, it will not repeal so much of the first as is not included within its scope, but the two will be construed together, so far as the first still stands."

[3] If the inquiring mind desires to run out to his satisfaction, and if he will consult the numerous authorities cited by this author in support of the rule there announced, he will find that the rule is correctly and accurately stated as gleaned and gathered from these various authorities. In the celebrated case of *Great Northern Railroad Company v. United States*, 208 U. S. 452, 28 Sup. Ct. 313, 52 L. Ed. 567, a case of considerable importance, and one in which were engaged some of the brightest legal luminaries in this country, it was in substance announced by that eminent authority that "the rule that a later act covering the whole subject of a former act and embracing new provisions operates by implication to repeal the prior act is subject to the qualification that where the later act expresses the extent to which it is intended to repeal prior laws, as by a clause repealing all laws in conflict therewith, it excludes any implication of a more extended repeal." With these primary, and we may add well-settled, canons of construction before us, it is believed that the solution of the question presented by this record is not a very difficult one. It is contended by learned counsel for the appellees that the act of 1908, not only repealed section 2303, but also sections 1201 and 1202, of the Code of 1906. Section 1201 of the Code condemns any dealing in contracts commonly called "futures," and makes it a misdemeanor so to do, and provides the punishment. Section 1202 condemns the buying or selling of commodities of any kind to be delivered at a future date, without agreeing or intending that the commodities are to be actually delivered in kind and the price paid, and declares the person so dealing to be guilty of a misdemeanor. Section 2303, which is found in the chapter relating to gambling contracts, provides that these future contracts shall not be enforced, and, further, that any person who shall make any such contract, and by reason thereof lose any money or other valuable thing, and shall pay or deliver the same, may, or his wife or children may, sue for and recover such money or other valuable thing from the person knowingly receiving the same, either for himself or as agent for another.

[4] Turning to chapter 118 of the Acts of 1908, we find that the first section of that act deals exclusively with persons, either as principal, agent, broker, or intermediary, who establish, maintain, or operate an office or place of business in this state for the purpose of carrying on or engaging in the business forbidden in the act, commonly called "dealing in futures on margins"; and this section further provides that the person offending any of the provisions of that sec-

tion is guilty of a misdemeanor, and, on conviction, shall be punished by a fine and imprisonment. This section evidently dealt alone and exclusively with what are known as "bucket shops," and places in this state maintained to receive orders for this class of business, and those persons who were engaged in the management or the conducting of this kind of business, either as principal or agent. Section 3 of said act makes it a misdemeanor for every person who shall become a party to any such contract or agreement as *is by this act made unlawful*, and every agent or officer of any corporation who shall in any way knowingly aid in making, furthering or effectuating any such contract or agreement, and provides that they shall be punished as provided in section 1 of the act. Section 2 of the act, which is the one especially relied upon by appellees as repealing section 2303 of the Code of 1906, is as follows: "That every contract or agreement, whether in writing or not, whereby any person or corporation shall agree to buy or sell and deliver, or sell with an agreement to deliver, any wheat, cotton, corn or other commodity, stock, bond or other security to any other person or corporation, when in fact it is not in good faith intended by the parties that an actual delivery of the article or thing shall be made, is hereby declared to be unlawful, whether made or to be performed wholly within this state, or partly within and partly without this state; it being the intent of this act to prohibit any and all contracts or agreements for the purchase or sale of any commodities or thing of value on margin, commonly called 'dealing in futures,' when the intention or understanding of the parties is to receive or pay the difference between the agreed price and the market price at the time of settlement: Provided, that nothing herein contained shall be construed to apply to transaction by mail or wire, between persons in this state and persons outside of this state, where neither person is represented, directly or indirectly, in this state by any broker, agent, attorney or intermediary in said transaction."

[5] This suit was brought by the losers, who were the complainants in the court below, Ascher & Baxter, and therefore the question arises whether the complainants, under the laws of this state (this suit having been instituted on the 15th day of January, 1910, by the complainants filing in the chancery court of Hinds county, in this state, their bill of complaint against Edward Moyse & Co., the appellees), can bring this suit. The right to bring this suit is specifically given to the complainants under section 2303 of the Code of 1906; whereas, under section 9 of the act of 1908, the right to bring an action for a loss sustained in dealing in "future contracts" is given to the parent, wife, child or children, executor or administrator of, or the assignee of, the person sustaining the loss, and further gives the

right of recovery in either the circuit or chancery court, and provides that "the sum so lost shall be considered as liquidated damages to the person suing therefor from the broker, agent or intermediary who negotiated such transaction." It is a well-known fact, known to every person in the commercial and business world, that these exchanges where "future contracts" are dealt in are established and found only in the larger cities of the United States, such, for instance, as in New York, Chicago, and New Orleans. It is further known that the members of these exchanges have in almost every city in the United States agencies, constituting the feeders of these exchanges, where the unwary are induced to engage and to embark in the dangerous, and always risky, business of getting rich quick. It is also a matter well known to every business man in this state that in 1908, and for only a few years prior thereto, we had in this section of the country what was known as these agencies, representing the members of these exchanges and of these bucket shops, and the result was that the spirit of speculation became so rife and so general as to be absolutely demoralizing to the commercial interests of the country. One of the prime evils of latter days is the desire to get rich quick. One of the inherent characteristics of humanity is the spirit of speculation, and every attribute of our nature but swells and exasperates its infernal conflagration. The establishment of these bucket shops and means and methods of communication between the citizens of this state and the various exchanges throughout the country were but kindling wood to set ablaze this spirit of speculation. The evils attending these transactions becoming so numerous and flagrant, it became apparent to the Legislature that some specific law should be enacted condemning and prohibiting the establishment and maintenance of these agencies of these exchanges and of these bucket shops; and therefor it was by reason thereof that the act of 1908 was enacted by the Legislature of this state.

[6] It has long since been the public policy of the state of Mississippi, not only to condemn contracts commonly known as "future contracts" by the enactment of the various laws specifically condemning these transactions and making it a misdemeanor to so engage therein, but, in addition thereto, as far back as 1892 made the dealing in futures a ground of attachment. The condemnation—indeed, the prohibition—of dealing in futures has become a great public policy in this state. The withering, blighting curse of these speculations has lured the rich and the poor, the princely merchant and the impetuous clerk, the erstwhile honest and trusted employé. The cashiers of many banks, and not a few other fiduciaries, have become obsessed, and have lost honor, reputation,

riches, and self-respect beneath its witcheries. The dealing in futures is the begetter of poverty, the companion of embezzlement, the associate of degradation, and it scourges every one whom it touches. Its thirst is unquenchable; its maw insatiable. Its baneful influences have become so destructive to the legitimate business interests of the country, and especially to the cotton planter and to the wheat grower, that for many years there has gone up, and there still continues to go up, a cry to the national Congress beseeching that body for the passage of an act prohibiting the making of such contracts and the suppression of the exchanges throughout the states. So far, the "shearers of the lambs, the sellers of doves, and the money changers have desecrated the temple," and the petitions of the people have been cast aside, ungranted. Such is the mischief.

In the Code of 1880, and prior thereto, we had no statutory law specifically condemning by name the making of contracts commonly known as futures. The only statutory law relative to this matter up to that time was the statute against gambling (Code 1880, § 990), and this court, in *Campbell v. National Bank*, 74 Miss. 526, 21 South. 400, 23 South. 25, construed this statute relating to "any wager whatever," and held that dealing in futures was a gamble or a wager, and that a judgment rendered upon a note given to reimburse the payees of the note for money paid on these future dealings was illegal and void, affirming the doctrine announced in *Clay v. Allen*, 63 Miss. 426, to wit: "Such a proceeding is a wager, and as such void only when the real intent of the parties is to speculate in the rise and fall of prices, and the goods are not to be delivered, and one party is to pay the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract."

[7] In 1882 the Legislature, for the first time, enacted a law (Laws 1882, c. 117) specially directed against these future contracts, and this act of 1882 first passed under review of this court in *Lemonius v. Mayer*, 71 Miss. 514, 14 South. 33. This court in the last-named case held that the act of 1882, not having been brought forward in the Code of 1892, was thereby repealed. In *Isaacs v. Silverberg*, 87 Miss. 185, 39 South. 420, it was held that under section 2116 of the Code of 1892, which provides that money lost at gambling may be sued for and recovered by the loser, had no relation to contracts for the buying of futures, which are made invalid by section 2117 of the Code of 1892, and which was the law of 1882. This opinion in *Isaacs v. Silverberg*, which was delivered in November, 1905, was evidently a very great surprise to the legislative department of this state, for the reason that it brought forth a vigorous protest from the Legislature, which convened only a few months subsequent to

the delivery of this opinion, as is evidenced by the enactments of the provisions of the Code of 1906 relating to these transactions. It must be presumed, not only that the Legislature was familiar with its own enactments and with the constructions which this court had placed upon those enactments, but also conversant with the rulings of this court; and it is perfectly manifest from the opinions of this court that the well-settled public policy of this state was the condemnation and the prohibition of dealings in contracts commonly called "futures." *Clay v. Allen*, 63 Miss. 426; *Campbell v. National Bank*, 74 Miss. 526, 21 South. 400, 23 South. 25; *Gray v. Robinson*, 95 Miss. 1, 48 South. 226. In the last-named case this court reaffirms the principle announced in *Campbell v. National Bank*, 74 Miss. 526, 21 South. 400, 23 South. 25, to the effect that "a contract for the payment of differences in prices arising out of the rise and fall in the market price above or below the contract prices is a wager on the future price of the commodity, and is therefore invalid." The suit in *Gray v. Robinson* was upon a promissory note made payable to bearer, and brought by a bona fide holder for value without notice, and this court very properly held that the maker was not liable, for the reason that the consideration of the note was given for moneys lost in "future dealings."

In this connection we refer to the opinion of the court in *Campbell v. Bank*, 74 Miss. 530, 23 South. 25, delivered in response to the suggestion of error. It was urged in that case that section 990 of the Code of 1880 was repealed by the act of 1882, in so far as dealings in futures were embraced in that section of the Code. But in response to that suggestion of error this court said that there is not the slightest reference in the act of 1882 to section 990 of that Code, and that repeals by implication are not favored. The repeal by implication, says the court, "must clearly appear in the supposed repealing act, and we fail to find any purpose to repeal any former law by the act of 1882; rather, it appears to have been the intention of the Legislature, by enacting the statute of 1882, to enlarge the existing law. The court then says that future contracts are already nonforfeitable under section 990 of the Code, as per the interpretation placed thereon in *Clay v. Allen*, supra, and that the second section of the act of 1882, so far as concerns future contracts made in this state, were idle, and added nothing to the law in force, neither did it, as to such contracts, take anything from that law." [8] Section 2 of the act of 1908 provides that "nothing herein contained shall be construed to apply to transactions by mail or wire between persons in and those outside of the state where neither is represented in the state." It therefore follows that, if the act of 1908 repeals all former laws upon this subject, we have

no law condemning these contracts as specified in the Code of 1906; and, consequently, the courts of this state would be open for the enforcement of these contracts wherever made, provided they were lawful where made. It is true that an act of the Legislature can have no extraterritorial force, and therefore can neither make unlawful a contract entered into upon the soil of another state nor subject a party thereto to punishment; yet at the same time, in view of the well-settled public policy of this state, in contemplation of the growing and increasing evils of the traffic, both financial and moral, it is unthinkable to believe that the Legislature intended that the courts of this state should be thrown wide open, wherein the contracting parties should be given redress for the enforcement of such contracts when made outside of this state. There surely has been no change in the public policy upon this question, and certainly no developments in recent years which in the least commends this class or kind of dealing to the encouragement of either legislative or judicial bodies.

Under section 9, p. 123, of the Acts of 1908, the parent, wife, child, executor, or administrator of the person sustaining a loss, or the assignee of any such person so losing, may recover by suit the amount so lost from the broker, agent, or intermediary who negotiated such transaction. It will be observed that the transaction must have been made in this state, as is provided by this act, and that only the *broker, agent, or intermediary* is liable for the amount so lost. The principal—the party receiving for himself—is omitted. Under section 2303, the loser, his wife, or child can recover only from the person *knowingly* receiving the same, either for himself or as agent for another. The fact that the principal is exempted from suit by the latter act is an unanswerable declaration that the purpose was not to repeal section 2303 of the Code, for by that section he is expressly made liable. No such injustice or absurdity can be attributable to the Legislature as to say that it would make the broker, agent, or intermediary liable, and at the same time relieve the principal from liability. The proper construction of the act of 1908 is to say that the Legislature did not intend to deal with the whole subject-matter relating to "futures"; but the whole act clearly shows that the purpose was to prohibit the establishment of "bucket shops" and places in this state where these unlawful contracts could be made and entered into. Such being the case, it left in full force and vigor the provisions of section 2303. We therefore say there is no irreconcilable inconsistency between the two statutes. The seeming repugnancy vanishes upon an analytical examination, and the two can stand without eating away or destroying the salutary effect of the other. It is not at all nec-

essary, in order to make these two statutes stand, to obey the positive injunction of the latter act "that it is remedial and should be liberally construed."

We note specially that the act of 1908 provides that "all laws or parts of laws in conflict with this act be and the same are hereby repealed." This is a positive, unequivocal declaration that only such laws as are in conflict with the act are repealed, and is equivalent to saying that all former laws upon the subject must remain unrepealed, unless the latter act is irreconcilable with the former law and comes under the rule, announced in *Great Northern R. R. Co. v. U. S.*, supra, that when the latter act covers the whole subject of a former act, and, embracing new provisions, operates by implication to repeal the prior act, is subject to the qualification that, where the latter act expresses the extent to which it is intended to repeal prior laws, it excludes any implication of a more extended repeal. This necessarily must be true when the right to sue is given in the two acts to a different class of persons. To say that the latter act gives the right to sue to the parent, wife, child, personal representative, or assignee of the person sustaining the loss is not irreconcilable with section 2303 of the Code, giving the right to recover to the loser, his wife, or child.

It is urged that the purpose of the Legislature was to prohibit the dealings in futures, and that to give the right to the loser to sue for and recover his losses would not tend to the suppression, but rather to the encouragement, of these dealings upon the part of the loser, upon the principle that "heads I win, and tails you lose." This is persuasive; but is not the purpose of the statute made more effective in prohibiting any person from receiving or collecting any money as margins for these transactions with the knowledge that he is liable to be sued for the recovery of the money lost? It is an effort upon the part of the Legislature to commercially "leprosize" the gamblers of Mississippi—those who deal in futures.

[8] It also may be insisted that the proviso of section 2 of the act of 1908, exempting from the condemnation of the act those transactions conducted and carried on through the medium of the mail or telegraph between persons in the state and persons outside of this state, was for the protection and in the interest of the local spot cotton buyer, who protects his sales and purchases by transactions upon the future board. We confess that we see very little force in this suggestion. We fail to appreciate the

spirit which encourages the doing of an act in one and prohibits it in another class of persons. The purpose was to suppress the traffic as to all persons, to shut out entirely the evil, and the more reasonable construction to place upon this portion of the act is to say that it was inserted by the Legislature upon the erroneous idea that the insertion of such a provision was necessary to preserve the constitutionality of the act.

[10] In view of the rulings of the lower court, we cannot consider the merits of this controversy. The lower court declined to enter into a consideration of the merits, but dismissed the bill solely upon the ground that the complainants did not have the right to sue, upon the idea that the provisions of the Code of 1908 were repealed by the act of 1908. This court is strictly a court of review, and it is only in rare instances where the court will consider the merits of any controversy, unless passed upon in the lower court. *Thompson v. Bank*, 85 Miss. 261, 37 South. 645; *Edwards v. Lumber Co.*, 92 Miss. 598, 48 South. 69. A moment's reflection will at once demonstrate the soundness of this rule. The parties to any litigation have the right to have matters of fact submitted to and passed upon by the jury or the chancellor, in whatever forum the cause is being tried, and the finding of facts in the court below by the proper authority will not be disturbed in this court unless it is manifestly wrong. The opportunities afforded to the lower court are so much better for the correct conclusions and findings upon all questions of fact than is this court. Here we have nothing but the naked record before us; there, in most cases, the parties themselves are in the presence of the court and testifying. The manner of testifying, and their appearance upon the witness stand, and many other things, are influential in determining the triers of fact. The cause is reversed and remanded.

SMITH, J. (dissenting). I am of the opinion that the act of 1908 "covers the whole subject of the earlier" laws relating to dealing in futures, "embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier laws, but to cover the whole subject then considered by the Legislature, and to prescribe the only rules in respect thereto," and that, consequently, "it operates as a repeal of all former statutes relating to the subject."

I feel constrained, therefore, to dissent from the conclusion reached by my Brethren.

(129 La.)

No. 18,439.

ELMS v. FOOTE et al.(Supreme Court of Louisiana. Nov. 13, 1911.
Rehearing Denied Jan. 29, 1912.)*(Syllabus by the Court.)***1. BOUNDARIES (§ 3*)—LOCATION OF MILE-POSTS—GOVERNMENTAL SURVEYS.**

The location of mileposts on a basis meridian line by measurement from a degree of latitude, cannot be affected by surveys from other starting points west of such meridian.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 3.*]

2. BOUNDARIES (§ 54*) — RESURVEYS — APPROVAL—EFFECT.

Where the location of a certain milepost on the basis meridian has been fixed by two governmental resurveys, duly approved, such surveys necessarily supersede the original survey.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 54.*]

Appeal from Seventeenth Judicial District Court, Parish of Vermillion; Wm. P. Edwards, Judge.

Action by George O. Elms against F. F. Foote and others. Judgment for defendants, and plaintiff appeals. Affirmed.

McCoy, Moss & Knox and Gordy & Gordy, for appellants. Kitchell & Bailey, for appellees.

LAND, J. This is a petitory action to recover sections 41 and 42 in township 12 south, range 1 west, Louisiana Meridian, as per survey of John W. Rhorer, made in May, 1905, containing about 230 acres, and rents for said property for the year 1908.

The defense is that the land sued for is a part of the S. $\frac{1}{2}$ of section 33, township 11 south, range 1 west, according to the original survey made by Joseph Aborn in 1807, and a resurvey by W. H. R. Hangen in 1873, and is included in the chain of title of the defendants, emanating from the state of Louisiana.

There was judgment for the defendants, and the plaintiff has appealed.

There is no dispute as to titles, and the issue has been narrowed down to the question of the true boundary line between townships 11 and 12, and the solution of this question hinges on the proper location of the sixty-sixth milepost on the basis meridian line.

The basis meridian line south of the thirty-first degree of latitude was originally surveyed by Thomas Owing, in 1806, and he set posts at the end of each mile running south. Owing set a post at the end of the sixty-sixth mile south, which marked the southeast corner of township 11 south, range 1 west. The south boundary of the same township was originally surveyed by Joseph Aborn in 1807 "beginning at the sixty-sixth milepost on the basis meridian at the southeast corner of this township and section (36) and running due west."

The plaintiff contends that the Hangen survey of 1873 changed the south boundary of township 11 south, range 1 west by locating it *north* of the sixty-sixth milepost. Hangen commenced at the fifty-fifth milepost which he clearly identified, and, running south, re-established the mileposts, from 55 to 66, inclusive. Hangen was instructed to retrace the old basis meridian line as established by the previous surveys of Owing in 1806, Walle in 1808, and Phelps in 1856; and was further instructed to retrace the south boundary of township 11 south, range 1 west, by beginning at its southeast corner running due west, re-establishing the original corners where they could be clearly identified, and when they could not be so identified, to resurvey the line in conformity with the original field notes. Hangen resurveyed the northern boundary of township 12 south, range 1 west, which is the southern boundary of township 11, range 1 west, beginning at the sixty-sixth milepost as previously re-established by him. According to the resurvey of Walle made in 1808, the eastern boundary of township 11 south, range 1 west, measured 485.55 chains. The resurvey of Hangen in 1873 was from the same starting point—that is, the northeast corner of township 11 south, range 1 west—and agrees with the Walle survey in course and distance from mile to mile, and consequently in the total distance of 485.55 chains. The Owing field notes give no distances between the mileposts, except for the first and last mile. The difference between his survey and those of Walle and Hangen for the first mile is only 4 links, and the difference for the last mile is 2.30 chains. Owing's notes show that the last mile was run by him through a country partly inundated, and this fact, doubtless, was the cause of the discrepancy. The slight errors of Owing in his measurements were corrected by the Walle survey made two years later; and the correctness of his measurements was confirmed by the resurvey made by Hangen in 1873. There is no dispute as to the location of the sixty-sixth milepost by Hangen. The post is where it should be; that is, on the prolongation of the southern boundary of the township east of the basis meridian and directly opposite township 11 south, range 1 west.

Plaintiff's whole case hinges on the theory that the sixty-sixth milepost from which Aborn surveyed the south boundary of township 11 south, range 1 west, was 14 chains and a fraction south of the sixty-sixth milepost as re-established by Hangen in 1873. As Aborn took for his starting point the sixty-sixth milepost established by Owing in 1806, the plaintiff's theory is that the Owing sixty-sixth milepost was 14 chains and a fraction south of the sixty-sixth milepost, as re-established by Walle and Hangen. This theory is not supported by the field notes of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Owing, and is exploded by the resurveys of Walle and Hangen.

[1, 2] It is unnecessary to consider surveys from starting points at long distances west of, and not prolonged to, the basis meridian, as such surveys cannot possibly change the location of mileposts established by measurement from the thirty-first degree of latitude, a mathematically certain starting point.

It is therefore ordered that the judgment below be affirmed, and that plaintiff pay the costs of appeal.

(129 La.)

No. 18,442.

ELMS v. ELLIOTT.

(Supreme Court of Louisiana. Nov. 27, 1911.
Rehearing Denied Jan. 29, 1912.)

(Syllabus by the Court.)

1. TOWNS (§ 4*) — BOUNDARIES—ESTABLISHMENT—EVIDENCE.

The dividing line between the two townships is not sustained as to its correctness by the evidence of plaintiff.

The new line does not supersede the old line.

[Ed. Note.—For other cases, see Towns, Dec. Dig. § 4.*]

2. PUBLIC LANDS (§ 60*)—SWAMP LANDS—NECESSITY OF SURVEY.

No land passes from the federal government to the state, under the Swamp Land Acts of 1849 and 1852, unless it has been surveyed. The survey is the basis of the transfer by the United States to the state.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 186, 187; Dec. Dig. § 60.*]

Appeal from Seventeenth Judicial District Court, Parish of Vermillion; Wm. P. Edwards, Judge.

Action by George O. Elms against Lee Elliott. Judgment for defendant, and plaintiff appeals. Affirmed.

McCoy, Moss & Knox and Gordy & Gordy, for appellant. Kitchell & Bailey, for appellee.

BREAUX, C. J. Plaintiff brought this action to recover fractional portions 44 and 45 in township 12 south, of range 2 west, containing 160 arpents.

Plaintiff holds a patent from the state, which was issued to his first predecessor in title on November 5, 1907, and duly recorded.

The defendant claimed the land described from George L. McClure.

The latter acquired from Francois and Jean Pierre Gueydan, and avers that he and the authors of his title have been in possession for over 20 years.

He assails the correctness of the Rhorer survey, on which plaintiff relies to sustain his claim to the land.

Defendant specially invoked the early surveys made under the government authority.

His contention is that the recent surveys are erroneous and afforded no grounds to the Registrar of the Land Office to issue the patent which is now in the possession of the plaintiff.

Defendant cited his warrantor, and he and his warrantors agree that there was no reason to change the eastern line between the two townships, 12—2 west and the adjacent township, 12—3 west, as attempted in this case.

Judgment was pronounced for defendant, and plaintiff appealed.

[1] The undisputed facts are: That the land was surveyed by Joseph Aborn in 1807, and the line between those two townships was located. This line had been previously established by Lucien Walle, who also surveyed part of the meridian line which passes at a comparatively small distance. That the defendant bought the land in controversy prior to the date of the survey made by Mr. John S. Rhorer.

The dividing line between the two townships, 12—2 and 12—3 west must be sustained until it is proven positively that they are erroneous lines, and, even then, the title would not be in the defendant, but the land would still belong to the United States government.

The United States government had the lines resurveyed by Hangen, surveyor, in 1873.

According to this resurvey of the old lines established by Aborn and others in 1807, the west boundary line of township 12—2 is the east boundary line of township 12, range 3.

All of the surveyors prior to Mr. Rhorer located the lines as represented on the United States maps.

The weight of the testimony is that there was no room for a strip between the two townships before mentioned, and, without a strip, plaintiff cannot locate his claim.

There is positive evidence of record that the line claimed by plaintiff does not correspond with the Aborn line.

One of the surveyors who testified in this case had surveyed the line a few days before he gave his testimony.

He stated that he traced the meridian line and the line in controversy according to the Hangen field notes. He mentioned the difference that there is between the old line and the lines established by Mr. Rhorer.

He is corroborated by other surveyors who testified.

[2] Without reference to the evidence, it remains that no land passes from the United States government to the state without a survey.

If the land in controversy had not been surveyed, or, if it had been omitted from the survey by error, it would still be the land of the federal government.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

No land passes from the general government without listing it, and the list must be based upon a survey.

The policy of the government, as relates to the swamp land acts of 1849 and 1852, has always been to have them surveyed before delivering them to the state. See case of *Elms v. Foote*, 129 La. 975, 57 South. 306, recently handed down.

For reasons stated, it is ordered, adjudged, and decreed that the judgment appealed from is affirmed at appellant's costs.

(129 La.)

No. 18,627.

**FIRST NAT. BANK OF VICKSBURG v.
MAYER et al.**

(Supreme Court of Louisiana. Jan. 2, 1912.
Rehearing Denied Jan. 29, 1912.)

(Syllabus by Editorial Staff.)

1. PARTNERSHIP (§ 146*)—COMMERCIAL PARTNERSHIPS—POWERS OF PARTNERS.

A firm carried on a general country store, and also owned several cotton plantations which it cultivated through tenants on shares making advances to them and buying the greater part of their share of the crops. Which part of the business was the principal part was not shown, and the entire business was conducted as one business. *Held*, that the firm was a commercial firm and a partner could bind it on a note executed by him in due course of business.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 242-255; Dec. Dig. § 146.*]

2. BILLS AND NOTES (§ 534*)—STIPULATIONS FOR ATTORNEY'S FEES—LIQUIDATED DAMAGES.

A stipulation in a note for 10 per cent. attorney's fees, if the note is placed in the hands of an attorney for collection, is a stipulation for liquidated damages, and the fees are recoverable in an action on the note without any proof that they were incurred.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.*]

Appeal from Ninth Judicial District Court, Parish of East Carroll; F. X. Ransdell, Judge.

Action by the First National Bank of Vicksburg against Mrs. Lena Mayer and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

J. M. Kennedy, David Goldsmith, and Lee Sale, for appellant. John B. Stone, for appellee.

PROVOSTY, J. The appellant, Mrs. Mayer, is sued as commercial partner on two notes of \$10,000 and \$3,000, and on a stipulation in each of the notes "to pay 10 per cent. attorney's fees if this note be placed in the hands of an attorney for collection."

The firm in which Mrs. Mayer is alleged to have been a partner was originally com-

posed of Mrs. Mayer's father and one Aschaffenburg. The father died, and Mrs. Mayer, his sole heir, stepped into his shoes, with the consent of the surviving partner; and the partnership went on as before. The notes were made by Aschaffenburg in his quality of partner in due course of partnership business. He, too, is now dead; and his succession, represented by an administrator, is a codefendant. Only Mrs. Mayer has appealed.

Her first defense is that the firm was not a commercial, but an ordinary, or planting, partnership; and that therefore Aschaffenburg was without authority to bind her or her father.

[1] The facts in that connection are that the firm carried on a general country store, whose sales amounted to some \$2,000 a month, and at the same time owned several cotton plantations which it cultivated through tenants on shares making advances to them, and buying the greater part of their share of the crops.

Upon these facts, the admission has to be made, and is now made in the brief, that the business of said firm was in part of a commercial character; but the contention is that the principal part of the business consisted in the operation of the plantations, and that the nature of the firm is determined accordingly.

Nothing shows which part of the business was the principal part; both were conducted together as one business; and, as the partners held themselves out to the world as commercial partners, and incurred the debt sued on in due course of business, they are liable as commercial partners.

[2] The appellant's (Mrs. Mayer's) next defense is that the attorney's fees are not due, because no proof has been made of the plaintiff's having incurred any expense for the attorney's fees.

In support to this, it is argued that even though the amount stipulated to be paid be determined and fixed, as in this case, the obligation is not to pay the fixed amount thus agreed upon, but only whatever amount of expenses the plaintiff may show was incurred for attorney's fees. In other words, that the attorney's fees are not stipulated by way of liquidated damages, but simply by way of a promise to pay whatever damages may have been suffered.

That contention was expressly passed on by this court, and adversely decided, in *Renshaw v. Richards*, 30 La. Ann. 398, and runs counter to the numerous cases where such stipulations have been enforced without the present question having been raised, and also to the still more numerous cases where the right to issue executory process for fees thus stipulated has been recognized.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(129 La.)

No. 18,253.

TEMPLEMAN BROS. LUMBER CO., Incorporated, v. FAIRBANKS, MORSE & CO.

(Supreme Court of Louisiana. April 24, 1911.
On Rehearing, Jan. 29, 1912.)

(*Syllabus by the Court.*)

1. SALES (§§ 178, 179*)—ACCEPTANCE OF MACHINERY SOLD.

Where machinery was received and used by the buyer for more than a year before offering to return it to the seller, during which time the buyer paid several installments of the purchase price without serious complaint as to the defects of the machinery, *held*, that the conduct of the buyer was equivalent to an acceptance of the machinery, but that such acceptance did not conclude the buyer from demanding a reduction of the price for nonapparent defects known to, but not disclosed by, the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 451-468; Dec. Dig. §§ 178, 179.*]

2. SALES (§ 126*)—REDHIBITORY ACTION—LIMITATIONS.

The prescription of one year against redhibitory actions and actions quanti minoris does not apply in cases where the seller had knowledge of the vices of the thing, and neglected to declare them to the purchaser.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 126.]

3. SALES (§ 180*)—REDHIBITORY ACTION—REDUCTION OF PRICE.

In a redhibitory suit, the judge may decree merely a reduction of the price.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 130.*]

(*Additional Syllabus by Editorial Staff.*)

4. WORDS AND PHRASES—"BACK-FIRING."

"Back-firing," as applied to an engine, is an explosion of gas in either the exhaust or intake pipe.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by the Templeman Bros. Lumber Company, Incorporated, against Fairbanks, Morse & Co. Judgment for defendant, and plaintiff appeals. Reversed, and judgment ordered.

Hubert M. Ansley and Eugene D. Saunders, for appellant. Ashcraft & Ashcraft and Hall, Monroe & Lemann, for appellee.

PROVOSTY, J. This is a suit in rescission of contract and in damages.

The plaintiff, Templeman Bros. Lumber Company of New Orleans, entered into a contract with the defendant, Fairbanks, Morse & Co. (Incorporated), of Chicago, Ill., on October 4, 1906, for the sale of a gas engine and its erection at the plant of the plaintiff in New Orleans, at an agreed price of \$3,110, payable \$1,000 cash, \$500 upon shipment, and \$1,600 in three equal payments at 6, 9, and 12 months from date of contract, for which the plaintiff company gave its notes.

The contract provided that the engine should produce 45 horse power on a consumption of 1¼ pounds of good clean Pennsyl-

vania pea or nut anthracite coal, per brake horse power, and that it should be tested at the works of the defendant company, and that no further test should be required. The engine itself, apart from the gas producer, was tested at the works of defendant, and found to operate perfectly. The gas producer was not used in making this test, and was not itself tested, for the reason that its construction is in part of brick and mortar, and hence it could be tested, or the engine could be tested in conjunction with it, only after it had been constructed at the place where the engine was to be permanently set up.

The engine was installed in plaintiff's plant in April, 1907. Plaintiff used it for the operation of its plant up to the time of the institution of this suit, August 31, 1908.

Plaintiff alleges that the engine has failed to fulfill the guaranty of producing 45 horse power; and that, "when operating at full load" (by which is meant, we assume, when producing 45 horse power), it consumes no less than 2½ pounds of coal.

Defendant's answer is to the effect: That the engine was tested at defendant's works and found to fulfill completely the guaranty of the contract. That it was properly installed at plaintiff's plant, but that the mechanic sent by defendant to install it could make no test of it, because, in the first place, before the engine could be set up, plaintiff allowed all the brass parts that possibly could be separated from it to be stolen, and, in the second place, furnished unsuitable coal, at first a semianthracite coal, full of clinkers and tar, which coated the gas producer with clinkers and the valves of the engine with tar, thus making proper results impossible, and later red ash coal covered with dust. That, nevertheless, plaintiff declared itself satisfied with the machinery, and accepted it unconditionally, and went on using it, making no complaint with regard to it. That, when the first of the notes given for the purchase price fell due on November 1, 1907, plaintiff paid it without demur or mention of any defect in the machinery. That a few days before the maturity of the second note plaintiff applied for an extension of time, still making no mention of any defect in the machinery, save as to a crack in the casting of the gas producer, which complaint defendant met by furnishing a new casting without cost to plaintiff. That on May 9, 1908, the third note having become due, together with a balance on the second note, on which defendant had granted an extension, plaintiff for the first time complained of the operation of the engine being unsatisfactory, and that plaintiff and defendant then entered into an agreement that defendant would send an expert to examine the engine, and that,

if the trouble complained of was found to be due to defects in the machinery, defendant would pay the expenses of this expert, and that plaintiff would pay them if the trouble was found to be due to faulty operation, and that, although the engine had been greatly injured and its efficiency reduced by the unskillful manner in which plaintiff had been operating it, this expert secured from it the full efficiency guaranteed by the contract and on even a smaller consumption of fuel than that guaranteed in the contract; but that plaintiff refused to pay the expenses of the expert. Finally, defendant pleads the prescription of one year.

Defendant prays that the suit be dismissed, and that the plaintiff be condemned to pay the expenses of the expert, amounting to \$500. Defendant also prays judgment for the balance due on the notes given for the purchase price.

Taking up the story of the case from the time the engine was installed and ready for operation, we find that Mr. Briggs, the engineer sent by defendant to install the engine, objected to the quality of the coal furnished by plaintiff. He said the coal was too large, and had slate in it. Plaintiff acquiesced in the decision; and one of the members of the firm, Mr. R. N. Templeman, and Mr. Briggs, visited together the several coalyards in the city to inspect the coal there to be had. Mr. Briggs did not find any of the coal to be the pea or nut size; and he says it was not pure, but semianthracite. On both of these points he is contradicted by the dealers who sold the coal; and he himself destroys the value of his testimony on this point by frankly admitting that he knows nothing about coal. He, however, for want of better, he says, concluded to make a trial with the coal such as it was, and on April 26, 1907, proceeded to do so. Nearly the entire day was taken in the effort to get the engine started; and, when it did start, it could pull but very little. Another trial was made on the 27th, with no more satisfactory result. After this second unsatisfactory trial had been going on half a day, Mr. Templeman went to see Mr. Eghert, the New Orleans agent of the defendant, through whom the defendant had sold the machinery, and told him of the situation at the plant, and asked him what kind of coal he should get. Mr. Eghert showed him a letter from the Philadelphia & Reading Iron & Coal Company, offering two kinds of pea size anthracite coal, one red ash, and one white ash. Mr. Templeman asked him which was the best to order. Mr. Eghert answered that he really did not know, but that the red ash was supposed to be the better. Mr. Templeman said that as the difference in price was only 50 cents per ton, and he wanted the best results out of the engine, he would order the red ash; and he, accordingly, ordered at once a car load of the red ash. He then went back to the

plant, and informed Mr. Briggs of what he had done. At the suggestion of Mr. Briggs, Mr. Templeman employed men to break some of the locally procured coal with hammers to what Mr. Briggs said was pea or nut size, and another trial was made. The machine operated no better. Mr. Briggs complained that the coal was still too large. Mr. Templeman then constructed a crusher; and another trial was made with the coal thus crushed, to no better satisfaction. Mr. Briggs said the coal was still too large; but that, if the coal could be made small, they would get along all right. The crusher was readjusted so as to produce a finer coal, which Mr. Briggs said was "just what was wanted," only that in the crushing a good deal of coal dust was produced which should be removed. Mr. Templeman procured a screen and screened the coal. With this new coal the engine operated much better; but still unsatisfactorily. Although only two of the four machines which it was designed to operate had been "put on," the load seemed to be too great. Every few minutes the "feed" would have to be thrown off, in order to let the engine regain its speed; and one hour to half a day would be lost in obtaining sufficient gas to set the engine running, and the fire would get too high in the producer; so that the producer would have to be emptied and refilled and the fire started anew; and in doing this an hour or two would be lost. Mr. Briggs explained the situation by saying that there was too much dust on the coal. He remained in New Orleans some six weeks, operating the engine. At this time the following letters passed between the parties:

"May 14, 1907.

"Templeman Bros. Lumber Co., New Orleans, La.

"Gentlemen: Some days ago we wrote you asking when you could get along without Mr. Briggs on your producer plant, as we expected to receive word from a concern in Louisiana to whom we shipped some weeks ago 100 H. P. plant that same had arrived and to send an erector to take charge of the work of placing and erecting the outfit. We have no word from you stating the condition of affairs regarding your plant, or when Mr. Briggs can leave the job. Will you please advise us promptly by return mail when Mr. Briggs can leave the job. He has been on your work since the first of April, which is considerably longer time than is generally required to erect and get a producer plant under way, and we wish to use him on the other plant if it is possible to do so.

"Yours very truly,

"Fairbanks, Morse & Co."

"New Orleans, May 17, '07.

"Messrs. Fairbanks, Morse & Co., Chicago, Ill.

"Gentlemen: We have yours of the 14th regarding the necessity of Mr. Briggs remaining with us longer. We leave that matter entirely to him. When he feels that our man is sufficiently instructed to capably take charge of the plant, we presume he will say so and make arrangements to go elsewhere. As for our part, we are certainly not going to hurry him off, as we feel that the longer he remains the more thoroughly we will be instructed.

"Yours truly,

"[Signed] Templeman Bros. Lum. Co., Inc."

Mr. Briggs went to Plaquemine on June 2, 1907, to attend to some work for the defendant. The car load of red ash coal ordered on April 27th from the Philadelphia & Reading Iron & Coal Company arrived on June 3, 1908. The results obtained with it were about the same as with the other coal. Plaintiff wrote to the Philadelphia & Reading Iron & Coal Company, to find out if the coal was of the kind that had been ordered; and in the meantime went on operating the engine with it. After about three weeks of trial plaintiff summoned Mr. Briggs from Plaquemine. Mr. Briggs came, and operated the engine for one day. According to Mr. R. N. Templeman, he said that the red ash coal was not fit for a producer of that size. He himself makes two statements on the subject. One that "after the new coal arrived everything was running in first-class condition and Mr. Templeman made no more complaints"; another, that the coal was "dust covered and unfit." Mr. Templeman says that, upon being told that the red ash coal did not suit, he lost patience.

"I asked him why he didn't tell me that when I was ordering the coal. I told him we weren't millionaires, and didn't have any money to experiment with the plant; that we had purchased this plant to do work on anthracite coal; and that the contract didn't say whether it was to be white ash or red ash in it."

Mr. Templeman says that Mr. Briggs recommended the buying of white ash coal. Plaintiff went on using the red ash coal. Mr. Templeman testifies that he did so—

"because Mr. Briggs told me that I could operate with that coal, but, of course, there would be waste, and, of course, I would not get the results I would out of the white ash. He also told me that I could operate with it because it wouldn't hurt the plant; said if I could stand to keep the fire in condition—that is, from clinking up and stopping the gas from going to the engine—I could use that coal. Of course, I would have some waste."

On August 24, 1907, plaintiff ordered a car load of white ash coal. It arrived on September 9, 1907, a few days after the supply of red ash coal had given out. During these few days plaintiff had used coal procured locally. Mr. Templeman testifies that this white ash coal clinkered a good deal less than the red ash; but that the working of the engine was about the same. Describing the situation, he says:

"Well, the same condition occurred all the time. We would start the fire, say, like Monday morning, everything fresh starting out. On Tuesday it would take an hour or an hour and a half or three hours, sometimes a half a day to start the plant. The same Wednesday; same way Thursday; same way Friday. Sometimes we didn't get started at all Saturday. We very seldom got a day's run at all, about two hours on Saturday, and we would have to pull the fire and get ready for Monday morning again."

This car of white ash coal lasted until December 10, 1907. In the interval from the

departure of Mr. Briggs, in the latter part of June, 1907, to the middle of December, 1907, we do not find that any complaint was made by plaintiff as to the manner the engine was operating. Another car load of white ash coal had been ordered on the 21st of November, but did not arrive until the 11th of February. In the interval between the 10th of December and the 11th of February, coal was procured from the local dealers. Mr. R. N. Templeman testifies that the reason of their going on using the engine and trying to get along with it was that Mr. Briggs had assured them that the sole and whole trouble was with the coal; but that towards the middle of December, 1907, he concluded that something must be the matter with the engine, and went to see Mr. Eghert, the local agent of the defendant company, and told him that something must be the matter with the engine; that he thought the producer was too small; that he had never been able to keep the fire down at the line where Mr. Briggs had instructed him to keep it. Mr. Templeman further testifies that on January 1, 1908, he lodged a formal complaint with Mr. Eghert, defendant's local agent, and that Mr. Eghert told him "he could not live without kicking," and that "he was talking through his hat."

At that time the following letters passed between the parties: January 6th letter of defendant demanding payment of note of \$533.33, part of purchase price of engine; January 8th, reply letter of plaintiff asking for an extension of time; January 10th, reply letter of defendant refusing extension; January 18th, reply letter of plaintiffs frankly declaring their inability to pay; January 15th, reply letter of defendant insisting upon payment; January 17th, reply letter of plaintiffs repeating inability to pay; January 22d, reply letter of defendant threatening suit; January 25th, reply letter of plaintiffs as follows:

"January 25, 1908.

"Fairbanks, Morse & Company, Chicago, Ill.
 "Gentlemen: Replying to yours of the 22nd, will state that if you bring suit you will certainly get your money. Our plant cost us \$10,000, all of which has been paid except \$2,067, and we have other assets amounting to \$15,000 or \$20,000. So far we have only had to ask an extension on two pieces of paper; one is yours and the other that of the American Wood Working Machinery Co., whose account is smaller than yours. We are compelled to ask this extension not because we have not the equivalent, but because we are unable to realize at this time. Sales have not only been very bad, but prices are likewise, and collections are the worst that it has been our lot to experience. We assure you we are not disposed to make you wait, and had you delivered our plant in accordance with agreement, you would have had your money before the stringency struck us. As it is, we are absolutely unable to realize at this time and we trust that your good judgment will prevent you from doing as you say you will, bringing suit. Should you sue we know that you will get your money. However, you will not get it any quicker than if you waited and gave us a

chance. We feel sorry that we have bought from people who are determined to do all in their power to ruin us.

"Hoping that you will think better of this matter and will look at it from a business rather than a spiteful standpoint, we are,

"Yours truly,

"Templeman Bros. Lumber Co., Inc."

The suggestion, "had you delivered your plant in accordance with agreement," refers to the delay in shipment, and not to the plant not having been such as was contracted to be delivered.

In none of these letters did the plaintiff make the slightest complaint about the engine not working satisfactorily or of defendant not having fulfilled its contract.

In April plaintiff called in an expert machinist. This machinist, while familiar with gas engines, had never had any experience with one like plaintiff's, provided with a gas producer attachment. He says that he stayed there a little while, and "the machine slakened down again," and that, when it did so, Mr. Templeman, addressing him, said:

"Now, where is the trouble? I says: 'It is not the igniter. Turn on your gas, and see how much gas you have in your plant.' And the consequence was there was no gas burning, the stream was not as great as when we started."

This machinist testifies that he was called to the plant four or five times; that there would be no trouble in starting the engine when the producer furnished sufficient gas, but that, after the engine would have run a while, there would be no more gas, and the engine could not be started again; that he noticed one morning that the coal was heated to the very top of the producer; that Mr. Templeman had it all taken out and a new charge put in. He testifies, further, that there being no difference between such an engine and the ordinary gas or gasoline engine, except that this engine is provided with a producer to make its own gas whereas the ordinary gas engine is not, he persuaded Mr. Templeman to let him disconnect the engine from the gas producer and connect it with a gasoline tank; and that, after this had been done, the engine ran perfectly and pulled the load perfectly.

On April 28, 1908, plaintiff wrote to defendant the following letter:

"New Orleans, April 28, 08.

"Messrs. Fairbanks, Morse & Co., Chicago, Ill.

"Gentlemen: We have been having considerable trouble with our plant owing to the fact that we have been unable to get a uniform grade of coal. Since we started our plant last summer we have had only one car of coal that was satisfactory, and now we are running on gasoline, and it is costing us somewhere about 9.00 per day for the gasoline, which you will readily see is entirely too much.

"We learn from your former representative Mr. Eghert, that you can arrange these plants so as to run them with Texas oil, also by Texas Lignite. We will be pleased to have you write us fully all information bearing on the

use of these two materials, as we must do something or else take the plant out.

"Hoping to hear from you by return mail, we are,

"Yours truly,

"[Signed] Templeman Bros. Lum. Co., Inc."

Mr. Templeman testifies that on May 9, 1908, he lodged a formal complaint with Mr. Beall, who had succeeded Mr. Eghert as defendant's local agent, and that Mr. Beall answered that he knew nothing about gas engines, and that plaintiff would have to take the matter up directly with the home office of defendant. Acting on that suggestion, plaintiff wrote to the defendant company at their home office in Chicago, complaining of the trouble they were having with the engine. This was the first complaint the plaintiff had made to the home office; and, so far as the record shows, the first intimation the home office had had of the engine not working to the satisfaction of plaintiff. It was then that the agreement referred to in the answer was made, for the sending of an expert to examine the engine, and find out what was the trouble with it. Several letters passed between the parties at this time. We reproduce here one of them:

"May 12/08.

"Messrs. Fairbanks, Morse & Co., Chicago, Ill.

"Gentlemen: We are absolutely unable to do anything with our plant which we bought from you. We have been trying for a year to make this plant go, and have used every effort that was in our power. We bought the coal from the people recommended by your agent, the Pa. Reading Coal & Iron Co., through Mr. J. H. M. Ollagert of Chicago, and in all of the time that we have been operating, we have only been able to get one lot of coal on which we could run the plant satisfactorily.

"We are now compelled to ask you to take this matter up at once and see if you can help us out, as we are very candid to state that we are extremely anxious to have this plant do the work properly, as we believe that should this plant be successful there will be other plants of the same nature put in this market.

"We have been cautious to keep from the outside world the defects as they appear to us, with the hope that time would prove that we had not made a mistake in putting this plant in, but as matters go from bad to worse instead of improving, we are now compelled to ask your co-operation in doing what is necessary to make this plant do the work according to your contract and agreement.

"Hoping to hear from you by wire on receipt of this, we are,

"Yours truly,

"Templeman Bros. Lum. Co., Inc."

Defendant's expert, Mr. Trowbridge, reached plaintiff's plant on June 6, 1908. He found that the engine had not been set up properly. In a letter of June 28, 1908, to the defendant, he says:

"The gas tank stands so close to exhaust muffler the gas (after engine runs a while) is heated to such an extent as to impair its value. The free air is also taken from immediately over the exhaust pot thereby becoming heated to an injurious extent, both of which trouble will in my opinion, have to be remedied to obtain satisfactory operation."

Mr. Trowbridge found, also, that the engine had been seriously injured in its operation by plaintiff. He says:

"On taking engine down to repair same, I found that cylinder is very badly scored on one side caused by the piston pin having become loose some time and working out. I think I have mentioned the fact that the piston blows some, also find piston is cracked through each hole for piston pin."

[4] Mr. Trowbridge remained at plaintiff's plant 42 days; and got no better results from the engine than Mr. Briggs had done. He made two special tests, one on July 4th, and the other on July 16th. At the first of these plaintiff secured the presence of an expert in such engines, Wm. B. Gregory, professor of experimental engineering at Tulane University. Prof. Gregory testifies that Mr. Trowbridge began at 9 a. m., and that it was 1:50 p. m. before he succeeded in starting the engine. It then ran for about 15 minutes and stopped. It could not be started again until 3 p. m. It then ran for about 20 minutes, when it back-fired and stopped. By "back-firing" is meant an explosion of gas in either the exhaust or intake pipe. It was started again at 3:25, and ran for five minutes, and stopped again, and no further effort was made to start it that day. Mr. Trowbridge was trying to make the engine run continuously with a load of 45 horse power, and he failed in that attempt. Prof. Gregory made a test of his own on August 6, 1908. The engine was started at 10:30; stopped the moment load was put on; started again at 10:50 and load put on at 11; slowed down at 11:17, and load taken off; load put on again at 11:20; ran to 3:15, and stopped; started again 3:28, and load put on at 3:28; ran to 5:30. It then gradually lost power until the end of the work day at 6:45. The conclusion reached by Prof. Gregory was that:

"The plant as now constructed and arranged is not capable of giving 45 brake horse power for a continuous run of more than a few hours."

We find no evidence as to the test made on July 16, 1908, by Mr. Trowbridge except the following from Mr. Luther Templeman, a nonexpert, who witnessed the test, and kept an account of the number of revolutions and of the quantity of coal:

"On July 16th Mr. Trowbridge attempted to start the engine at 2:31 o'clock after attempting to start the engine during the morning hours. They finally got the load on at 2:44 o'clock p. m., and at 2:44½ o'clock the engine could not carry the load. The load was on again at 2:47, off at 2:47½, on at 2:51 p. m., off at 2:52 p. m., and so on continuously until 9:32 p. m., when the engine shut down."

From letters which passed between Mr. Trowbridge and the defendant company, we make the following extracts: Letter of June 8th, Trowbridge to defendant:

"We are rather up against it on the Templeman Bros. Lumber Co., 45 H. P. gas producer

proposition. I find that it will be probably necessary to reline producer when replacing old base with new."

(N. B.—The base furnished with the machine had developed a crack, and defendant had consented to replace it with a new one without cost to plaintiff.)

Defendant to Trowbridge, June 12, 1908:

"We have wired you to-day as follows: 'Re-place base. Reline producer. Make test. Say nothing.' Please be careful to get everything first-class shape and we will fight it out with Templeman Bros. afterwards."

Trowbridge to defendant, June 28, 1908:

"The gas tank stands so close to exhaust muffler gas (after engine runs a while) is heated to such an extent as to impair its value. The free air is also taken from immediately over exhaust pot thereby becoming heated to an injurious extent, both of which troubles will, in my opinion, have to be remedied to obtain satisfactory operation."

Defendant to Trowbridge, June 29, 1908:

"It is absolutely necessary that a test be made on this plant, as Templeman is holding off paying the account because he says the engine will not develop 45 H. P., and that it will not operate on a pound and a quarter coal per H. P. per hour, and as long as there is no test made we can never collect."

Trowbridge to defendant, July 2, 1908:

"We are not getting very good results from Templeman Bros. producer as yet, the coal consumption running too high. I wrote you some time ago on the advisability of making some changes in the setting of gas tank, it being placed in such a position as to be heated to an injurious extent by exhaust. Thinking you may have overlooked same, I have drawn your attention to the fact. We have also had some trouble with water leaks. On taking engine down to repair same, I found that cylinder is very badly scored on one side caused by the piston pin having become loose some time and working out. I think I have mentioned the fact that the piston blows some, also find piston is cracked through each hole for piston pin."

Trowbridge to defendant, July 4, 1908:

"We have to-day made a brake test of Templeman's engine. The engine pulls up to guarantee (45 H. P.) easily which is very good considering the condition of the engine. I was unable to make fuel consumption test owing to lack of water as now operated. Templeman Bros. have all along insisted the engine would not develop rated power, but to-day they admitted they were mistaken and that engine was O. K. as to rating. They have calmed down now, and I think they will not demand a fuel consumption test which I think would be well, as it is my candid opinion that a fuel consumption test under the existing conditions would not show up as F. M. Co. would like it to. The piston blows badly, being cut, and cylinder is badly scored on one side by piston pin. I have kept in close touch with your Mr. Beall here and he is also of opinion that it would be well to settle if possible and drop the fuel proposition."

The statement made by Mr. Trowbridge in this report compares strangely with that of Prof. Gregory given above. Either he or Prof. Gregory has perverted the facts. We

find no reason for not accepting the statement of Prof. Gregory.

The trial court would not allow the plaintiff to offer testimony to cover the 42 days during which Mr. Trowbridge was at the plant of plaintiff endeavoring to rectify whatever was the matter with the engine. This was on the theory that the only question before the court was "the condition of the plant on April 22, 1907." If this was so, we cannot imagine why all the evidence in the record, nearly all of which relates to a time subsequent to that date, was allowed to be offered.

Mr. Trowbridge was not examined as a witness to substantiate the statements of his letters to the effect that the plant operated satisfactorily. He is contradicted in that respect by Prof. Gregory and by Mr. Luther Templeman; and the objection of defendant to letting in testimony on that point is very significant.

The two local agents of defendant were examined as witnesses in the case. Mr. Eghert was called by plaintiff, and Mr. Beall by defendant. They were no longer in the employ of defendant, and, as both seem to have been harboring a grievance against defendant, they cannot be suspected of partiality to defendant. Beall testified that he visited the plant in January, 1908, with a gentleman who was contemplating the purchase of a similar engine, and that he asked Mr. Templeman what success he was having with the engine, and that Mr. Templeman told him he "was getting good results"; that up to the time the first note fell due he had heard no complaint touching any excessive fuel consumption; that there had been some complaint "as regards the igniter, and the engine failing to pull the load and getting it to run satisfactorily"; that the first complaint he heard touching excessive consumption of coal was in July, 1908. On cross-examination he said:

"I have a recollection of a great many complaints being made to me by Mr. Templeman about the operation of the plant. These complaints were due to some irregularity or some fault or unsatisfactory working of the igniter of the engine that had no reference to the fuel consumption or the horse-power development."

He further testified that:

"Mr. Trowbridge made the statement that the engine would never run for any great length of time with that producer and fulfill the requirements of the contract."

Mr. Eghert testifies that a very short time after the installation of the engine Mr. Templeman complained that "he couldn't get the coal to burn up properly. It wouldn't consume the coal." And to the question, "Were there any other complaints made?" he answered: "Well, he complained about not being able to run the engine continuously, that it would run a little while, and the engine would slow down or refuse to pull the load."

He does not say at what time these other complaints were made. He testifies that Mr. Briggs, the mechanic whom defendant sent to set up the engine, told him that:

"Templeman would have, to use Briggs exact language, 'a hell of a time with running that engine'; that nobody could sell him that size engine and put that size producer to it. If they sold him an engine of that size, they would have to give him a larger producer."

That the engine never operated properly we think the record leaves no doubt whatever. It was not properly set up by Mr. Briggs; so that, even if all the parts, as manufactured by defendant, had been perfect, the whole, as set up in the plant, would have been defective. Mr. Trowbridge in his letter of June 28, 1908, page 313 of this opinion, says:

"The gas tank stands so close to exhaust muffler the gas (after engine runs a while) is heated to such an extent as to impair its value. The free air is also taken from immediately over exhaust pot thereby becoming heated to an injurious extent, both of which troubles will, in my opinion, have to be remedied to obtain satisfactory operation."

We have here a positive statement from defendant's expert and representative that, until the "troubles" here mentioned had been remedied, satisfactory operation could not be obtained. Defendant's learned counsel say that this defect of construction could have been easily remedied. That may be true, but the fact remains that, until an expert had discovered the trouble and remedied it, the engine did not work satisfactorily. But, even apart from this, the evidence leaves no doubt that the engine never operated satisfactorily. We think the evidence leaves little, if any, room for doubt that the gas producer was too small. The failure of the engine to develop the required horse power was due to this insufficiency of the gas producer, and not wholly, as pretended by Mr. Briggs, to the quality of the coal. The testimony of the local coal dealers shows that the coal was of the quality which the contract provided should be used, namely, "clean nut anthracite coal." It was not pea coal, but pea coal is called for only by the consumption guaranty clause. It is not called for by the clause prescribing what kind of coal shall be used. The latter clause calls for only "clean nut anthracite coal."

The fact itself that Mr. Briggs remained 42 days at the plant, and that, even then, he left only because he was called elsewhere by defendant's work, shows pretty conclusively that the engine was not operating satisfactorily. Had it operated satisfactorily, Mr. Briggs would have left it as soon as he had sufficiently instructed Mr. Templeman in the manner of operating it, which certainly would not have taken 42 days or even a quarter of that time.

The only question, then, must be whether the plaintiff company has lost its right to exact the guaranty contained in the contract.

We attach no importance to the contention made that plaintiff allowed the brass parts that could be separated from the engine to be stolen while the machinery lay in their plant preparatory to being set up. Mr Briggs makes such a statement; but adds that he has forgotten what parts were stolen. Mr. Templeman testifies that only one piece of brass was missing; that he does not know whether that piece was stolen or lost. Whatever this piece was, Mr. Briggs does not pretend to say that its absence interfered in any way with the operation of the engine. For all we know, it may have been a mere trimming or ornament.

Nor can the prescription of one year avail. Article 2534, C. C., provides:

"This limitation does not apply where the seller had knowledge of the vice and neglected to declare it to the purchaser."

The vice in the present case consisted in the inadequacy of the gas producer, and in the defective installation of the machine. Of both of these defects the defendant must be held to have had full knowledge. The manufacturer of a machine is held to the knowledge of even latent defects (35 Cyc. 401); and the inadequacy of the gas producer must be held to have been patent to the defendant, though not to the plaintiff, since plaintiff was not supposed to have, and, in fact, had, no special knowledge of machinery. And the defendant must also be held to have known that the engine had been defectively installed. It was its duty to know it, and it had full opportunity to know it. It must, therefore, be presumed to have known it. *Johnson v. Marx & Levy*, 109 La. 1044, 34 South. 68.

But it is impossible from plaintiffs' conduct and letters to escape the conclusion that they accepted the engine and are liable for the price, notwithstanding the fact that the machine did not work to their perfect satisfaction. In their letter of May 17, 1907, transcribed at page 310 of this opinion, in answer to the letter of defendant inquiring as to the necessity of Mr. Briggs remaining with them longer, they spoke of the necessity of his remaining until their man who was to run the engine should have been sufficiently instructed, and said not a word about the engine not being satisfactory. When Mr. Eghert told Mr. Templeman that he was forever kicking and was talking through his hat, Mr. Templeman seems not to have considered his complaint as calling for more serious treatment. When Mr. Beall visited the plant in January, 1908, with a stranger who was contemplating the purchase of a similar engine, and asked Mr. Templeman what success he was having with the engine, Mr. Templeman said he "was getting good results." When in January and February defendant pressed plaintiff for payment of the credit part of the price and plaintiff was hard put to it for an excuse, or ground on which to ask for delay, nothing

was said about the engine not operating satisfactorily or of defendants not having fulfilled their part of the contract, although this would have been a good and obvious ground on which to claim delay in payment. On the contrary, plaintiffs expressly said in their letter of January 25, 1908, copied at page 311 of this opinion, that, if defendants brought suit, they would certainly get their money. In April, 1908, plaintiffs treated the machine as their own by adapting a gasoline tank to it, and running it in that condition for operating their plant. In their letter of April 28, 1908, copied at page 312 of this opinion, while they spoke of their having "been having considerable trouble with our plant owing to the fact that we have been unable to get a uniform grade of coal," they said not a word about the engine operating imperfectly. On the contrary, they spoke of having had one car load of coal that was satisfactory, and of their running at the date of the letter with gasoline. Their only complaint was that the gasoline was too expensive, and they inquired if defendant could not give them information how to run the engine with Texas oil or Texas lignite. And, finally, in their letter of May 12, 1908, copied at page 312 of this opinion, they said, "We have only been able to get one lot of coal on which we could run the plant satisfactorily," which was tantamount to an express declaration that with this lot of coal they had run the plant satisfactorily. From all this we say it is impossible to avoid the conclusion that plaintiff's present dissatisfaction with the engine has grown out of the fact that the engine has now by misuse become much impaired, so that it can no longer come even near fulfilling the guaranty of the contract. That it had become seriously impaired by the time plaintiff concluded to make a positive serious complaint, or, in other words, addressed themselves to the home office of defendant, calling upon defendant to fulfill the guaranty of the contract, there can be no doubt. The testimony of Mr. Templeman must be read in the light of his present dissatisfaction, or, in other words, as exaggerating or aggravating more or less conditions which did not at the time impress him in the same way. If, before the engine was damaged, things were as bad as he depicts them, the plain duty of his company was to notify the home office of defendant, and put defendant in formal default; and not go on using the engine as was done "with the hope that time would prove that we had not made a mistake in putting this plant in."

We think that, after having used the machinery during 18 months for running their plant, it is too late for plaintiffs to offer to return it; and we think further that, under all the circumstances of the case, plaintiffs are not even in a position to claim damages. In the latter connection the case is analogous to that of *Delambre v. Williams*, 86 La. Ann. 331, where this court said:

"The record shows to our entire satisfaction that all the changes which were made in the work, all defects in the job had been fully considered by plaintiff and satisfactorily accounted for and explained in his mind, and that he had knowingly and unequivocally accepted the work, and had settled for the same advisedly, and without any error or concealment on the part of the defendant. Hence his lips must be sealed from the utterance of any complaint.

"His counsel relied on the decision in the case of *Levy v. Schwartz* [34 La. Ann. 209], which he holds as precisely similar in its facts with the present case.

"But in that assertion he is mistaken. In that case the construction was not accepted and used without objection, and the plaintiff was not shown as in this case to have expressed his satisfaction with the work. We adhere to the principle therein announced that payment of the price will not by itself be conclusive of proof of a waiver of damages. But we do hold here, as we did there, that such a settlement must be considered as one of the links in the chain of evidence which demonstrates that by his acts in the premises this plaintiff has effectually waived all claims for damages."

Plaintiff really never placed defendant in default until by their letter of May 12, 1908, copied at page 312 of this opinion, when, for the first time, they called upon defendant to make good the guaranty of the contract. And we find that, when thus called upon, defendant agreed to send an expert to ascertain what, if anything, was the matter with the engine. The complaints of plaintiff to the local agents, or salesmen, of defendant, cannot be made to answer for a formal putting in default. These agents certainly never so understood. They do not seem to have taken the complaints as being at all of a serious character, or as placing the defendant company under the necessity of taking up the matter seriously. In fact, it is not shown that these local agents were anything more than mere salesmen, having authority to sell machines, but not to represent defendant in connection with machines already sold and installed.

Judgment affirmed.

SOMMERVILLE, J., takes no part herein.

On Rehearing.

LAND, J. After a reconsideration of this case, we find no good reasons for reversing our previous conclusions as to the rescission of the contract.

[1-3] It is an undisputed fact that the plaintiff used the machinery for more than a year before offering to return it to the defendant. It is an undisputed fact that plaintiff paid several notes given for installments of the purchase price with full knowledge of many of the defects complained of in his petition. Plaintiff, therefore, must be held to have accepted the machinery. This

action, however, did not deprive the plaintiff of the right to demand a reduction of the price under article 2541 et seq. of the Civil Code. In a redhibitory suit the judge may decree merely a reduction of the price. Id. 2543. The action for reduction of price is prescribed by one year, except where the seller had knowledge of the vice, and neglected to declare it to the purchaser. Id. 2534, 2544. In our former opinion we said:

"The vice in the present case consisted in the inadequacy of the gas producer and in the defective installation of the machine. Of both of these defects the defendant must be held to have full knowledge, * * * and the inadequacy of the gas producer must be held patent to the defendant, though not to the plaintiff, since plaintiff was not supposed to have, and, in fact, had no special knowledge of machinery."

For these reasons, the court overruled the plea of prescription of one year against the action to rescind the contract of sale. For the same reasons the plea is bad against a demand for a reduction of the price. The case at bar is one where the defects known to the buyer in the quality of the thing sold were not of such importance as to induce him to refuse to accept the machinery; but the buyer by keeping the machinery did not waive his right to a reduction of the price. Civ. Code, § 2542. We therefore conclude that the plaintiff should be dispensed from the payment of the balance of the purchase price.

It is therefore ordered that the judgment below be reversed, and it is now ordered that there be judgment in favor of the plaintiffs, canceling the unpaid balance of the purchase price as claimed by defendant in reconvention, and condemning the defendant to pay costs in both courts; and it is further ordered that all other demands of the parties in this suit be rejected and dismissed.

(129 La.)

No. 18,828.

DILLON et al. v. FREVILLE et al.
(Supreme Court of Louisiana. Jan. 15, 1912.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE (§ 257*)—SALE OF HUSBAND'S SEPARATE PROPERTY—LIABILITY OF COMMUNITY.

In order to sustain a demand that the community be held liable for the proceeds of the sales of the separate property of the husband, received and disposed of by him during the existence of the community, it must be proved that such proceeds were expended for the benefit of the community.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 910; Dec. Dig. § 257.*]

2. HUSBAND AND WIFE (§ 255*)—EXCHANGE OF PROPERTY—LIABILITY OF COMMUNITY.

One of the principal effects of an exchange is that the thing received is subrogated, in full

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

right, to that which is alienated. Hence when the husband exchanges his separate immovable property for other like property, the property received by him acquires the status of that alienated. Nor does it affect the question that he may give money "to boot," where the main consideration, moving from him, is the real estate; though, in such case, in the absence of proof that the money was his separate property, he and his estate become indebted to the community for the amount.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 900-902; Dec. Dig. § 255.*]

3. GUARDIAN AND WARD (§ 145*)—SETTLEMENT WITH TUTRIX.

Where, in the inventory of the husband's succession and in the subsequent adjudication of the community property to the widow, the property is undervalued, the proper value will be attributed to it upon a settlement between the widow, as tutrix, and the heirs, issue of the marriage.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 145.*]

4. HUSBAND AND WIFE (§ 258*)—COMMUNITY ESTATE—IMPROVEMENT.

Improvements placed by the community upon the property of one of the spouses belong to the owner of the soil, who, or whose estate, becomes liable to the community to the extent of the enhanced value of the property, resulting from such improvements, at the date of the dissolution of the community.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 909; Dec. Dig. § 258.*]

Appeal from Eighteenth Judicial District Court, Parish of Acadia; William Campbell, Judge.

Action by Ella Nason Dillon and others against Jessie B. Freville and others. From the judgment, plaintiffs appeal. Affirmed in part, and reversed in part.

Medlenka & Bruner, for appellants. Smith & Carmouche, for appellees.

Statement.

MONROE, J. Plaintiff is a daughter of defendant by the latter's first marriage to Samuel Nason, and she brings this suit against her mother, individually and as tutrix of plaintiff's minor sisters, Edna and Irma Nason, for a partition of certain property (some of which is conceded to have been the separate property of Samuel Nason, and concerning other of which there is dispute), and for other purposes. She alleges that, in an account of tutorship (filed in court on November 19, 1908), her mother failed to charge the community with the proceeds, or parts of the proceeds, of certain lots or tracts of land which were acquired by petitioner's father, before marriage, and sold by him, after marriage, and which proceeds, amounting to \$1,150 she alleges, inured to the community. She further alleges that defendant erroneously inventoried in the succession of Samuel Nason, as community property lot 2 and the south 100 feet of lot 9, in

the town of Crowley, which was the separate property of the decedent, and that said property was fraudulently undervalued; that since November 5, 1908, defendant has been collecting revenues from the separate property of said decedent, and is indebted to petitioner for her proportion thereof; and she prays for judgment accordingly. Defendant admits that the property held in indivision is not susceptible of division in kind and makes no objection to a partition thereof by licitation. She alleges that said property consists of bare lots in the improvements upon which plaintiff has no interest, and that her interest in the revenue derived from said property would not exceed \$20; but that, should the court hold otherwise, plaintiff should be condemned for her proportion of the cost of maintenance and of the taxes.

Plaintiff thereafter filed a plea of estoppel alleging that defendant, in opening the succession, and in her account of tutorship, charged the estate of Samuel Nason, and credited the community with the value of said improvements and cannot now be heard to assert title to them.

Samuel Nason, a widower with three children, and defendant were married July 1, 1890, and it appears that he then owned the following pieces of property, to wit:

(1) Lot 15, in block 50, measuring 50x100 feet, in the town of Crowley, for which he paid \$150 cash February 11, 1888. (2) Ten acres of land, north of Crowley for which he paid \$50 cash February 11, 1888, and gave two notes for \$50 each payable in one and two years. (3) Lot 10, in block 50, in the town of Crowley, for which he paid \$100 cash February 11, 1888. (4) Lot 3, in block 149, in the town of Crowley, for which he paid \$15 cash February 20, 1888. (5) Twelve acres of woodland, northwest of Crowley, for which he paid \$75 cash February 29, 1888.

April 7, 1891, Nason exchanged the "northern third of lot 10, in block No. 50" for the "southern two-thirds of lot 9 in block No. 50," and "lot No. 2 in the same block," and he paid \$55 "to boot."

June 18, 1891, he sold the "12 acres" for \$120 cash.

September 24, 1891, he sold the "lot 3 in block 149" for \$50 cash.

August 22, 1893, he sold the "10 acres, north of Crowley" for \$500 in notes of \$100 each, payable in from one to five years.

January 31, 1899, he sold to Wm. F. Campbell, "23 feet of ground taken off the north side of lot No. 15, in block No. 50," for \$1,800, of which \$600 were paid in cash, and, for the balance, the purchaser gave his two notes for \$600 each, payable in one and two years.

April 22, 1899, he died; and on November 21, 1899, his widow filed an inventory upon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which there appears, as the separate property of the decedent:

1. The southern portion of lot 15 in block 50, appraised at..... \$1,250 00
2. The two promissory notes received in part payment of the price of the 23 feet, off the north side of said lot 15..... 1,200 00
3. "The southern two-thirds portion of lot 10, in block No. 50 * * * together with the buildings and improvements thereon, which were placed there, during the marriage by the husband, and which were paid for with community funds, and which enhanced the value of said community property as hereinafter set forth"..... 375 00
4. The claim of the separate estate against the community for the value, on April 7, 1891, of the northern one-third of lot No. 10, in block 50, "without any of the buildings, improvements, trees, etc., on said lot"..... 40 00

Total valuation of separate property\$2,865 00

"From the above" (the procès verbal proceeds) "must be deducted the charges in favor of the community against the separate estate of the deceased, S. Nason, for the buildings and improvements placed by the deceased on his separate property during marriage, and paid for with community funds as aforesaid—the said charges and recompense due to the community being the enhanced value resulting to the separate property of the estate at the date of the dissolution of the community, on April 22, 1890, as follows:

- (a) From the buildings and improvements heretofore described under item 1.....\$500 00
- (b) From the buildings and improvements on the property sold to Campbell, as described above, under item 2, due allowance being made for the fact that the one-third of the purchase price of said property had been paid previous to the dissolution of the community. This charge is made only to the extent of two-thirds of the enhanced value of said property by reason of the said buildings and improvements, and the said two-thirds is 240 00
- (c) From the buildings and improvements on the property herein before described under the item 3..... 75 00

Total enhanced value.....\$815 00"

Under the title "Community Property" we find the following items in the inventory, to wit:

"Lots 1 and 2 in block 50 * * * and the southern two-thirds portion of lot 9 of said block * * * appraised at \$1,040, from which, however, are deducted \$40, as stated above (4) leaving the net appraisement \$1,000.

"(2) Recompense due the community by the separate estate of S. Nason for the enhanced value, at the time of his death, of his separate property, by reason of the buildings and improvements thereon, paid for with community funds, as herein before fully set forth, \$815.00."

Then follow items of cash, merchandise, household effects, open accounts, etc., mak-

ing the total appraisement of the community property, \$3,362.50.

The procès verbal then recites that Samuel Nason had been married twice and had left three children by his first marriage, and a widow and three children by his second marriage; that he had also left a will whereby he bequeathed his entire estate to his widow and the three children of his marriage with her, in the proportions of one-fourth to each; that the children of the first marriage had contested the will, and that the widow had bought their interests in the estate; and that the property was therefore owned by her and her three children in the proportion of $\frac{10}{24}$ of the separate property, and $\frac{17}{24}$ of the community to the widow, and $\frac{14}{24}$ of the separate property and $\frac{7}{24}$ of the community to the children, from which it follows that plaintiff owns $\frac{14}{72}$ or $\frac{7}{36}$ of the separate property and $\frac{7}{72}$ of the community property—the proportion which she is claiming.

By judgment of date February 15, 1901, rendered on the advice of a family meeting, the community property as per the inventory, was adjudicated to the widow, at the valuation therein given, to wit, \$3,362.50.

On November 19, 1908, the widow, who had, in the meanwhile, married her present husband, with him to authorize her and as cotutor, filed an account of her tutorship of the plaintiff herein, in which plaintiff is charged with her board and tuition, etc., from the date of her father's death; with her proportion of the cost of the maintenance of, and taxes on, the separate property of her father, and with interest upon the disbursements therefor; as also with the fees of the attorney for preparing and filing the account; making a total, on the debit side, of \$1,965.08. And she is credited with:

Her share of community property, adjudicated to surviving widow.....\$ 326 85
5 per cent. interest thereon, from Feb. 25, 1901, the date of adjudication to Nov. 5, 1908..... 126 63
Her proportion of \$4.482—being rent of whole property for nine years.. 871 50

Total\$1,324 99

Recapitulation.

Due by minor to cotutors.....\$1,965 08
Due to minor by cotutors..... 1,324 99
Balance due to cotutors.....\$ 640 09

(The question is not raised, either in the pleadings or the argument, and we therefore allow the fact that the tutrix and cotutor appear to have expended the entire patrimony of the minor and to have brought her in debt, without authority, speaks for itself.) Several witnesses, called by plaintiff, testified that lots 1 and 2, and the southern two-thirds of lot 9 in block 50, were worth in 1899 (with the then improvements), say, \$2,400, or \$800 each. There is also some testimony to which we will refer later, concerning the rents collected, and the expenses

defrayed by defendant, from and on account of the property.

Upon the case as presented, the judge a quo gave judgment, ordering the partition of the south two-thirds of lot 10, and the south 27 feet of lot 15, in block 50, and holding that the buildings thereon "are community property in which the plaintiff has no interest"; rejecting plaintiff's demands as predicated upon the allegation that the community property has been undervalued and that lot 2 and the south two-thirds of lot 9, in block 50, should have been inventoried as the separate property of Samuel Nason; and disposing of the demand for rents of the separate property, as follows:

"It is further decreed that the \$251.22 for rent, from November 5, 1908, to March 5, 1910, is rejected, for the reason that the separate property consisted of unimproved lots, the buildings and improvements thereon being and belonging to defendant in which plaintiff has no interest, and that a fair rent for the same would be, for said share of plaintiff, the sum of \$20, which said amount was duly tendered in court. It is further decreed that defendant herein pay and account to plaintiff herein, from June 5, 1910, for rent of the Crowley furniture store at a rental of \$35 per month, and for rent of the cigar stand at a rental of \$8 per month, making a monthly rental of \$41 per month, and, of the said amount of \$41, that plaintiff receive her share, which is $\frac{1}{3}$ thereof for each month. As to other claims of the plaintiff, they are rejected. It is further decreed that plaintiff pay her share of the taxes and costs of repairs made upon the property aforesaid. It is further decreed that defendant pay all costs, except as to the partition, which are to be paid proportionately."

Opinion.

1. There is no evidence in the record as to the disposition that Samuel Nason made of the proceeds of his separate property, sold after his marriage to defendant. The sales were made in 1891, 1893, and January, 1899, respectively, and he died in April, 1899, leaving \$151 cash on hand, to which were added \$381.25 collected by the widow from notes and open accounts, referred to in the inventory as belonging to the community.

[1] The case, as to the demand that the community be held liable for the amounts so received is not distinguishable from others in which it has been held that, in order to sustain such demand, it must be proved that the amounts were expended for the benefit of the community. *Stewart v. Pickard & Others*, 10 Rob. 18; *Depas v. Riez*, 2 La. Ann. 44; *Succession of Vland*, 11 La. Ann. 297; *Belair v. Dominguez*, 26 La. Ann. 605; *Succession of Bollinger*, 30 La. Ann. 193; *Succession of Foreman*, 38 La. Ann. 700; *Succession of Breaux*, 38 La. Ann. 728; *Succession of Rhodes*, 39 La. Ann. 473, 2 South. 36; *Heirs of Gee v. Thompson & Burns*, 41 La. Ann. 348, 6 South. 548; *Succession of Lyons*, 50 La. Ann. 53, 23 South. 117.

In the cases of *Suc. of Kidd*, 51 La. Ann. 1160, 26 South. 74; *Suc. of Cormier*, 52 La. Ann. 861, 27 South. 293; *Suc. of Kleinert*,

125 La. 549, 51 South. 584, relied on by plaintiff, it was held, merely, that where the evidence is sufficient to justify the conclusion that the separate funds of the husband have been used for the benefit of the community, his separate estate should be credited for the amount of such funds.

2. There is no doubt that, for lot 2 and the southern two-thirds of lot 9 in block 50. Nason, after his marriage, gave in exchange the northern one-third of lot 10, in the same block, which was his separate property, and that he also gave \$55 "in order to equalize the value of his property * * * exchanged." The transaction may, however, be none the less an exchange although a balance was paid in money. *C. C. 2666*. The evidence shows that, for the whole of lot 10, Nason in 1888 paid \$100, and that for the whole of lots 2 and 9 Carver & Frankel (with whom the exchange was made) in February, 1891, paid \$150. It may therefore be assumed that, when, in April following, lot 2 and two-thirds of lot 9 were conveyed to Nason, the property so conveyed was worth \$125; and we also assume that the one-third of lot 10, conveyed by Nason in exchange was at that time worth \$125, less the \$55 given to equalize the values or \$70; so that the major part of the value given by Nason consisted of his separate real estate.

In *Newson v. Adams*, 3 La. 231, it was held that:

"Where paraphernal property of the wife is given in exchange, that received in place of it partakes of the same character" (syllabus); *Mr. Justice Matthews* saying in the opinion: "*Pothier, Contracts of Sale*, part 7, No. 9, states it to be one of the principal effects of an exchange that the thing is subrogated in full right to that which was alienated; *subrogatum capit naturam subrogati*."

In *Lawson v. Ripley*, 17 La. 238, it was held (quoting from the syllabus):

"When the title to property brought in marriage was in the party, although not paid for, it became his separate property, and remained such at the dissolution of the community. Slaves received during marriage by one of the spouses in exchange or in payment of money due him on his separate and individual right do not become community property."

In *Percy v. Percy*, 9 La. Ann. 184, it was held that a slave received in Mississippi by a wife (who afterwards with her husband removed to this state) in exchange for one owned by her at the time of her marriage became her paraphernal property.

In *Troxler et al. v. Colley, Sheriff, et al.*, 33 La. Ann. 428, it was held (quoting the syllabus):

"Property acquired by an heir at a partition sale, and paid for by means of his heritable share, is his separate property, and does not fall into the community of acquets and gains, as property acquired during marriage."

In the course of the opinion in the case thus cited, it was said:

"In substance, this general interest in all the property of the succession, the heir may be said

to exchange, by the effect of these proceedings, for the specific thing he receives as the result of them. * * * If it be an exchange, there can be no question that property received in exchange for separate property, whether of a husband or wife, is of the same identical character as that given for it. [Newson v. Adams] 3 La. 233; [Percy v. Percy] 9 La. Ann. 185."

We therefore conclude that the lot 2 and the southern two-thirds of lot 9, acquired by Nason, in the exchange, became his separate property, and that his separate estate is the debtor of the community for the difference, of \$55, paid, during the existence of the community, in order to equalize the values.

3. Lots 1 and 2, and the southern two-thirds of lot 9, inventoried as community property, were appraised together at \$1,040, from which \$40 was deducted, leaving the appraisement at \$1,000. There are two witnesses who testify that the property was worth \$2,400 and \$2,500, respectively.

We should, however, be disposed to accept the appraisement as made by the officers of the court, were it not that the record contains conclusive evidence that their appraisements were too low. Thus, on January 31, 1899, Nason sold a lot measuring 23x100 feet off the north side of lot 15, and as lot 15 measured 50x100 feet, there was left, by the side of the lot that was sold, a lot measuring 27x100 feet, which a few months later, was appraised in the inventory at \$1,250. We are therefore of opinion that lot 1, in block 50 (which is the only one of the three in the valuation of which the plaintiff, in view of the conclusion heretofore reached, is interested), should be held to have been worth, with such improvements as were on it, \$800, though we are satisfied that the original appraisement was made with no fraudulent purpose.

4. In the inventory filed by her, defendant attributes the ownership of the improvements, placed by the community on the separate property of her deceased husband, to his separate estate, and makes a charge, in favor of the community and against that estate, for the enhanced value of the latter, resulting from such improvements, which was the proper view to take of the matter.

"It is settled that the recompense due by the separate estate of the wife for improvements placed thereon, during marriage, at the expense of the community, is the enhanced value resulting to her separate estate, from the improvements, at the date of the dissolution of the community." Succession of Roth, 33 La. Ann. 540 (syllabus).

[4] "Improvements erected during marriage on the separate property of one of the spouses, even though made with community funds, belong to the owner of the soil, subject only, to the duty of paying to the community, at its dissolution, the enhanced value of the property, resulting therefrom." Dillon v. Dillon, 35 La. Ann. 92 (syllabus).

"The separate estate cannot be charged with the cost of improvements, but only with the enhanced value of the property. C. C. art. 2408; [Depas v. Ries] 2 La. Ann. 43; [Succession of

McClelland] 14 La. Ann. 763; [Succession of Roth] 33 La. Ann. 540."

Succession of Boyer, 36 La. Ann. 509. See, also, Sims, Tutrix, v. Billington, 50 La. Ann. 968, 24 South. 637.

It is evident, therefore, that plaintiff is entitled to receive her proportionate share of the revenue derived from the property belonging to her father's estate whether improved at the expense of the community or otherwise, subject to the obligation of the estate with respect to the reimbursement of the community as stated in the above quoted cases.

5. It is conceded that, from the furniture store, on lot 15, and from a tenant, Pete, on lot 10 (which lots are admitted to belong to the separate estate of Samuel Nason) defendant collected rents from November 5, 1908—from the furniture store, at the rate of \$35 a month, up to May 1, 1910, less two months when the building was vacant, and thereafter, at the rate of \$40 per month, up to the time of the trial, say, June 5, 1910; and, from Pete at the rate of \$6 a month from November 5, 1908, to the time of the trial; and plaintiff is entitled to recover $\frac{7}{10}$ of the amount so collected, with reservation of her rights with respect to other amounts which have since been collected from said property, or from the lot 2 and the southern two-thirds of lot 9, in block 50, subject to her obligation to contribute in like proportion, to the reimbursement of the amount expended in maintaining and paying taxes on said property.

6. The evidence in regard to the disbursements made by defendant on account of the property in question is not as full as it might be, but as plaintiff (through her counsel) admits the payment of certain bills there is no good reason why as to them there should not be judgment, at this time, and as to other similar claims, including taxes, we think the matter should be left open for further proof on the consummation of the partition. The bills admitted are as follows: Thomas, \$8.35; Gilbert, \$1.50; Marx, \$144.75; Thomas, \$17.37; Thompson, \$22.50; Fontenot, \$7.35—total, \$207.07.

It is therefore ordered, adjudged, and decreed that, in so far as the judgment appealed from directs the partition, by licitation, of the southern two-thirds of lot 10 and the southern 27 feet of lot 15, in block 50, of the city of Crowley, and in so far as it rejects plaintiff's demand that the community lately existing between Samuel Nason and defendant shall further account for moneys received by said Nason from sales, during the existence of said community, of his separate property, and in so far as it condemns the defendant, Mrs. Jessie B. Freville, with respect to the costs of this litigation, said judgment be affirmed. It is further adjudged that, in all other respects, said judgment be annulled, avoided, and re-

versed, and that there now be judgment in favor of plaintiff decreeing lot 2 and the southern two-thirds of lot 9 in block 50, in the city of Crowley, to have been the separate property of her late father, Samuel Nason, together with all the improvements thereon, as also all the improvements on the southern two-thirds of lot 10, and the southern 27 feet of lot 15, of said block 50, in the city of Crowley; decreeing all of said lots or parts of lots, and improvements, to be now owned by defendant, Mrs. Jessie B. Freville, and her three children, Ella, plaintiff herein, and Edna and Irma minors, in the proportions of $\frac{10}{24}$ to said Mrs. Freville and $\frac{7}{24}$ to each of said children; decreeing that the whole of said property be sold in the manner provided by law, in order to effect a partition; and that the parties be referred to the proper officer, to be designated by the district court, for the consummation of the same. It is further adjudged that the valuation of lot 1, of block 50, in the city of Crowley, as appearing upon the inventory in the succession of Samuel Nason and in the adjudication of the community property to the surviving widow, defendant herein, be increased to \$800, and that said defendant account to plaintiff for her interest in said lot upon that basis. It is further adjudged that, in the consummation of said partition, said defendant account to plaintiff for \$118.88, being $\frac{7}{24}$ of \$608.84, which amount is held to be the total of the rents collected by said defendant from the portions of said lots 10 and 15 in block 50, heretofore mentioned, between November 5, 1908, and June 5, 1910. It is further adjudged that in said partition plaintiff account to defendant for \$40.23, being $\frac{7}{24}$ of \$207.07, which amount defendant is found to have disbursed in maintaining and paying taxes on the property in question. It is further adjudged that the right of plaintiff be reserved to demand and recover in said partition such further amounts as may be due her on account of rents collected by defendant, and that the right be reserved to said defendant, similarly, to demand and recover, such further amounts as may be due her on account of disbursements made by her for the maintenance of, or in paying taxes on, the property in question; or by reason of the enhanced value of said property, resulting from improvements placed thereon at the expense of the formerly existing community between her and the late Samuel Nason; or by reason of the expenditure of community funds as "boot," in the exchange of the separate property of said Samuel Nason for other property acquiring the same status. It is further adjudged that defendant Mrs. Jessie B. Freville pay the costs of this appeal.

(129 La.)

No. 19,215.

STATE v. JENKINS et al.

In re JENKINS.

(Supreme Court of Louisiana. Jan. 2, 1912.)

(Syllabus by the Court.)

MANDAMUS (§ 61*)—ADMISSION TO BAIL.

The fact that a person charged with a capital offense supports his application by the ex parte affidavits of two other persons, tending to establish an alibi, does not so rebut, or destroy, the presumption arising from the action of the grand jury, in finding the bill of indictment, as to make it the plain legal duty of the judge of the district court to admit the accused to bail, and this court will not issue the writ of mandamus directing him to do so.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 61.*]

Trent Jenkins and others were charged with arson, and, on refusal of bail, John Jenkins applies for writs of certiorari and mandamus. Denied, and proceedings dismissed.

Carter & Carter, for relator.

MONROE, J. Relator, having been charged with setting fire and burning in the nighttime the house in which Oliver Williams and his family were then residing and lodging, asked to be admitted to bail, and, his request having been refused, he prays that a writ of mandamus issue commanding the judge a quo to grant it. The judge, made respondent, answers as follows:

"Relator relies on two affidavits, made by deputy sheriffs which, if true, would show an alibi. An alibi, after indictment is found, is a defense to be heard at the trial of the case. No doubt, the grand jury, in finding the indictment in this case, heard all proper evidence on this question of fact, and that the district attorney, during the trial of the case, will offer proof on this question of an alibi. It would be a dangerous precedent for any court to establish: i. e., to give a party bail on the strength of two affidavits which are not legal testimony. The power to grant bail is never exercised after an indictment by the grand jury. The reason is that the testimony heard by the grand jurors is not written and cannot be disclosed, and, consequently, cannot be looked into by the judge, who must, necessarily, regard the conclusion of the grand jury as too great a presumption of the guilt of the prisoner to bail him. State ex rel. Hunter v. Brewster, 35 La. Ann. 605; State ex rel. Rice v. Butler, 40 La. Ann. 3 [3 South. 350]; [State ex rel. Strickland v. Criminal Sheriff] 41 La. Ann. 573 [6 South. 827]; [State ex rel. Johnson] 48 La. Ann. 1407 [20 South. 892]. I respectfully submit John Jenkins is not entitled to bail," etc.

Counsel for relator call our attention to the two affidavits referred to by the respondent judge, which set forth that the affiants arrested the relator on the evening of the night on which, relator alleges, in the petition, here filed, the burning is said to have taken place, and lodged him in a jail, 21 miles distant from the scene of the fire; and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that he was not released until the next day, and did not return to the scene of the fire until the next afternoon. Counsel also call our attention to article 12 of the Constitution, which provides (inter alia) that "all persons shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident or presumption great," etc.

As relator is charged with a capital offense, the question presented for decision is whether the two affidavits relied on by him so entirely rebut the presumption of guilt arising from his indictment by the grand jury as to make it the plain legal duty of the respondent to admit him to bail? That question is answered in the negative by the authorities to which we are referred by the respondent. In the case first cited, Mr. Justice Manning, as the organ of this court, said:

"The fact that a grand jury has found a bill against a person for a capital offense is, of itself, a sufficient presumption of guilt to preclude any inquiry into the merits of the prisoner's case upon a habeas corpus. And this in no respect trenches upon that fundamental rule, which lies at the root of criminal law and jurisprudence, that every one is presumed to be innocent until he is proved to have been guilty." State ex rel. Hunter v. Brewster, Sheriff, 35 La. Ann. 606.

And, in the next case cited, Mr. Justice Poche, speaking for the court, said:

"Under the provisions of section 841 of the Revised Statutes, the crime of arson, as charged against relator, is punishable by death, hence, it is a capital offense. * * * Criminal jurisprudence has, long since, settled the rule that an indictment furnishes absolute evidence that the proof is evident and the presumption great as regards the right to bail." State ex rel. Rice v. Sheriff, 40 La. Ann. 4, 8 South. 351 (citing authorities).

It is therefore ordered, adjudged, and decreed that relator's application be denied and this proceeding dismissed, at the cost of the relator.

(129 La.)

No. 18,619.

GULF REFINING CO. OF LOUISIANA v.
JEEMS BAYOU HUNTING
& FISHING CLUB.

(Supreme Court of Louisiana. Jan. 15, 1912.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION (§ 101*)—OPERATION AND EFFECT—CONSTRUCTIVE POSSESSION.

Where one acquires, though at the same time and from the same person, distinct and widely separated tracts of land, and takes actual possession of one or more of them, the rule that possession, under title, of part of an estate is possession of the whole has no application to the tracts not actually taken possession of. That rule applies, and is confined in its application, to property so situated as to be within a common boundary, or, at all

events, to property known and recognized as constituting a single estate.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 575-589; Dec. Dig. § 101.*]

2. TENANCY IN COMMON (§ 20*)—MUTUAL RIGHTS OF COTENANTS—ACQUISITION OF ADVERSE TITLE.

Where property, held in common by a number of heirs, is sold for taxes, and, within the delay allowed for redemption, one of the heirs redeems it, or takes title from the tax purchaser, in the form of a sale, he acquires no greater interest than he had before, save that he has a claim against his co-owners for reimbursement of his outlay.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 61, 62; Dec. Dig. § 20.*]

3. TENANCY IN COMMON (§ 35*)—RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

Where a co-owner has taken title to the property held in common, at tax sale, or under any circumstances as a consequence of which the transaction inures to the benefit of his co-owners, as well as himself, and years afterwards appears before a notary solely as an heir, and, acting as such, declares that he relinquishes his rights in the property, and ratifies a conveyance, made by one of his coheirs, of the whole property, such relinquishment and ratification do not, quoad his other coheirs, operate to convey the tax title so taken by him, but is confined in its application to his interest as an heir.

[Ed. Note.—For other cases, see Tenancy in Common, Dec. Dig. § 35.*]

Appeal from First Judicial District Court, Parish of Caddo; A. J. Murff, Judge.

Action by the Gulf Refining Company of Louisiana against the Jeems Bayou Hunting & Fishing Club. From a judgment for plaintiff, defendant appeals. Affirmed.

Blanchard & Barret & Smith and Alexander & Wilkinson, for appellant. D. Edward Greer and Thigpen & Herold (F. C. Proctor, of counsel), for appellee.

Statement of the Case.

MONROE, J. Plaintiff alleges that it is the owner of an undivided one-fourth interest in the N. W. $\frac{1}{4}$ of section 20, township 20 north, range 15 west, in Caddo parish, and, after setting forth its title, further alleges that defendant "claims to be the owner of said property," and that neither it nor defendant is in possession; and it prays that defendant be cited, and that it have judgment decreeing it to be the owner of the interest described, and decreeing a partition of the property in kind, and putting it in possession of the part that may be allotted to it. Defendant filed an exception, alleging actual possession for more than a year, and praying that plaintiff be relegated to "a regular petitory action," which exception, having been referred to the merits, it answered, setting up title to the entire tract, pleading the prescription of 3 and 10 years, and praying that plaintiff's demand be rejected.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Omitting, for the present, certain alienations, to which we will refer hereafter, it appears that the quarter section of land here in question was owned by Stephen D. Pitts and his wife, Ann, as community property, and that they died (the last of the two about 1883), and were succeeded in title by their sons, T. H. Pitts, R. D. Pitts, and R. L. Pitts; that T. H. Pitts died in 1877, and was eventually succeeded in title by his daughters, Sallie (who became Mrs. Austin) and Lucy (who became Mrs. Jocelyn); that R. L. Pitts died in 1905, and was succeeded in title by his sons S. D. Pitts, A. C. Pitts, A. L. Pitts, and T. H. Pitts; that R. D. Pitts died in 1905, and was succeeded in title by his daughter Annie (Mrs. Graham) and his son, L. J. Pitts; so that, if there had been no alienation, the land would now be owned by Mrs. Austin and Mrs. Jocelyn, each for one-sixth, aggregating four-twelfths, S. D., A. C., A. L. and T. H. Pitts, each for one-twelfth, aggregating four-twelfths, and Mrs. Graham and L. J. Pitts, each for one-sixth, aggregating four-twelfths.

Referring now to the alienations, we find that on November 1, 1886, the land in question was registered as forfeited to the state for the taxes of 1885, assessed to the succession of Mrs. Ann Pitts. On June 3, 1889, it was sold to Benjamin & Barron for the taxes of 1888, similarly assessed; and, within the 12 months allowed for redemption, to wit, on May 21, 1890, Benjamin & Barron conveyed "such title as they received" to R. D. Pitts; but, so far as we are informed by the record, the deed executed by the parties was never recorded. On September 29, 1895, Mrs. Austin paid into the state treasury the sum of \$4.60, as the amount, including interest, penalties, and costs, due for the taxes of 1885, and obtained from the State Auditor a certificate of redemption, as against the forfeiture for said taxes, which had been registered on November 1, 1886. On May 8, 1899, Mrs. Austin executed an instrument, purporting to be a sale of said quarter section, together with a quarter section in another range and township, to S. N. Kerley and the Jeems Bayou Fishing & Hunting Club; and nearly 16 years later, to wit, on March 3, 1905, R. D. Pitts executed an instrument reading, in part, as follows:

"Before me * * * personally appeared R. D. Pitts, * * * who declared * * * that he is one of the three heirs of Stephen D. and Mrs. Ann Pitts, and, as such, that he did, by these presents, waive, relinquish and renounce in favor of S. N. Kerley and the Jeems Bayou Fishing & Hunting Club * * * all his right, title and interest in and to the following described property: [describing the property that had been conveyed to Kerley by Mrs. Austin]."

The consideration of this transfer and waiver is this, to wit:

"That said Pitts has a like waiver of interest in other lands from the heirs of Stephen D. and Ann Pitts, deceased, and he desires here to ratify and confirm the sale of this particular

property, by his niece, Mrs. Sallie Austin, to S. N. Kerley, * * * and by said Kerley sold, or agreed to be sold, to the said Fishing & Hunting Club; his niece and the other heirs of Stephen D. and Mrs. Ann Pitts having ratified and confirmed the transfer made by him of another piece of property belonging to the succession of said Stephen D. and Mrs. Ann Pitts, his mother.

"The said Pitts further states that, while there has been no written partition between the heirs of Stephen D. and Mrs. Ann Pitts, there was an understanding and agreement between them as to a division of the property, and that the property herein described has been set aside to Mrs. Sallie Austin, who sold it to S. N. Kerley, and, by said S. N. Kerley was transferred, or agreed to be transferred, to the Jeems Bayou Fishing & Hunting Club, and that it was his purpose and intention to here ratify and confirm this sale to said Kerley, above referred to, and to waive and renounce in favor of said Kerley and the said Fishing & Hunting Club all right, title and interest in said property."

On April 12, 1907, the defendant herein obtained an order, in the United States District Court for the Western district of this state, in the matter of the bankruptcy of S. D. Pitts, who, as one of the four sons of R. L. Pitts, had inherited an undivided one-twelfth interest in the property, enjoining the trustee from selling, as belonging to the estate of the bankrupt, the undivided one-twelfth interest in S. W. fractional $\frac{1}{4}$ of section 10, Tp. 20, R. 16, and the undivided one-eighth interest in the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and the undivided one-twelfth interest in the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, of section 20, Tp. 20 N., R. 15 W., which order appears to have been obtained upon a finding by the court that defendant was the owner of the whole of said sections 10 and 20, and apparently upon the fact that the property which the trustee was thus prohibited from selling was scheduled as belonging to the estate of the bankrupt. Why the interest of the bankrupt in the land in section 20 should have been described as it was is not explained, since the interest that he inherited from his father was one-twelfth of the quarter section, and not one-eighth of the E. $\frac{1}{2}$ and one-twelfth of the W. $\frac{1}{2}$, which together make five forty-eighths, or one forty-eighth more than the bankrupt had inherited.

Assuming that defendant has acquired the interests in said property which were inherited by Mrs. Austin, R. D. Pitts, and Mrs. Jocelyn, it has obtained title, in that way, to three-fourths of the whole; thus: Mrs. Austin, two-twelfths, R. D. Pitts, four-twelfths, Mrs. Jocelyn, two-twelfths, S. D. Pitts, one-twelfth, total nine-twelfths or three-fourths. The remaining one-fourth interest was inherited by A. C., A. L., and T. H. Pitts (sons of T. H. Pitts, and brothers of S. D. Pitts, bankrupt), and was sold by them to plaintiff, by two acts of date October 30, 1908, and duly recorded. There was judgment in the district court in favor of plaintiff, and defendant prosecutes the appeal.

Opinion.

[1] The prescription of 10 years pleaded by defendant is abandoned, and that of 3 years would be of value only in the event of its being found that defendant acquired rights under the tax title conveyed by Benjamin & Barron to S. D. Pitts. The claim of possession, set up in order to compel plaintiff to resort to a petitory action, proper, is but vaguely pressed, and is without merit. It rests upon the proposition that defendant, having purchased a quarter of section 10 in one township and range, and a quarter of section 20 in another township and range (the two tracts being widely separated), at the same time and from the same person, and having gone into possession of the tract in section 10 under the title so acquired to both quarter sections, such possession, as to the quarter of section 20, falls under the rule that possession, under title, of part of an estate is possession of the whole. The rule is well established; but it has never been applied in this state or elsewhere, so far as we are advised, to cases such as this, where a purchaser acquired distinct tracts, which are separated from each other, and only takes actual possession of one or more of them. Article 3437 of the Civil Code, to which we are referred, contemplates, we think, an estate included within the same boundary, or at all events, known and recognized as a single estate; and the case of *Bernstine v. Leeper*, 118 La. 1098,¹ which is also cited, was a case involving contiguous subdivisions of the same section. The question does not appear to have been heretofore presented to this court; but we are informed, through the brief of plaintiff's counsel, that it has been decided by the courts of some of our sister states upon the basis upon which the views above expressed are predicated; the cases to which we are referred being *Stephenson v. Doe*, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489; *Moses v. Gatliff* (Ky.) 12 S. W. 139; *Ga. Pine Inv. Co. v. Holton*, 94 Ga. 551, 20 S. E. 434; *Brown v. Bocquin*, 57 Ark. 97, 20 S. W. 813.

[2] Defendant's main contention is that, by the act of ratification and relinquishment, executed by R. D. Pitts on March 3, 1905, it acquired, not only the one-third interest that he had inherited as the heir of his parents, but all the title that he possessed, and that as to it (a third person) he was the owner of the entire property by virtue of the recorded conveyance to him from Benjamin & Barron, the adjudicatees at the tax sale. In equity and good conscience, and under the settled jurisprudence of this state, R. D. Pitts was not the owner of, and had no claim to, any other interest in the property, save that which he had inherited, since his acquisition of the title from the purchasers at the tax sale inured to the benefit of his co-owners, as well as to his benefit; and he thereby acquired no greater interest

than he had before. *Hake v. Lee & Beall*, 106 La. 482, 31 South. 54; *Bossier v. Herwig*, 112 La. 545, 36 South. 557; *Alexander et al. v. Light et al.*, 112 La. 927, 36 South. 806; *Duson et al. v. Roos et al.*, 123 La. 835, 49 South. 590, 131 Am. St. Rep. 375; *Robinson v. Lewis*, 68 Miss. 69, 8 South. 253, 10 L. R. A. 101, and note, 24 Am. St. Rep. 254; *Pitts v. Kerley*, 126 La. 221, 52 South. 281.

In the case last above cited, this court said, with regard to the identical conveyance to which we are now referring:

"When Rush D. Pitts purchased from Sam Benjamin and Isaac Barron, as adjudicatees at the tax sale made to them in 1887, all rights which they may have acquired therein, he, for the benefit of himself and his coheirs, lifted the cloud which rested on their title, as heirs, by the adverse claims of those parties." *Pitts v. Kerley*, 126 La. 237, 52 South. 286.

[3] Defendant's claim therefore rests upon the proposition, not that R. D. Pitts owned more than a third interest in the property, or that he had the right to sell more, but that he appeared upon the public records as the owner of the whole; and that, as he, so appearing, undertook to convey title to the whole to a third person, whose rights are to be determined solely by such appearance, the title to the whole passed the equities in favor of the nonregistered co-owners notwithstanding.

It is not contended that, as a matter of fact, the defendant was guided by the public records, in so far as the tax title was concerned, or that, at the time it accepted the ratification and relinquishment from R. D. Pitts, it had any knowledge or suspicion that the conveyance to him from Benjamin & Barron existed, or had ever existed. Nevertheless, if the situation were altogether as the proposition that we are considering assumes it to be, we are inclined to think that it would be well founded. There is, however, a defect in the minor premise. R. D. Pitts did not undertake to convey title to the whole property.

The instrument that he executed begins by declaring, in unmistakable terms, the capacity in which he appeared and was acting, thus:

"Personally appeared * * * R. D. Pitts, * * * who declared * * * that he is one of the three heirs of Stephen D. and Mrs. Ann Pitts, and, as such [italics by the court], that he did, by these presents, waive, relinquish and renounce * * * al his right, title and interest," etc.

What right, title, and interest did he thus waive, relinquish, and renounce? The answer is plain. He had just declared that he was "one of the three heirs" of his parents, and that what he was doing he was doing in that capacity. So that the title that he waived, relinquished, and renounced was the title which was vested in him "as such" heir. That was the only title which, without the perpetration of a fraud upon his

¹ 48 South. 889.

coheirs, he could alienate or incumber; and that what, from the language used, he appears to have done is exactly what he intended to do is sustained by the presumption that he did not intend to perpetrate a fraud. Nor do we think that the defendant understood that he was appearing in any other capacity or waiving any other right than that of heir; for assuredly if it had considered that it was dealing with him as one who held a valid title to the whole property it would not have been satisfied to have him appear and act as the heir of an undivided one-third interest. Nor, if defendant had supposed that R. D. Pitts had effectively conveyed, waived, or relinquished the title to the whole property, would it, as we imagine, more than three years later (long after the tax title should have been made safe by the prescription established by the Constitution of 1898), have paid Mrs. Jocelyn \$1,500 for a relinquishment of her one-sixth interest.

We are therefore of opinion that the case has been correctly decided, and the judgment appealed from is accordingly affirmed.

LAND, J., recused.

(129 La.)

No. 18,540.

BAILEY v. LOUISIANA & NORTHWEST R. CO. et al.

(Supreme Court of Louisiana. Jan. 2, 1912.
Rehearing Denied Jan. 29, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 256*)—OPERATION—COMPANIES LIABLE FOR INJURIES.

Whether a railroad company shall operate its road by itself or by another is a question for it, within certain limits, to determine; but the determination of that question cannot relieve it of the consequences to others of negligence in such operation.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 789-792; Dec. Dig. § 256.*]

2. MASTER AND SERVANT (§§ 96, 101, 102, 150*)—RAILROADS (§§ 261, 278*)—INJURIES TO SERVANT—INSTRUCTIONS TO SERVANT.

A section foreman in the employ of a railroad company has a right to expect adequate instructions and information and a reasonably safe place, the character of the work and the circumstances considered, for the discharge of the duties for which he is employed, and, as to him, the negligence of a licensee, operating trains over the road of such company under contract with the owner, whereby his place of work is rendered unnecessarily dangerous, is imputed to his employer. And the licensee is also liable to him for the consequences of its negligence, unless the sufferer is himself guilty of such negligence as directly to contribute to his own injury, or has assumed the risk of the negligence of the other; in either of which cases, both railroad company and licensee are relieved.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 165, 171-184, 192, 297-307; Dec. Dig. §§ 96, 101, 102, 150; * *Railroads*, Dec. Dig. §§ 261, 278.*]

3. MASTER AND SERVANT (§ 240*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

It is not negligence in a section foreman on a railroad to travel over his section on a hand car, furnished him for that purpose, when the only train to be at all expected is a log train, which may or may not come on that day, and of whose irregular and unscheduled movements he receives no notice; nor is it negligence in him to be on the track, at such distance from the approaching log train as would enable him, under ordinary circumstances, and with ordinary care on the part of those by whom the train has been made up and is operated, to take himself and his car out of the way, or as would enable them to stop the train before colliding with the car; nor is it negligence in the foreman, under such circumstances, to endeavor to take his hand car off the track, instead of at once seeking his own safety; for, if his position has become perilous by reason of the unexpected failure of those in charge of the train to stop it or check its speed, he cannot be held to the exercise of the most deliberate judgment.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 240.*]

4. MASTER AND SERVANT (§§ 137, 213*)—INJURIES TO SERVANT—OPERATION OF TRAINS—ASSUMPTION OF RISK.

It is gross negligence to make up a log train with a caboose at one end and a locomotive at the other, when the train is to be pushed by the locomotive, moving backward, and is so long as to render it difficult, and at times impossible, for the engineer, who alone, has the power to stop it, to get a stop signal from the lookout in the caboose. And it is gross negligence in those who are operating such a train to fail to make the best of a bad situation, for the engineer to ride with his back in the direction in which the train is moving, and for the men in the caboose not to arrange a more expeditious method of conveying a stop signal than by running back, through the length of the caboose, and waving their arms over the side of the train. And no section foreman can be held to have assumed the risk of such negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. §§ 137, 213.*]

5. DAMAGES (§ 132*)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

Where a railroad section foreman, 32 years old, who is dependent on his physical labor for the maintenance of himself and family, who, by reason of the negligence of others, has had his thigh broken, and, after severe suffering, is left permanently lame, has recovered \$3,500 by way of compensation for such injuries, this court finds no sufficient reason for reducing the award.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Appeal from Third Judicial District Court, Parish of Claiborne; J. E. Reynolds, Judge ad hoc.

Action by W. Turner Bailey against the Louisiana & Northwest Railroad Company and others. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

John A. Richardson, for appellant Louisiana & Northwest R. Co. Barnette, Roberts & Goff, for appellant Athens Lumber Co. Wimberly & Reeves and McClendon & McClendon, for appellee.

Statement of the Case.

MONROE, J. This is an action in damages against the Louisiana & Northwest Railroad Company and the Athens Lumber Company, sued in solido, for personal injuries, alleged to have been sustained by plaintiff by reason of their negligence. After exceptions of no cause of action, the lumber company denies liability, and imputes contributory negligence and "assumption of risks" to plaintiff, and the railroad company makes a similar defense, omitting the "assumption of risks" plea, and adding the averment that, by contract between it and the lumber company, the latter had assumed liability for all injuries that might be received by "this defendant's employes," and the prayer that, in the event of a judgment against it, a like judgment be rendered in its favor against the lumber company.

We find the facts, as disclosed by the evidence, to be as follows:

Plaintiff was a section foreman in the employ of the railroad company, and his section included four miles of track between the town of Bienville, in the parish of Claiborne, and Bear Creek. On the morning of October 28, 1907, he started from Bienville at about 7 o'clock, on a hand car, with 3 section hands, and, going northward for about 3 miles, was passing through a cut, some 3 feet deep, when the brakeman of the car, who was working (or "pumping," as they call it) on the right side of the car, and could therefore see somewhat farther into a sharp curve (to the left), through a cut 14 or 15 feet deep, some 700 feet in front of them, saw, rapidly emerging therefrom, a train (which, as it turned out, was owned and operated by the lumber company), consisting of 7 flat cars and a caboose, and pushed by a locomotive, moving backward. The hand car was immediately stopped, and plaintiff and his men jumped off and attempted to remove it from the track; but, before they could do so, the train came so near that the men took themselves out of the way, and plaintiff was attempting to do likewise, and was in the act of climbing up the embankment, when the train struck the hand car and, knocking it against him, inflicted the injury of which he complains.

The witnesses differ as to how fast train was moving, plaintiff's witnesses saying "unusually fast," and defendant's that the speed was not unusual. Plaintiff's witnesses say that there was no outlook on the southern, or forward, end of the train. Defendant's witnesses say that the conductor of the train and two of his men were in the caboose, looking ahead through a door, which opened in that direction. Defendant's witnesses—the engineer, the conductor, and his brakeman—say that, before entering the deep cut, the engineer blew his whistle. Plaintiff's witnesses—himself and his men, and two others who were on the outside, but were in a posi-

tion to have heard—say that no whistle was blown; and their testimony appears to be supplemented by that of the fireman on the locomotive. Taking the testimony of the witnesses on both sides, the facts are established, as we think, that, as the train, or, perhaps, we should say, the locomotive, was passing through the deep cut, the engineer turned his face to the rear, and for several minutes was examining the "equalizer bar," on the side of the locomotive, and the fireman was engaged in supplying the furnace with coal, with the result that, when those in the caboose saw the hand car in front of them, and attempted to signal the locomotive to stop, it was quite a little while before they could attract anybody's attention. The conductor testifies that he could not see any one on the locomotive, and did not see the engineer or the fireman until after the accident had happened, though he knew that they must have seen his signal, because the train did eventually stop. One of the men who was in the caboose with the conductor, being asked:

"Now how far did you run, how far did the train go, before you got * * * Mr. Short's, the engineer's, attention?"

—replied:

"I suppose we went about eight car lengths"

—which was a matter of, say, 320 feet; it being shown that the cars were 40 feet long. The engineer admits that the first intimation that he had of the danger in front was a signal, or warning, from the fireman, and the following questions were propounded to and answered by him, to wit:

"Q. How far was the hand car ahead when you first discovered it? A. I suppose about half a car length, flat car—40-foot car. Q. Who was giving the signals to stop? The fireman gave the signal to you; but who was giving signals from the front end of the train, if any one, to the engine? * * * A. I noticed a couple or three negroes back on the train, about two cars, possibly, from the caboose."

The fireman testifies that when he first saw the flagging from the front—

"the end of train was pretty close to the hand car, maybe two car lengths; that it scared him, and that he 'hollered to him' [the engineer], to stop him, and 'when I [he] knew anything the engine was stopped.'"

He testified at one time that the stop signal was given too late for them to stop, and that he never saw—

"any effort made to stop or check the train until after the man was struck. The train was going at a fast rate of speed."

At another time, speaking of the engineer, he said:

"He stopped as quick as he could, I guess; I know he stopped."

The engineer says that the train ran about six car lengths (240 feet) after striking the

hand car. Other witnesses say that, when the train stopped, the locomotive was about opposite to where plaintiff was lying. The testimony, taken as a whole, is fairly conclusive to the effect that the distance from the southern end of the deep cut, from which the train emerged, to the point at which it struck the hand car was 690 feet; that there was nothing to prevent a "lookout" on the front of the train from seeing the hand car as soon as the train emerged from the cut, if not before; and that the train could readily have been stopped in time to have avoided the collision, if the brakes had been applied promptly when the hand car became visible, or even after the train had run as much as two or three hundred feet; and that, even if the train had not been actually stopped in time to avoid striking the hand car, the injury to plaintiff would, in all probability, have been avoided, if it had been slowed down, so that, when it did strike the hand car, it would not have knocked it, as it did, off the track and against the plaintiff. Not only was there delay on the locomotive, however, in taking the signals from the front of the train (delay caused by the fact that both the engineer and the fireman had their backs turned in the direction in which the train was moving), but there was delay at the front of the train in giving the signals. The conductor and his men, who were looking out through the narrow front door of the caboose, had, in order to give the signals, to run back through the caboose (or, at least, that is what they appear to have done), and get outside and wave their arms over the side of the train; whereas, if the caboose had been provided with a cupola, the signal might have been given from there at once, and seen at once on the locomotive; but the caboose was not so provided. Plaintiff had begun to work as foreman of the section in August preceding the accident, and, not having been furnished with any schedules or time-tables, he picked up his information as to movements of the trains as best he could. He learned from the schedule posted in the office at Bienville when the regular trains were to be expected; and, also, that he might ordinarily look out for an extra train within certain hours. But the logging trains of the lumber company ran irregularly—when they were loaded, or when, as on the day of the accident, an empty train might be going after a load. The trainmaster of the road was, no doubt, advised when a logging train would make use of the road; but no one communicated such information to the plaintiff, whose business it was to keep the roadbed in a safe condition, and who was furnished with the laborers to do the work required for that purpose, and with the hand car, with which to carry them and himself over the road to the place where the work was to be done. There is no doubt that, as between the hand car and the train, the latter was entitled to the right of way; that the train was, per-

haps, more easily seen from the hand car than the hand car from the train; and that plaintiff could have escaped without injury, if he had not attempted to get the hand car off the track.

The contract between the two defendants was entered into in 1905, and had 10 years from that date to run. The right is thereby given to the lumber company, upon certain terms and conditions, to operate a locomotive and log trains on the railroad, and, among the conditions, is one to the effect that all engineers and conductors employed to operate such locomotive and trains are to be approved by the railroad company; and another to the effect that the lumber company shall be liable for all personal injuries to the employes of the railroad company, or to other persons, from the operation of said locomotive and trains. There was a verdict and judgment in the district court in favor of plaintiff and against the defendants in solido for \$3,500. Defendants have appealed.

Opinion.

Counsel for the lumber company predicate their argument upon the assumptions that plaintiff knew, or ought to have known, the rules of the company; and that he ran his hand car into the deep cut, from which the train emerged, without taking any precaution to ascertain whether a train was coming through. Thus (quoting one of the several passages on that subject, which we find in the brief) they say:

"In order for the plaintiff to recover in this suit, this court must hold that it was not negligence for a section foreman, who knew the rules of the company, or ought to have known them, who knew the trains were liable to come along at any time, to run his car into a deep cut, on a sharp curve on the road, where he could not see more than two or three hundred yards ahead of him, without first stopping to look and listen for the approach of the train, or to send a flagman ahead to warn of the approaching danger, because every fact and every circumstance connected with this case shows that, if the plaintiff had done this, there would have been no accident."

The assumptions thus indulged in are not, however, sustained by the facts. Plaintiff was not furnished with any copy of the rules of the railroad company, or particularly advised concerning them; and he knew nothing, so far as we are informed, of the rules of the lumber company. And the witnesses agree that the accident did not occur in the deep cut, but at a point which defendant's witnesses, by guesswork, fix as from 400 to 480 feet, and plaintiff's witnesses, by actual measurement, at 690 feet, to the southward of that cut. The defendant was employed to keep the roadbed in such a condition that the trains of both defendants might safely be operated over it. Both defendants expected, and had the right to expect, that he would discharge the duty for which he was employed. Both defendants knew that, in the discharge of that duty,

it was necessary for him to carry himself and his men backwards and forward over the road upon the hand car that was furnished him for that purpose; and both of them knew that trains, which were operated over the road at odd times, without regard to schedules, and with no notice to him, were likely to encounter him at any time; and hence that such trains, in order to give him a reasonable chance to escape death or injury, should be operated with at least the care required in the operation of regular trains.

It is said that there is no evidence in the record that it was negligence for the defendant to run its train backward. But the thing speaks for itself. The train was about 480 feet long, or, perhaps, more—so long that, in coming around a sharp curve, in a deep cut, the "lookout" in front could not be seen by the engineer, which, probably, accounts for the fact that, in passing through the cut here in question, the engineer and fireman, both turned their backs in the direction in which the train was moving, and, not knowing when the head of the train emerged from the cut, were not ready to take the signals to stop, and did not know, until it was too late to stop the train, that the hand car was on the track. There is not the shadow of a doubt that, had the engineer seen the hand car when the conductor saw it, from the head of the train, the train could easily have been stopped before it reached the hand car; for, according to the engineer, it was stopped within 6 car lengths, or 240 feet, from the time that he applied the brakes, after the fireman had "hollered" to him, and he would have had 690 feet within which to stop it, if he had been where the conductor was, and where, in our opinion, he ought to have been. To the suggestion that the train was more easily seen from the hand car than the hand car from the train, there are, as it appears to us, two answers: First, that the train *was* seen from the hand car, and the hand car was stopped in time to have enabled those in charge of the train to have avoided the collision by stopping it; second, that though there is some little talk about a slight drizzle, there was no trouble about seeing either the hand car or the train. The plaintiff, seeing the train, did all that he could to give it the right of way, to which it was entitled, and to avert the accident, and was trying to do more when he was injured. The engineer of the train who alone had control of the brakes, being in a position where he could neither see the hand car nor see the stop signals given by those who had been placed at the head of the train for the purpose of giving such signals, did nothing to avert the accident, because he did not know that it was impending until it was too late for him to act. Finally, it is said that plaintiff might have escaped injury if he had not attempted to get the hand car off the track, and atten-

tion is called to the fact that he first testified that his idea was to save the hand car, and that it was only when he was re-examined that he said that he wanted to avert a wreck and loss of life. It is quite certain, from any point of view, that he was risking his life in the discharge of what he conceived to be his duty, and what, we think, plainly was his duty; and it is also quite certain that he was acting under circumstances which left no time for mature reflection. What his predominant idea or motive was it would, perhaps, be difficult for him to say; but the defendants, by whom he was placed in a position where he was required to act at once, cannot be heard to complain that he did not adopt the course which would have been safer, and leave the question of the safety of the property and lives of others to take care of itself.

[1-4] We find nothing in the contract between the two defendants which relieves either from liability to plaintiff for the injury received by him. The road belongs to the railroad company, and, whilst the question whether it shall be operated by itself or by another is one for it, within certain limits, to determine, the determination of that question cannot relieve it of liability for the consequences to others of negligence in such operation. Plaintiff, being an employé of the railroad company, had the right to expect adequate instructions and information and a reasonably safe place, the character of the work and the circumstances considered, for the discharge of the duties for which he was employed, and, as to him, the negligence of the lumber company (through which the railroad company chose, in part, to operate its road), whereby his place of work was rendered unsafe, is imputable to his employer. And the lumber company is also liable to plaintiff for the consequences of its negligence, unless, indeed, plaintiff himself was guilty of such negligence as directly to have contributed to his own injury, or unless he assumed the risk of the negligence referred to, in either of which cases, both defendants would be relieved. There was, however, no contributory negligence in plaintiff's traveling upon the railroad upon his hand car, since that was the work for which he was employed; or in his being on the track at such a distance from the approaching log train as would have enabled him, under ordinary circumstances, and with ordinary care on the part of those by whom the train had been made up and was being operated, to have taken himself and his car out of the way, or as would have enabled them to have stopped the train before colliding with the car. Nor was plaintiff guilty of contributory negligence in endeavoring to get the hand car off the track, and in not at once seeking his own safety, since the position was one of apparent danger, resulting from the unexpected failure of those in charge of the train either to check its speed, or to stop it,

and he could not be held to the exercise of the most deliberate judgment. On the other hand, those who were responsible for the making up of the train were guilty of gross negligence in so making it up as to render it difficult, and at times impossible, for the engineer upon the locomotive at the rear end, who alone had the power to stop it, to get a stop signal from the "lookout" at the head of the train. And those who operated the train were grossly negligent in failing to make the best of a bad situation, since the engineer might have been on the alert, instead of riding with his back in the direction in which the train was moving; and those at the head of the train might have arranged a more expeditious method of transmitting a signal, immediate action on which was likely to be required. It is hardly necessary to say that plaintiff did not, in his contract of employment with the railroad company, assume the risk of any such negligence as is thus described. Whether, if he had done so, the assumption would inure to the benefit of the lumber company, it is unnecessary to inquire. Though the railroad company in its answer prays that, in the event of a judgment against it, it have a like judgment against the lumber company, its counsel, in their brief, ask that, in such event, the right of the railroad company be reserved. We have therefore, pretermitted the consideration of the question thus referred to.

[5] The physicians who attended plaintiff say that his thigh bone was fractured a few inches above the knee; that he was confined to his bed for a number of weeks; that he suffered intense pains; that his leg is shortened (plaintiff himself says $2\frac{1}{2}$ inches); and that he is permanently lame. One of the physicians says:

"The limb is shorter and the knee joint is stiffened," causing great lameness and inconvenience."

The other physician says:

"The result of the fracture is the shortening of the limb about $1\frac{1}{2}$ or 2 inches. * * * He is handicapped, to some extent, by lameness due to the fracture."

It is shown that plaintiff is about 32 years old, and has a wife and two children; and it is evident that he is dependent upon his physical labor for his and their maintenance. We do not, under the circumstances, feel called upon to reduce the amount awarded him.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reserving the rights of the defendant railroad company as against the defendant lumber company, and, as thus amended, that said judgment be affirmed; the defendants and appellants to pay the costs of the appeal.

(129 La.)

No. 18,554.

CHEF MENTEUR LAND CO., Limited, v.
MERCIER.

(Supreme Court of Louisiana. Nov. 13, 1911.
Rehearing Denied Jan. 29, 1912.)

(Syllabus by the Court.)

ADVERSE POSSESSION (§§ 12, 25*)—JOINT TENANCY (§ 1*)—GOOD FAITH.

Joint tenants may prescribe against the true owner by actual possession, as owners, of real estate for more than 30 years, provided the same has been continuous and uninterrupted, peaceable and public. Neither title nor good faith are required in the prescription of 30 years. Persons who possess for themselves are considered as possessing as owners. The possession of one joint tenant is regarded in law as the possession of his cotenants, their assigns and legal representatives. The question as to who are the cotenants of the party in possession does not affect the fact of his adverse possession for himself, or for himself and others.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 116-120, 387-393; Dec. Dig. §§ 12, 25;* Joint Tenancy, Cent. Dig. § 1; Dec. Dig. § 1.*]

Breaux, O. J., dissenting in part.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Chef Menteur Land Company, Limited, against Joseph A. Mercier. Judgment for plaintiff, and defendant appeals. Reversed, and suit dismissed.

Chas. F. Claiborne, for appellant. James O. Henriques, for appellee.

LAND, J. This is a petitory action. Plaintiff alleges ownership of a tract of land situated in the parish of Orleans, measuring about 2 leagues front on the Chef Menteur river by a depth of about $1\frac{1}{2}$ arpents, and sets up title from John T. Michel, of date June 11, 1908. Plaintiff alleges that said Michel acquired title in May, 1909, from the heirs of Guy Du Fossat, who acquired title December 2, 1788, by virtue of a Spanish grant, which was confirmed by act of Congress of May 11, 1820, c. 87, § 3 Stat. 573.

The petition alleges that Joseph A. Mercier has taken possession of and is occupying a portion of said grant measuring about 180 feet front on Chef Menteur by about 110 in depth. Plaintiff prays for judgment recognizing petitioner to be the owner of said property, and ordering that petitioner be put in possession of the same, and condemning the defendant to pay rent at the rate of \$75 per annum from judicial demand.

The defendant Mercier answered, averring possession in himself and eight other named persons, constituting a fishing or hunting club or association, styled the "Happy Club," and prayed that said members be made parties codefendant. This was done and the defendants pleaded title by the prescription of

30 years, and in the alternative for judgment for the value of their improvements.

There was judgment for the plaintiff for the land in dispute and costs, and against the defendants on their reconventional demand. Defendants have appealed, and plaintiff has by answer joined in the appeal, praying for an amendment of the judgment, so as to decree plaintiff to be the owner of the improvements, without having to pay for the same, for the reason that the defendants are squatters.

It is conceded that the legal title to the premises was once in Du Fossat, but defendants contend that they have acquired the ownership of the property by the prescription of 30 years.

The evidence shows that the land in dispute has been in the possession of persons holding adversely to Du Fossat, his heirs and assigns, since the year 1873. The first house was built by one St. Amant in 1873. Amant sold to one Bero, who in 1876 sold to Camors, Moreau, Boulement, and Trouyano. The four associated themselves into the "Happy Club," for the purposes of hunting and fishing, and, from time to time, other members were admitted on the payment of from \$50 to \$75 each. Moreau, Boulement, and Trouyano are dead, and the club is now composed of Camors and his eight codefendants. Camors and his associates have been in actual possession of the property, as owners, since some time in the year 1876, and have spent a considerable sum of money in the permanent improvement of the premises.

"Immovables are prescribed for by 30 years, without any title on the part of the possessor, or whether he be in good faith or not." C. C. arts. 3475, 3499.

The possession must be continuous and uninterrupted during all the time, public and unequivocal, and under the title of owner. C. C. art. 3500. As to the fact itself of possession, a person is presumed to have possessed as master and owner, unless it appears that the possession began in the name of and for another. C. C. art. 3488. While the articles of the Civil Code do not specifically provide for the case of joint possession, it has been held that joint owners, possessing in common a thing belonging to them in indivision, may prescribe against the true owner by such a possession for the required length of time. *Le Blanc v. Robertson*, 41 La. Ann. 1028, 6 South. 720, citing *Troplong*, to the effect that co-owners do not possess *separately*, but in common. Hence a co-owner is presumed to have possessed for account of all the interested parties. 25 *Baudry-Lacantinerie*, § 286, p. 223. The rule at the common law is that "joint tenancies and tenancies in common are alike, in that in both cases the cotenants hold by *unity* of possession."

"Each is entitled, equally with all the others, to the entire possession of the whole property and of every part of it, and no one has the exclusive right to the whole or any particular part. * * * The entry and possession of one joint tenant or tenant in common is regarded in law as the entry and possession of all the cotenants, and will inure to the benefit of all." 17 A. & E. Ency. Law (2d Ed.) p. 669. See, also, 23 Cyc. 490, 492.

By the purchase made in 1876, Camors and his three associates became joint tenants or copossessors of the property in controversy. Camors' continued possession inured to the benefit of his cotenants and their *ayant cause*. The possessory rights of Camors' cotenants have, or have not, been transferred to him and his codefendants. Under the first alternative, Camors and his codefendants stand in the shoes of the four original possessors. Under the second alternative, their possessory rights remain vested in Camors and the legal representatives of his deceased copossessors. As far as the plaintiff is concerned, it makes no difference whether we adopt the first or second alternative, and the question whether Camors possessed for himself, or for himself and others, is immaterial.

The *actual* possession by Camors of an *undivided interest* in the property is a physical impossibility. His possession was necessarily of the *whole* premises for account of himself and his cotenants.

The actual possession of Camors for more than 30 years was continuous and uninterrupted, peaceable and public. C. C. art. 3487. It is not shown that during this time Du Fossat or his heirs ever asserted their title to this Spanish grant, or any part thereof, by any act of ownership. As a matter of fact, the possession of Camors and his associates was never disturbed until the institution of this suit. The attempt of the plaintiff to show an interruption of prescription by the reservation of the lands for military purposes by the United States has failed, because the reservation on its face embraced only "public lands." Moreover, the possession of Camors and his associates was never disturbed by the officers or agents of the government.

It is therefore ordered that the judgment below be reversed, and it is now ordered that plaintiff's demand be rejected and this suit be dismissed, with costs in both courts.

BREAUX, C. J., for reasons assigned, dissents in part and concurs in part.

Dissenting Opinion as Relates to the Eight-Ninths of the Property.

BREAUX, C. J. Plaintiff claims title to a tract of land acquired on the 11th day of June, 1910, and which the vendor to plaintiff acquired from the heirs of G. Du Fossat in the same year.

The heirs of Du Fossat held under grant of the Spanish government during territorial days in Louisiana.

This grant was confirmed by an act of Congress on May 11, 1820.

Years before the suit was brought (over 30), Paul Camors and others organized a fishing and hunting club, to which they gave the auspicious name of "Happy Club."

The membership has changed since, and of the original members only Camors survives. There are now in all eight new members.

This club went into possession of the land.

They allege that their possession was continuous and undisturbed, and that they have acquired a prescriptive title.

The strip claimed by defendants measures about 180 feet front on Chef Menteur by about 110 feet in depth.

These defendants claim the land and the improvements for the club, and allege that, if the land is not owned by the club, they own it in their own right, as members of an unorganized club.

To the end of defeating the prescription pleaded by defendants, plaintiffs appeared in court and alleged, as an amendment to their original petition, that the land had not been surveyed before the year 1854; that in 1842, by order of the government, the land near Ft. Wood, afterward called Ft. Macomb (including the land in controversy), was taken possession of by the government for military purposes; that the possession began in 1842 and terminated in 1896; that in the year 1896 the government relinquished possession; and that year the heirs of G. Du Fossat, the grantee of the government, resumed possession.

The evidence discloses that Paul Camors, A. Moreau, Eugene Boulement, and Sam Trouyano bought the improvements which were on the land many years ago.

Of the four who bought the property, three are dead and only Camors is living.

The evidence is that none of the members of the club (those living nor those dead) have been in possession 30 years, except Camors.

No question is raised about the Du Fossat title. It was complete from the date of its confirmation; and it was transferred by mesne conveyance to the present owner, all in regular form.

The title by 30 years prescription presents the only question in the case.

Those who have not been members of the club 30 years, and who have not been in possession of the land that number of years, have not acquired any title. No one held possession for them. Each was in possession for himself, both personally and as a member of the club, by reason of the fact that the club was not regularly organized. It existed only by common consent of the members, who did not choose to enter into

any written agreement upon the subject, or to adopt a charter.

Plaintiff attacked the possession of Camors on the ground of its irregularity, and avers that he was a mere squatter, and acquired no right.

The fact remains that he was in undisputed possession, and exercised all of the rights of an owner, both as a member of the club and personally.

His own testimony and that of other witnesses was that his possession began from the date alleged; that he repaired to the place every few days to hunt and fish, and sometimes remained a day or two in quest of rest away from his usual occupation in the city.

As to the club: It acquired no right. It was neither a corporation nor a partnership.

But, article 446 of the Civil Code affords some protection to those who associate themselves together and acquire property. The members become joint owners of the property acquired by them, and not the asserted corporation or partnership.

The members have no rights, save those acquired as owners, in proportion to the joint interest of each.

If one has been in possession a sufficient length of time to acquire by prescription, he certainly is entitled to the benefit of his possession.

The defendant's contention on this point is that the one member, Camors, held for the others, and that his tenure was theirs.

I cannot agree with that view. He had no authority to represent the others, either in law or by agreement. The members had not delegated to him any authority whatever.

We have seen that the property was held in indivision.

Occupancy, as a mode of acquiring property, is effective when possession is taken with the intention of acquiring a right of ownership.

When the members of a municipality act for the municipality—an organized body—the common act enables the organized community to sustain prescription.

When there is no organization, each acts for his particular account. *Huc*. vol. 14, p. 435.

The foregoing is applicable to an entirely unorganized club.

The possession of the defendant Camors was for his account to the extent of his interest. After the other members of the club ceased to hold possession, it did not enlarge Camors' possession. He remained in possession, and had no authority to represent the others.

Baudry-Lacantinerie, "*Traite de Droit Civil de la Prescription*" (page 155) says:

"La définition de l'article 2228 ne s'applique ainsi suivant nous, qu'à ceux qui ont l'animus

domini, qui détient la chose à titre de propriétaires ou s'il agit de la possession d'un droit réel sur la chose, même avec la volonté de se comporter comme titulaire de ce droit."

Then, again, on the same page, he says:

"Il ne s'agit pas toujours d'un animus domini impliquant prétention à la propriété puisque d'autres droits réels peuvent être possédés, il s'agit de l'animus domini ou de l'animus rem sibi habendi dans un sens plus large, il s'agit de l'intention de se comporter en maître."

If the intention to possess animus domini is necessary upon which to base prescription, can a prescriptive right be larger than the animus domini?

The logical answer is that the possession can be only coextensive with the intention to possess.

Now, what was the extent of the animus domini of Camors?

There is nothing to show; and therefore it must be concluded that it was only to the extent of his share.

Then, if his prescription right was coextensive with his intention to possess animus domini, and this intention did not extend beyond his share, it must be held that his possession was only to the extent of one-ninth.

As his possession during the past 30 years was only one-ninth, then his ownership acquiring causa is to one-ninth of the land.

To illustrate: Four persons find pleasure in assembling together to fish and hunt. They make improvements in order to be able to lodge at a camp.

Only one remains and continues in possession for 30 years.

The others simply quit; are never heard from again in matter of the camp. They have authorized no one to represent them.

In time other persons are attracted to the place; they assemble there occasionally. There is no legal tie between them and the three who have left. They in no way inherit or acquire from these first three. Their possession is very much less than 30 years.

They have not become owners, in my opinion, because they have not had possession the required number of years, and no one has exercised possession in their names. Civil Code art. 3426.

The decision in *Le Blanc v. Robertson*, 41 La. Ann. 1023, 6 South. 720, is not similar; besides the owners and possessors were successive owners, who had acquired some right which passed to the last owner. In this instance, no one, save Camors, acquired any right to the land.

I therefore concur in the decree to the extent that Camors is concerned, and I dissent as to the other defendants.

(129 La.)

No. 18,614.

In re RECEIVERSHIP OF BONITA MERCANTILE CO., Limited.

(Supreme Court of Louisiana. Nov. 27, 1911.
Rehearing Denied Jan. 29, 1912.)

(Syllabus by the Court.)

1. RECEIVERS (§ 140*)—FINAL ACCOUNT—ATTACK ON RECEIVER'S SALE.

An attack on a sale by a receiver cannot be made by opposition to a final account, when the necessary order for the sale has been on the order book for the required time. If there was irregularity in the order directing the sale, or relating to appraisement, a rule to show cause why the order "shall not be vacated" should have been taken by the present opponent.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 246; Dec. Dig. § 140.*]

2. RECEIVERS (§ 135*)—FINAL ACCOUNT—CHARGES.

As the receiver did not purchase the property, he cannot be charged with the difference between the purchase price and the price which the property should have brought.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 231-235; Dec. Dig. § 135.*]

3. RECEIVERS (§ 183*)—FINAL ACCOUNT—CHARGES.

If there is any action against the receiver and others, it is for damages; but, as these have not been prayed for, the question of whether they are due cannot be inquired into.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 183.*]

4. RECEIVERS (§ 154*)—CLAIMS AGAINST PROPERTY—ATTORNEY'S FEE.

The receiver allowed attorney's fees on two notes held by the bank of Monroe, and which provide for 10 per cent. attorney's fees when it becomes necessary to place them in the hands of an attorney, or to sue upon them; and, as there is no proof in the record that the notes were placed, either in the hands of an attorney for collection, or to be sued upon, the fees should not have been allowed.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 154.*]

Appeal from Sixth Judicial District Court, Parish of Morehouse; J. P. Madison, Judge.

Final account of the receiver of the Bonita Mercantile Company, Limited, and oppositions thereto. From the judgment, William T. Hardie & Co. appeal. Modified and affirmed.

A. A. Gunby and T. O. Newton, for appellants. H. Flood Madison, for appellees Weiss and Lewin. Stubbs, Russell & Theus, for appellee receiver.

BREAUX, C. J. The questions for decision arose in the course of the proceedings in matter of the insolvency of the Bonita Mercantile Company, Limited.

It was represented to the court by the Bank of Monroe, in its petition, that the company was insolvent and unable to continue with its business.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Upon the petition of the bank, J. J. Jordan, its cashier, was appointed receiver, and, as authorized by the appointment, went into possession of the assets.

An inventory was taken and appraisal made before a notary, which was filed on March 2, 1909.

The receiver attempted for a short time to carry on the business of the late firm, in order, as is somewhere stated in the testimony, to recoup the losses of the creditors. This proved a failure.

There were creditors who favored this plan of settlement; others were very much opposed to it. The latter carried their point, and the result was that the receiver applied to the court to sell the property.

One of the creditors, the Witt Shoe Company of Virginia, opposed the application to sell the property, on the ground that Jordan was not legally appointed; that he was appointed ex parte, and without necessary notice duly entered on the court's receivership docket; that no legal inventory had been made; that no meeting of creditors was held to advise the sale; and other similar grounds were urged.

The district court heard evidence on this application to sell.

The receiver testified that the property would not improve with age, and that, in view of the costs and other reasons stated, a sale was not only advisable, but necessary.

After having heard other testimony as between the Witt Shoe Company, opponent, and the receiver, the court decided, on the demand of the receiver, to order the sale of the property for "cash, subject to appraisalment."

Another appraisalment was made, and the assets of the Bonita Mercantile Company were appraised at:

Stock merchandise.....	33 1/2	on the dollar
Fixtures	33 1/2	on the dollar
Open account and note....		on the dollar
Live stock (12 head), total	\$360	

Pursuant with the court's orders, the merchandise, except the live stock, and all other property was adjudicated in bloc to the highest bidder for the sum of \$6,385, which was over two-thirds of the appraised value.

The live stock was sold separately.

Shortly thereafter, the receiver filed a table of receipts and distributions, showing:

Total receipts from every source...	\$ 7,854 22
Privilege debts amounted to.....	2,812 88
Ordinary creditors.....	18,542 89

There is an item carried on the account covering a disputed sum between the receiver and Hyman-Hiller & Co.

Mrs. A. M. Weiss opposed this account on the following grounds:

That the Bonita Company is indebted to her in the sum of \$1,500.64, with 5 per cent.

legal interest from date stated in the opposition, rental secured by lessor's privilege from 1905 to 1908, both inclusive, and the first two months of the year 1909, at the rate of \$250 per year.

She asked to have her claim credited on the account for the sum of \$500.50 as an ordinary creditor, and, as a privileged creditor, for the sum of \$1,041.64 and interest.

Mike Lewin also filed an opposition, claiming \$1,483.28 for services as clerk of the Bonita Mercantile Company, asking that the account be amended, and that he be placed thereon as a creditor, to be paid by preference from the proceeds of the sale.

William T. Hardy & Co., another creditor, filed an opposition, setting out that it is a creditor for \$1,498.

The opposition of Hardie & Co. is, in the first place, directed against the claim of P. Lewin and M. Lewin, on the ground that they are members of the Bonita Mercantile Company, and bound for its debts; and that, in consequence, they have no right to recover anything from the company.

The same opponent opposes the claim allowed to the Bank of Monroe for \$6,300 as excessive and illegal, and opposes the fee of attorney allowed to the bank on the amount.

Moreover, the receiver was the cashier of the Bank of Monroe; acting in its behalf, he took charge of all the assets and business of the Bonita Mercantile Company, sold goods, and collected debts, for which he did not account.

Again, this opponent charges that there was a damaging delay between the date of the order of inventory and the taking of the inventory itself; that the inventory did not represent all the property received by the receiver; and other charges are directed against the receiver.

Opponent further urges that the last inventory was made without the authority from the court, and that, in ordering the sale to be made, the court ordered that the first inventory be taken as the basis for the sale; that no order was applied for a second inventory; it was made without order; that the stock of goods and the notes, accounts, and books and fixtures were offered altogether, and that they were bid in by the president of the Bank of Monroe, and for the benefit of the bank, for the insignificant price of \$6,385, in which bid Rice-Stix & Co. was interested; that there was no sale, particularly no sale of the notes and accounts which aggregated the sum of \$38,000; that they were illegally advertised and offered for sale in a lump, and thereby they were sacrificed.

That the receiver neglected to collect them.

The company asks that the account be rejected.

The judge ordered changes in the account, and, the changes having been noted, he approved the account.

In this judgment, the oppositions of W. T. Hardie & Co., of Sigor Bros. Company, and Mrs. Philip Lewin were rejected, and the opposition of Mike Lewin was sustained for \$434.78, as a privilege claim for clerk's hire, to be paid by preference over the proceeds of the sale of the stock of merchandise, notes and accounts sold by the receiver, and another claim to remain as heretofore allowed.

The opposition of the Central Savings Bank & Trust Company was sustained to the extent of \$972.30, as an ordinary creditor.

The opposition of Hyman-Hiller & Co., to the extent of \$3,500, together with interest, less credits, as stated in the judgment, all as an ordinary creditor.

The opposition of Mrs. A. M. Weiss, to the extent of \$1,540.64, was sustained, and she was recognized as an ordinary creditor of the Bonita Mercantile Company to the amount of \$500, together with interest, and as a privileged creditor on the proceeds of the sale of the stock of merchandise, notes, accounts, and fixtures in the amount of \$104.64, together with interest.

Wm. T. Hardie & Co. are the only appellants.

The receiver has not appealed, nor have any of the opponents, except Wm. T. Hardie & Co.

It follows that the appellees cannot have the judgment amended among themselves.

[1] Although not in the order of the issues as presented, as it is the most important issue, we take up the question growing out of the attack made by opponent against the validity of the sale.

The position of the receiver, Jordan, in answer to Hardie & Co., opponents, is that, the opponents not having in any way opposed the sale, this sale having been confirmed by the court's decree after legal notice, this opponent (the Hardie firm) is without right to attack this sale in an opposition to a receiver's account.

The grounds of Hardie & Co. in their opposition are that there were decided illegalities in the proceedings; and it is in answer to these grounds that the receiver takes the position just stated.

We have heretofore specifically stated what those grounds were. They have a threatening aspect, and, as an original proposition, the sale should not stand.

But matters are complicated and much is added to the task of deciding the questions involved by the delay of Hardie & Co. in urging the grounds which they now urge.

[2] The opponents, Hardie & Co., attack the proceedings conducted at the instance of the receiver on the ground of their irregularity, and asked that, as in the case of Sheets Lumber Company, the receiver be charged with the appraised value, amounting

to over \$35,000, as carried in the first inventory.

This is followed in the petition of opposition by the charge against the receiver that he illegally sold the property at public auction to the Bank of Monroe; and the inference to be drawn from the allegations was that there was collusion.

The charge is not sustained by proof. The evidence does not disclose that there was any collusive agreement.

He was, it is true, the cashier of the Bank of Monroe. That fact alone is not sufficient to establish collusion. The attorney of the receiver was the president of the bank. That of itself is not an illegality, although it would require less proof to show wrongdoing than ordinarily. That proof, if there is any such proof, was not introduced.

The opponents attack the sale of the property on various grounds.

Some of these grounds would surely have been maintained, had they been timely urged.

We will not take up each ground separately for the decision.

It will suffice to take up two of these grounds:

First. That the reappraisal of the property was not made in accordance with the order of the court.

Second. That the property was sold in block.

These grounds are urged exclusively in the opposition to the approval of the final account.

Now, as relates to the second appraisalment, which, according to the opponent was a nullity, because it had not been preceded by a required order:

In the judgment decreeing the sale of the property, reference is made to an appraisalment; that is, it was stated that the sale should be made in accordance with appraisalment. It is not clearly stated whether it was an appraisalment to be made, or the appraisalment in the inventory already made.

It was taken as meaning an appraisalment to be made, and another appraisalment was made, informally, it is true; still an appraisalment was made.

An application was thereafter made to sell the property. Proper entry was made on the receiver's book in the clerk's office; parties in interest were duly notified; the present appellant did not offer the least objection to the sale.

The property was sold and adjudicated to the agent of the attorney who represented the receiver, and who was, we have stated, the president of the Bank of Monroe.

After the sale, again proper entry was made of the fact in the clerk's office. The receiver applied to the court for its ap-

proval of the sale; no one opposed the application, although all were notified.

Not the least objection was offered; it follows that no appeal was taken at any time, and the judgment remained in full force.

In the opposition of Hardie & Co., the point is urged that the property was sold in block. That is true. We are of the opinion that some objection should have been urged at the time that the receiver applied to the court to approve and confirm the sale.

As relates to the proceedings in court, all of the parties were in court.

It was to some extent as it is in a con-curso, or a concurso de acreedores, to quote the Spanish technical term.

[3] It is late in the day in matter of this litigation to set aside the sale.

The Bank of Monroe and the attorney are not parties to the suit, especially the latter.

The issue is not made up and presented in a way that would justify us in setting aside the sale.

Conceded for a moment that we should undertake to set aside the sale, the property was movable and perishable.

Since the sale, that which has survived the effect of time, it is entirely probable, has changed hands.

The only action possible (if there is an action possible) would be in damages.

We cannot pass upon questions of damages when no damages are sued for; besides, the parties are not before the court.

So that as relates to the alleged irregularities in matter of the appraisalment and in matter of the sale in bloc, nothing can be done at this time in opposition to the account.

We are asked that, as in the Sheets Lumber Company Case, before cited, we charge up the receiver with the amount.

The receiver, different from what it was in the cited case, did not buy the property; and therefore he cannot be charged with the value with which a receiver who acts wrongly may be charged.

On leaving this ground urged by opponent, we will notice another similar to the foregoing in some respect.

The objection is that the notes of the corporation should have been collected, and not sold.

In answer, we will state that the evidence is that the notes were not collected because of their little value, and had to be sold.

To summarize in conclusion: No appeal was taken from the order to sell the property, nor from the judgment affirming the sale. See Metropolitan Bank v. N. O. Brewing Association, 51 La. Ann. 1525, 26 South. 413.

The statute of 1898, Senate Bill No. 102, par. 10 (Act No. 159 of 1898), de receiver and insolvent or other corporations: In proper case the court may, on application of any one in interest, after 10 days notice in the judge's book, if there be no opposition, order the sale.

Special opposition, that of the two Lewins: The opposition of M. Lewin, claiming \$437.76, was properly maintained with privilege as allowed on sale of the stock. This was in addition to the amount allowed him on the account.

The evidence, although it was alleged that he was a stockholder, does not sustain that allegation.

The claim of the Bank of Monroe:

[4] The bank appears on the account for an amount of \$6,300.

The main objection to this claim is that it is not proven; that it is excessive and illegal.

Opponent particularly opposes the fee of attorney.

This opponent (Hardie & Co.) avers in its petition that the two notes of \$2,500 each, held by the bank, were not due at the time the bank applied for the appointment of a receiver.

This is beyond question—that the bank held the two notes.

The opponent further avers that these notes were given to the Bonita Mercantile Company for advances made by the latter, and that the failure of said bank to carry out its agreement caused loss.

The allegations admit the notes as due. It is stated that they were filed in evidence.

The amount of the notes themselves was admitted as due.

Fee of attorney:

The notes signed by the Bonita Mercantile Company are due to the Bank of Monroe. They are admitted by the opposition as notes of said maker due to the said bank.

Opponent denies that the fee of attorney is due to the Bank of Monroe.

We are of opinion that the opposition is correct in this respect.

True the notes contain the following:

"And ten per cent. addition for attorney's fee, if sued upon or placed in the hands of an attorney for collection.

The notes to recover thereon must surely be placed in the hands of an attorney for collection.

There is no proof that these notes were sued upon or placed in the hands of an attorney for collection.

If a note is sued on, the unavoidable inference is that the fee is due as claimed.

There was not a word of evidence about the fee of attorney.

For all we know, these notes may have been handed to the receiver by the creditor to have them placed on the account. At any

rate, there is no evidence that any attorney has ever had them in hand for collection.

The claim of Mrs. Weiss:

This claim was not allowed by the receiver.

This creditor opposed the account of the receiver.

Two witnesses testified in support of her claim. It is abundantly proven that the amount is due as allowed.

We have not found wherein the court erred, both as relates to the ordinary claim or to the claim secured by privilege.

She was the lessor of the company. The Bonita Mercantile Company occupied her property as tenants.

The ordinary claim was also sustained by proof.

We take up next the claim of Hyman-Hiller & Co.

It appears that this firm had on hand 138 bales of cotton at the date the receiver took charge and went into possession.

The receiver reserved \$300 on the proceeds to pay costs to recover this cotton.

The argument on the part of the opponent is that this cotton should have been sur-

rendered, and the proceeds distributed as a common fund.

The statement of Hyman-Hiller & Co. shows that the 138 bales of cotton were sold and credited after January 12, 1909, when the company went into the hands of a receiver.

The judge allowed this claim of Hyman-Hiller & Co., and ordered the receiver to place it on his account.

The three notes due to this firm were filed in evidence, each for \$1,750, accompanied with a statement of Mr. Hyman, of the firm, which was admitted without objection.

We are of the opinion that there was sufficient proof to allow the claim, especially in the absence of all evidence to the contrary.

It is therefore ordered, adjudged, and decreed that the judgment and account be amended by striking and excluding therefrom the fee of attorney allowed to the Bank of Monroe.

With this amendment, the judgment appealed from is affirmed; the costs of appeal to be paid by the mass represented by the appellee.

DOWLING LUMBER CO. v. KING.

(Supreme Court of Florida, Division B. Dec. 13, 1911. Headnotes Filed Feb. 12, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 479*)—OPERATION—INJURIES BY FIRE—ADMISSIBILITY OF EVIDENCE.

In an action by an administratrix for damages alleged to have been caused by fire negligently set out upon the premises of the decedent by the engine of a corporation operating a tramroad, no error is committed by the trial judge in refusing to permit a letter written by the decedent to be introduced in evidence in which he stated that the fire was set out by train No. 58, when it is not alleged in the declaration that the fire was set out by a train so numbered, and especially when the purpose of the letter was to confine the evidence on the part of the plaintiff to the condition of an engine numbered 58, its spark arrester and ash pan.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 479.*]

2. DAMAGES (§ 174*)—RELEVANCY—VALUE—PERSONAL PROPERTY.

When fence rails, trees, etc., destroyed by fire had no market value in the neighborhood where they were destroyed, all pertinent facts and circumstances tending to establish the real and ordinary value of the property at the time of its destruction are admissible in evidence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 462-467; Dec. Dig. § 174.*]

3. RAILROADS (§ 456*)—OPERATION—INJURIES BY FIRE—CARE REQUIRED.

Where it is apparent that damage would result to the adjacent property of others in the event of a fire started along a railway company's abutting roadbed, it is the duty of the company to render the chance of the escape of fire from its engines less hazardous by keeping its roadbed and right of way clear of fire-breeding and combustible material.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1673-1676; Dec. Dig. § 456.*]

4. APPEAL AND ERROR (§ 1019*)—REVIEW—QUESTIONS OF FACT—JUDGMENT OF REFEREE.

Where the evidence is conflicting, the judgment of a referee upon the liability of the defendant will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4008-4010; Dec. Dig. § 1019.*]

5. DAMAGES (§ 91*)—PUNITIVE DAMAGES—GROUNDS—GROSS NEGLIGENCE.

Gross negligence, not amounting to such wanton and reckless indifference to the rights of others as to be equivalent to an intentional violation of them, will not warrant punitive damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 193-201; Dec. Dig. § 91.*]

Error to Circuit Court, Taylor County; L. W. Blanton, Referee.

Action by J. L. King against the Dowling Lumber Company. At the death of plaintiff, Martha S. King, administratrix, was substituted as plaintiff. From a judgment for plaintiff, defendant brings error. Affirmed on condition.

McCollum & Harrell, for plaintiff in error.
Hendry & McKinnon, for defendant in error.

HOCKER, J. J. L. King sued the Dowling Lumber Company, a corporation, in the circuit court of Taylor county, to recover damages to the lands and farm of plaintiff alleged to have been caused by fire communicated from a certain locomotive operated on a tramroad through the farm of the plaintiff. It is alleged that weeds, grass, and debris had been carelessly and negligently allowed to accumulate on the track and right of way, and that the engine was not properly equipped with spark arresters and a good and sufficient ash pan that would prevent throwing out sparks, coals of fire, etc., and carelessly and negligently allowed coals of fire to drop from the ash pans, and sparks of fire to be emitted from the smoke stack, which fell in the dry grass and debris and ignited the same, causing a fire which destroyed 361 panels of fence of the value of \$141, three gates of the value of \$15, burnt over land on which were trees and timber, damaged and destroyed 75 trees of the value of \$75, left the farm open and unprotected against cattle causing unusual labor and inconvenience. It is alleged "that the defendant by and through its servants, agents, and employés then and there well knew of the said fire which so destroyed plaintiff's property; that they were then and there present, and saw the said fire as it was raging, but the defendant then and there carelessly, negligently, and wantonly failed, neglected, and refused to aid the plaintiff in extinguishing said fire, which if such assistance had been rendered, the great damage which was sustained would have been to a great extent avoided." The foregoing contains the substance of the four counts of the declaration.

Pleas of not guilty were filed to the several counts. The plaintiff having died, his administratrix was without objection made party plaintiff in the suit. The cause was then referred to a referee for trial. The referee made the following findings:

"This cause being submitted for final hearing upon the evidence adduced by the parties hereto before the undersigned referee, the referee finds as follows: That the defendant allowed grass, weeds, stubble, trash, and debris to accumulate on its roadbed and right of way running through plaintiff's farm and to remain thereon for several months—the roadbed not having been cleaned off and cleared of such grass, weeds, stubble, and debris for more than 12 months prior to the alleged fire—and that in so doing the defendant was then and there grossly negligent; that on or about the 17th day of January, 1910, one of the defendant's locomotives, then and there passing along and over said roadbed through plaintiff's farm, was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not equipped with proper ash pan and spark arrester and that by reason of said defective equipment emitted and dropped sparks and coals of fire on and along said roadbed and right of way and from which said coals of fire and sparks the grass, weeds, stubble, and debris on and along said roadbed and right of way were ignited and therefrom fire spread out over and through plaintiff's farm, and then and there burned and consumed a quantity, to wit, 361 panels of 10 rails each, of plaintiff's fence, also burned over plaintiff's woodland and burned and destroyed plaintiff's timber; that said fire was observed by defendant's employees and that they neglected to render any aid in extinguishing the same, and that the plaintiff used his best efforts to extinguish the fire and to avoid the damage. And the referee finds the actual damage sustained by the plaintiff by reason of defendant's negligence, as alleged and proved, to be \$166.51, and that by reason of defendant's gross negligence as found, the additional sum of \$75 should be assessed against it as punitive or compensatory damages.

"Therefore the referee finds for the plaintiff and assesses her damages at two hundred forty-one dollars and fifty-one cents (\$241.51), with interest from day of filing suit. This March 22, 1911."

Judgment was entered in accordance with the findings. This judgment is here for review on writ of error.

The evidence shows that the Dowling Lumber Company operated a log railroad through the farm of the defendant in error; that said farm consisted of several hundred acres, and was fenced with a rail fence; that the track and right of way on the 17th of January, 1910, at the time of the fire, was covered with dry weeds and grass, and had been in that condition for some time; that fires had occurred on the track and right of way several times before and after the said date, some of them having occurred immediately after the passing of the locomotives of the plaintiff in error. The evidence on the part of the defendant in error tends to show that on the morning of the day in question, possibly about 11 o'clock, about half an hour after the passing of a locomotive and cars through the farm of defendant in error, a fire was seen on or near the track on said farm not far from the fence which inclosed it; that no fire was seen there before the passing of said engine; that defendant in error with the assistance of others after considerable labor put out the fire. His evidence also tends to show that the fire started on the track of the railroad and burnt eastward from it; that it destroyed a large number of panels of fence, three gates, about 70 pine trees of considerable size, burnt over about 15 acres of woodland and damaged or killed the trees thereon. There was testimony on the part of the defendant in error

tending to show the amount of the damages.

[1] The assignments of error are quite numerous based on the rejection and admission of testimony. For instance, the plaintiff in error offered to introduce a letter from J. L. King, then dead, in which he stated that the fire was set out by train No. 58. This offer was refused and the ruling is assigned as error. We discover no error in this ruling. It was not alleged in the declaration that the fire was set out by a train so numbered, and there is no proof whatever, nor offer to prove there was a train so numbered. It is true the lumber company proved that the train which ran over the road about the time of the beginning of the fire was handled by an engine numbered 58, but the letter does not show that this engine was meant. The purpose of introducing the letter was to confine the evidence to the condition of said engine 58 as to its spark arrester and ash pan, and to exclude all evidence as to the condition of other engines and all evidence as to fires having been put out, except by this engine. But the allegations of the declaration did not so limit the proof, because it described no particular engine. These matters afforded occasion for a number of assignments of error—none of which we think are sustained. *Florida East Coast R. Co. v. Welch*, 53 Fla. 145, 44 South. 250, 12 Ann. Cas. 210.

[2] Again in proving the damages the defendant in error was not in a condition to show that the trees, rails, and gates which were burned had any market value, so he resorted to proof of facts from which the actual value of those trees could be estimated. For instance, he showed that the trees in that neighborhood had no market value except as they would make cross-ties, and that a tree was valued according to the number of cross-ties it would make, and that each cross-tie was worth 10 cents. So that a tree that would make five cross-ties was worth 50 cents, etc.

So with reference to the damage caused by burning the fence. It was shown that rails had no particular market value, but it was shown how many it would take to restore the fence, what it would cost to split, haul, and put them up. These matters gave rise to a number of assignments of error on the introduction of testimony. Such matters are controlled by the decision in *Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Manufg Co.*, 27 Fla. 1, 9 South. 661, 17 L. R. A. 33, 65. "Where the value of the properties destroyed is the criterion of the amount of damage to be awarded and the property destroyed had no market value at the place of its destruction, then all such pertinent facts and circumstances are admissible in evidence as tend to establish its real and ordinary value at the time of its destruction; such facts as will furnish the jury, who alone determine the amount, with such

pertinent data as will enable them reasonably and intelligently to arrive at a fair valuation," etc.

[3] Railroads should keep their roadbeds and right of way reasonably clear of dried grass and other combustible material. Where it is apparent that damage would result to the adjacent property of others in the event of a fire started anywhere along a railway company's abutting roadbed, then it is the duty of the company to render the chance of the escape of fire from its engines less hazardous by keeping its roadbed and right of way clear of fire-breeding debris. *St. Johns & H. R. Co. v. Ransom*, 33 Fla. 406, 14 South. 892. Says the Supreme Court of Nevada in the case of *Watt v. Nevada Cent. R. Co.*, 23 Nev. 151, 44 Pac. 423, 62 Am. St. Rep. 772: "We are of opinion that we are justified in saying that it is common knowledge, based on common observation in this railway age, that railroad engines of the most approved construction and with the best-known appliances and managed by the most skillful engineers and firemen are liable to and do frequently from necessity or by accident emit sparks and fire capable of igniting dry rubbish or combustible matter along their pathway, and thus place the property of adjoining owners in imminent danger of destructive conflagrations and frequently cause the destruction of property." A number of cases are referred to by this court, among them *Richmond & D. R. Co. v. Medley*, 75 Va. 490, 40 Am. Rep. 734; *Jones v. Michigan Cent. R. R.*, 59 Mich. 437, 28 N. W. 862. We think these cases dispose of all the important assignments raising questions of law.

The testimony of the lumber company was inconsistent with that of the plaintiff below. Mr. Clark, an engineer in charge of engine No. 58, says he passed along through the farm of the defendant in error about 11:30 o'clock a. m.; that as he passed along he saw a fire; that the fence was burning about 50 yards east of the railroad track; that it was not burning at any other place that he knew of; that the right of way was not burned; that his engine and spark arrester were of the best; that he was only running about 15 miles an hour under low pressure which could not cause the exhaust to throw out coals or sparks in any considerable quantity or size, and that his engine did not set out the fire. He said also his engine had not been along there in about 40 hours.

[4] Mr. Hardee was a locomotive engineer for the Dowling Lumber Company on the 17th of January, 1910; was running a work train; had under him a crowd of negro laborers; passed through the King farm about 12:15 p. m. going to Live Oak; observed the fire on the King plantation, about 50 yards to the right of the road going to Live Oak, just inside of the field—that the fire was out as he came along; his engine did not set out the fire; saw Mr. J. L. King, Mr. Mc-

Collough, and Mr. King's son out there. These gentlemen did not give any kind of signal, nor request him to stop and assist in putting out the fire; that he was running about 15 miles an hour; that he had run his engine along there the last time on the day before. It does not affirmatively appear whether other engines were used or not on this tramroad. In the face of these statements the witnesses for plaintiff in error testified that soon after a train passed along going from Live Oak the fire was seen; that the wind was blowing from the west; that the fire went from the track eastward, and that there were no other fires that day in the neighborhood. If Mr. Clark was correct, that as he passed along the fire was 50 yards east of the track, and not burning anywhere else, we do not see how it could be probable that the fire would eat back against the wind to the track and stop there. The evidence shows that the track, right of way and adjacent land was covered over with like combustible material, and no reason appears why the fire should have stopped at the track, if it could have worked its way back against the wind. Evidently the referee gave credence to the facts stated by the witnesses for the plaintiff below, and found in her favor, as to the origin of the fire. We also think there is evidence which supports the findings of the referee as to the actual damages. Upon the principle that the same effect is to be given to the findings of a referee upon the testimony as to the verdict of a jury, we think that in the foregoing matters the action of the referee must be sustained. *Alachua Phosphate Co. v. Anglo-Continental Guano Works*, 51 Fla. 143, 40 South. 71.

[5] We meet with difficulty when we come to consider the question of punitive damages. A reference to the finding of the referee will show that for what he considered *gross negligence* on the part of the Dowling Lumber Company he gave the plaintiff below \$75, as *punitive or compensatory damages*. The distinction between compensatory and punitive damages has frequently been stated by this court, and need not be restated here.

In the case of the *Florida Southern Ry. Co. v. Hirst*, 30 Fla. 1, 11 South. 506, 16 L. R. A. 681, 32 Am. St. Rep. 17, this court distinctly held that gross negligence will not justify the imposition of punitive damages, nor can we say the evidence shows such wanton and reckless indifference to the rights of others as to be equivalent to an intentional violation of them. The referee had already fixed the amount of compensatory damages, and we think he erred in giving the amount of \$75, as punitive damages. Under these circumstances it is considered and ordered that the defendant in error, within 30 days from the date of the filing of the mandate of this court in the clerk's office of Taylor county file a remittitur of \$75, of the judgment below in said office, and, upon this be-

ing done, that the judgment stand affirmed; otherwise, that it stand reversed. It is so ordered.

TAYLOR and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

ERICKSON v. INSURANCE CO. OF NORTH AMERICA.

SAME v. CITIZENS' INS. CO. OF MISSOURI.

(Supreme Court of Florida, Division B. Jan. 3, 1912. Headnotes Filed Feb. 12, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1201*)—REMAND—LAW OF CASE—AMENDMENT OF PLEADINGS.

Where insurance policies have been held void at law by this court in actions on the policies, by reason of facts set up that the insured was not the unconditional and sole owner of the insured property when the policies were issued, he having before contracted to sell and convey the property to another, the attempt after the cases were remanded to avoid this defense by pleading that in fact the agent of the insurance companies knew of the said contract to sell and convey and the real interest of the parties under said contract when the policies were issued, and waived the condition of sole ownership contained in the policies, is unavailing to give life to the policies, in actions at law on said policies.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4673-4683; Dec. Dig. § 1201.*]

2. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—RULING ON DEMURRER.

Where the circuit judge overruled demurrers to replications, and subsequently sustained demurrers to a second set of replications, setting up practically the same matters as in the first, his action was equivalent to a revocation of his first ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

Error to Circuit Court, Dade County; Minor S. Jones, Judge.

Action by John W. Erickson against the Insurance Company of North America and others, and by the same plaintiff against the Citizens' Insurance Company of Missouri. Judgments for defendants, and plaintiff brings error. Affirmed.

C. C. Chillingworth and Geo. M. Robbins, for plaintiff in error. Cockrell & Cockrell, for defendants in error.

HOCKER, J. These cases were before this court at the June term, 1905, and the decision of the court is found in 50 Fla. 419, 39 South. 495, 2 L. R. A. (N. S.) 512, 111 Am. St. Rep. 121, 7 Ann. Cas. 495. As was stated in that opinion the pleadings and issues in the two cases are substantially the same. It was held in the former opinion that the

pleas setting up the fact that prior to the taking out of the fire insurance policies Erickson had contracted to sell and convey the property on which the insurance was taken out to one W. L. Burch, rendered the policies void at law by reason of the provision contained therein: "This entire policy unless otherwise provided by agreement indorsed hereon or added hereto shall be void if the interest of the insured be other than unconditional and sole ownership." For this reason the judgments below were reversed and the cases remanded. After the case was sent back to the circuit court, the plaintiff filed replications to these pleas setting up in substance that, at the time of the execution of this policy, the insurance company, through its agent, Robert R. Taylor, by and through whom they entered into the contracts of insurance, was already informed and knew of the sale of the property to Burch, and that the sale was a true sale, and notwithstanding wrote up said policies and received the premiums as a consideration for the insurance and suffered the plaintiff to believe he was insured until after the fire, and that thereby the defendant companies were estopped to claim the policies were void. The replications further set up that the plaintiff Erickson had executed the contract of sale with Burch, deducting \$2,000, the amount of the insurance, in reliance on said contracts of insurance.

These replications were demurred to on 20 grounds, covering every possible objection to them, among others, that they constituted a departure in pleading, and that they attempted to make valid contracts held void by the former decision of this court by means of estoppel.

These demurrers were overruled, and the defendant company given leave until rule day in December, 1908, to plead as it might be advised. On the 7th of December, 1908, the defendant company joined issue on the plaintiff's replications, and also filed several rejoinders thereto. On the same day, the defendants, with leave of the court as alleged, filed four additional pleas. These pleas set up the contract between Burch and Erickson, which is set up in the original pleas, which was passed upon by this court in its former opinion, and certain allegations based upon the construction given said contracts in said opinion. The pleas substantially repeat the issues made in the first pleas. A motion to strike these pleas was made and overruled. On the 1st of January, 1909, the plaintiff filed replications to the additional pleas substantially setting forth the facts contained in the replications to the first pleas. On the 10th of August, 1909, the plaintiff filed other replications substantially embracing the facts set forth in the replications of 1st of January, 1909, and other facts, all of which are in substance but a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

repetition of the facts set forth in the replications to the first pleas. A demurrer was filed by the defendant company to these replications filed August 10, 1909, and on the 8th of June, 1911, the court sustained said demurrer in the following order:

"In the Circuit Court, Dade County, Fla.

"John W. Erickson, Plaintiff, v. Insurance Company of North America, a Corporation, and Fire Association of Philadelphia, a Corporation, Defendants.

"Final Judgment.

"This cause coming on again to be heard, and it appearing that an order has been made sustaining the demurrer of defendants to the replications filed by plaintiff August 10, 1909, to the first, second, third and fourth additional pleas of defendants filed December 7, 1908, said replications being amended replications, the replications first filed to said pleas having been considered bad.

"It is thereupon considered that the defendants are entitled to final judgment on said demurrer, it is considered that the defendants have final judgment on said demurrer, and that the plaintiff, John W. Erickson, have and recover nothing of the defendants and that the defendants, Insurance Company of North America, a corporation, and Fire Association of Philadelphia, a corporation, go hence without day and have and recover of and from the plaintiff their costs herein taxed at \$16.44, for which let execution issue.

"This 8th day of June, 1911.

"[Signed] Minor S. Jones, Judge."

A writ of error was sued out from this judgment.

[1] We shall not undertake to discuss in detail the assignments of error having their basis in an unusual method of pleading, but keep in mind the real issue in the case. This court in its former opinion, as has been said, held that as a matter of law the insurance contract sued on was void at law because Erickson was not at the time it was executed the sole and unconditional owner of the property which was insured. The attempt to give life to a policy void at law, by the application of the doctrine of estoppel or waiver may find some support in the decisions of some courts, but it seems to us that under our system of pleading and practice, where courts of law and courts of equity have separate functions and jurisdictions this cannot be done. The jurisdiction over the correction of mistakes in the making of contracts is peculiarly one of chancery. If the facts set forth in the replications to the pleas of the insurance company are true, they will afford ground for reformation in equity of the insurance policy, and will authorize the chancery court to reform the contract and make it payable to Burch or Erickson,

as upon a hearing, their interest might be found to exist, unless there now exists some proper defense to such a proceeding. This procedure will be in accord with the doctrine laid down in *Phenix Ins. Co. v. Hilliard*, 59 Fla. 590, 52 South. 799, 138 Am. St. Rep. 171, and *Taylor v. Glegs Falls Ins. Co.*, 44 Fla. 273, 82 South. 887.

[2] There are some technical objections presented here arising out of the pleading. There was an issue joined to the replication to the first plea. It was never formally withdrawn. But it seems to us there is no reversible error because judgment was entered by the court with that issue technically undisposed of. As we have said the second set of pleas of defendant company practically presented the same defense as the first pleas. The second set of replications presented practically the same defense as the first. The order of the court sustaining the demurrer to the second set of replications was a practical retraction of his order overruling the demurrer to the first set of replications. We do not think the judgment should be reversed because this technical joinder of issue was not actually withdrawn or set aside, as the real issue in the case was disposed of by the last order of the trial judge, and the final judgment. *Franklin Phosphate Company v. International Harvester Company of America*, 57 South. 206, decided at this term.

The judgment below in both of said cases is affirmed.

TAYLOR, P. J., and PARKHILL, J., concur.

WHITFIELD, C. J., and SHACKLEFORD, J., concur in the opinion.

COCKRELL, J., being disqualified, took no part.

PHILLIPS v. STATE.

(Supreme Court of Florida, Division A. Jan. 8, 1912. Headnotes Filed Feb. 6, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1066*)—APPEAL—REFUSAL OF NEW TRIAL—OBJECTIONS.

In the absence of an exception to an order refusing a new trial, the sufficiency of the evidence is not properly presented to the Supreme Court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2686; Dec. Dig. § 1066.*]

2. CRIMINAL LAW (§ 1066*)—DENIAL OF NEW TRIAL—EXCEPTIONS TO ORDER.

Allowance of time to present a bill of exceptions upon a denial of a motion for new trial is not allowing an exception to that order; other exceptions having been allowed during the trial.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1066.*]

Error to Criminal Court of Record, Walton County; Charles O. Andrews, Judge.

F. M. Phillips was convicted of assault with intent to kill, and brings error. Affirmed.

W. T. Bludworth, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

COCKRELL, J. Phillips was convicted of an assault with intent to murder one Joshua Cox by cutting him with a knife, and sentenced to a term of four years in the state prison.

The only error assigned here questions the sufficiency of the evidence to support the verdict.

[1, 2] We fail to find in the bill of exceptions that the accused excepted to the ruling of the court denying the motion for a new trial, and the assignment of error is not, therefore, properly before us. *Johnson v. State*, 53 Fla. 42, 43 South. 430, and cases cited. We do find that the court denied the motion, and following the judge's name is an allowance of additional time to present a bill of exceptions. Numerous exceptions were taken as to the admissibility of evidence during the progress of the trial, so we are not permitted to read into the record a noting of an exception to this order from the allowance of additional time.

Lest this may appear as overtechnical, we may add that after a consideration of the whole evidence we do not see that the plaintiff in error has really lost by the omission.

Judgment affirmed.

WHITFIELD, C. J., and SHACKLEFORD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

SAUNDERS et al. v. COLLINS.

(Supreme Court of Florida. Jan. 6, 1912.)

(*Syllabus by the Court.*)

TAXATION (§§ 750, 788*)—TAX DEED—NOTICE OF APPLICATION.

Where the mandatory statutory requirement as to the publication of the notice of an application for a tax deed has not been complied with, the deed is void, and the failure to make the statutory publication may be shown after the deed is admitted in evidence.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1497, 1565-1569; Dec. Dig. §§ 750, 788.*]

In Banc. Error to Circuit Court, Santa Rosa County; J. Emmett Wolfe, Judge.

Action by S. G. Collins against D. R. Saunders and others. Judgment for plaintiff, and defendants bring error. Reversed.

Blount & Blount & Carter, for plaintiffs in error. J. W. Kehoe, for defendant in error.

PER CURIAM. This writ of error was taken to a judgment awarding damages for trespass upon real property alleged to belong to S. G. Collins. The right of Collins to maintain the action is based upon a tax deed issued March 8, 1904. The deed was issued upon a tax sale certificate of December, 1901.

Section 8 of chapter 4888, which became effective September 1, 1901, now section 574 of the General Statutes of 1906, provides that "no tax deeds for lands sold for taxes shall issue until the clerk of the circuit court shall have given at least thirty days previous notice of the application for a deed by publishing the same once a week in some newspaper in the county," etc. The proof shows that the publication began February 12, 1904, and the deed was issued March 8, 1904. The mandatory provision as to publication being intended for the benefit of the landowner and not being complied with, the tax deed is void. See *Clark Ray Co. v. Williford*, 56 South. 958, decided this term.

The introduction of the deed was not objected to on this ground; but such objection would have been unavailing, since the tax deed is by the statute made prima facie evidence of the regularity of the proceedings. *Saunders v. Collins*, 56 Fla. 534, 47 South. 958.

The tax deed was properly admitted in evidence over the objections made to its introduction; but this did not debar the defendants of the right to overcome the prima facie effect of the tax deed by showing its invalidity by proper evidence, as was done when it was made to appear without objection that the publication of the notice of the application for the tax deed was not made for 30 days as required by the mandatory provisions of the statute.

The judgment is reversed.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, COCKRELL, and HOCKER, JJ., concur.

GOLDSTEIN v. MALONEY.

(Supreme Court of Florida, Division A. Dec. 19, 1911.)

(*Syllabus by the Court.*)

1. CONSTITUTIONAL LAW (§ 209*)—EQUAL PROTECTION OF LAWS—VALIDITY OF CLASSIFICATION.

Great latitude is accorded to the lawmaking power in selecting and classifying subjects for statutory regulation, and, if a classification made has a reasonable basis in real differences of practical conditions with reference to the subject regulated and is not merely arbitrary, it will not be regarded as unjustly discriminatory and will not of itself be a denial of the equal protection of the laws.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 678; Dec. Dig. § 209.*]

2. CONSTITUTIONAL LAW (§ 240*)—EQUAL PROTECTION OF LAWS—BULK STOCK LAWS.

A classification, covering "every person who shall bargain for or purchase any stock of goods, wares, or merchandise in bulk," apparently has a reasonable basis in practical differences in the conditions affecting those engaged in trade, and such classification is not merely arbitrary, nor patently an unjust discrimination among those who sell and buy.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 240.*]

3. CONSTITUTIONAL LAW (§ 191*)—RETROACTIVE LAWS—EVIDENCE AND PROCEDURE.

Rules of evidence and procedure that are prescribed by the courts and by statutes may be changed by statute when substantive rights secured by the Constitution are not thereby invaded.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 534; Dec. Dig. § 191.*]

4. CONSTITUTIONAL LAW (§ 311*)—DUE PROCESS OF LAW—RULES OF EVIDENCE.

It is competent for the Legislature to create by law prima facie presumptions of evidence without denying due process of law, where such presumptions may be a natural or reasonable inference from the facts or circumstances from which the presumptions are raised by the statute, and the opposite party is not deprived of the right to rebut the presumptions in some fair manner duly provided or accorded by the rules of law or procedure.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 982; Dec. Dig. § 311.*]

5. FRAUDULENT CONVEYANCES (§ 271*)—REMEDIES OF CREDITORS—PRESUMPTIONS—STATUTORY PROVISION.

Where a statute regulating the sale of goods in bulk provides that a sale made without complying with the statute "shall, as to any and all creditors of the vendor, be presumed to be fraudulent," the presumption is only prima facie and may be rebutted.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 271.*]

6. APPEAL AND ERROR (§ 1010*)—REVIEW—CONCLUSIONS OF FACT.

Where the evidence justifies a finding of the trial court that a sale of goods was "out of the usual or ordinary course of business or trade of the vendor," the finding will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

Error to Circuit Court, Monroe County; J. B. Wall, Judge.

Action of replevin by Norvin G. Maloney, as trustee in bankruptcy of Sarah H. Davis, against Louis M. Goldstein. Judgment for plaintiff, and defendant brings error. Affirmed.

Jefferson Browne, for plaintiff in error. W. Hunt Harris, for defendant in error.

WHITFIELD, C. J. Sarah H. Davis, a retail dealer in dry goods, being indebted in excess of her assets, on November 15, 1910, sold to Louis M. Goldstein, her son-in-law, 448 pairs of shoes for \$424, which was 10 per cent. more than the invoice price of said shoes; there being other shoes left in the

stock. The purchaser did not comply with the statute (chapter 5679, Acts of 1907), requiring a purchaser of "any stock of goods, wares, or merchandise in bulk" to give notice of the contemplated purchase to the creditors of the vendor, or the purchase will be presumed fraudulent as to any and all creditors of the vendor. On November 16, 1910, Sarah H. Davis was adjudged a bankrupt, and the shoes were replevied by the trustee in bankruptcy. To the judgment in favor of the trustee in bankruptcy this writ of error was taken. It is contended that chapter 5679 is unconstitutional and that the sale here is not within the statute. The statute is as follows:

"Chapter 5679—(No. 84).

"An act to regulate the sale of stocks of goods, wares, and merchandise in bulk, and to provide certain penalties therefor, and for other purposes.

"Be it enacted by the Legislature of the state of Florida:

"Section 1. It shall be the duty of every person who shall bargain for or purchase any stock of goods, wares, or merchandise in bulk for cash or credit, before paying or delivering to the vendor any part of the purchase price therefor, to demand and receive from the vendor thereof, and if the vendor be a corporation, then from the managing officer or agent thereof, a written statement under oath of the names and addresses of all the creditors of said vendor, together with the amount of indebtedness due or owing by the said vendor to each of such creditors; and it shall be the duty of such vendor to furnish such statement, whether he be a wholesale or a retail merchant.

"Sec. 2. Thereupon it shall be the duty of the purchaser, at least five (5) days before the completion of said purchase, or the payment therefor, to notify personally or by registered mail, each of said creditors of the said proposed sale, the price to be paid therefor, and the terms and conditions thereof.

"Sec. 3. When any person shall purchase any stock of goods, wares, or merchandise in bulk and shall pay the price or any part thereof, or execute or deliver to the vendor thereof, or to his order, or to any person for his use, any promissory note, or other evidence of indebtedness, for said purchase price, or any part thereof, without having first demanded and received from said vendor the statement under oath mentioned in section one (1) of this act, and without first giving to each of the creditors whose names have been furnished by said vendor the notice provided for in section two (2) hereof, such sale or transfer shall, as to any and all creditors of the vendor, be presumed to be fraudulent.

"Sec. 4. Any vendor of a stock of goods,

wares, or merchandise in bulk, who shall knowingly or willfully make or deliver, or cause to be made or delivered, any false statement or any statement of which any material portion is false, or shall fail to include the names of all his creditors in any such statement, as is required in section one (1) of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars (\$500.00), or by imprisonment for not more than six (6) months.

"Sec. 5. Any sale or transfer of a stock of goods, wares, or merchandise out of the usual or ordinary course of business or trade of the vendor, or whenever thereby substantially the entire business or trade theretofore conducted by the vendor shall be sold or conveyed, or attempted to be sold or conveyed, to one or more persons, shall be deemed a fraudulent transaction or transfer in bulk in contemplation of this act; provided, that nothing contained in this act shall apply to sales by executors, administrators, receivers, or any public officer under judicial process.

"Sec. 6. All laws and parts of laws in conflict with this act are hereby repealed.

"Sec. 7. This act shall take effect upon its passage and approval by the Governor.

"Approved May 27, 1907."

This statute was enacted under the police power of the state, the exercise of which power can be checked by the courts only when some provision or principle of the state or federal Constitutions has been clearly violated.

[1] Great latitude is accorded to the law-making power in selecting and classifying subjects for statutory regulation, and, if a classification made has a reasonable basis in real differences of practical conditions with reference to the subject regulated and is not merely arbitrary, it will not be regarded as unjustly discriminatory and will not of itself be a denial of the equal protection of the laws.

[2] A classification, covering "every person who shall bargain for or purchase any stock of goods, wares, or merchandise in bulk," apparently has a reasonable basis in practical differences in the conditions affecting and affected by those engaged in trade, and such classification is not merely arbitrary nor patently an unjust discrimination among those who sell and buy. The burdens imposed by the statute are merely incident to the regulation, and they are apparently not unreasonable. See *John P. Squire & Co. v. Tellier*, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322; *Walp v. Moar*, 76 Conn. 515, 57 Atl. 277; *Thorpe v. Pennock Mercantile Co.*, 99 Minn. 22, 108 N. W. 940, 9 Ann. Cas. 229; *Young, Trustee, v. Lemleux*, 79 Conn. 434, 65 Atl. 436, 20 L. R. A. (N. S.) 160, and notes, 129 Am. St. Rep. 193; *Peninsular In-*

dustrial Ins. Co. v. State, 61 Fla. 376, 55 South. 398.

[3] Rules of evidence and procedure that are prescribed by the courts and by statutes, and not by the Constitution, may be changed by statute when substantive rights secured by the Constitution are not thereby invaded. See *Stearns & Culver Lumber Co. v. Fowler*, 58 Fla. 362, 50 South. 680.

[4] It is competent for the Legislature to create by law *prima facie* presumptions of evidence without denying the process of law, where such presumptions may be a natural or reasonable inference from the facts or circumstances from which the presumptions are raised by the statute, and the opposite party is not deprived of the right to rebut the presumptions in some fair manner duly provided or accorded by the rules of law or procedure. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 81 Sup. Ct. 337, 55 L. Ed. 309; *Mobile, Jackson & Kansas City R. Co. v. Turnipseed*, 219 U. S. 85, 81 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226; *Campbell v. Skinner Mfg. Co.*, 53 Fla. 632, 43 South. 874.

[5] The statute merely provides that a sale without compliance with its requirements "shall as to any and all creditors of the vendor, be presumed to be fraudulent." This is only a *prima facie* presumption raised from the relevant facts, and the presumption may be rebutted by due procedure under the law. The statute is not subject to the points made against its constitutionality.

[6] There is no evidence that substantially the entire business or trade theretofore conducted by the vendor "was sold, but it is admitted that the stock of the vendor was appraised at the time of the bankruptcy at something over \$7,000." Therefore, unless the sale to Goldstein was "of a stock of goods, wares, or merchandise out of the usual or ordinary course of business or trade of the vendor," the purchase is not within the provisions of the statute. It is agreed "that the said Sarah H. Davis was engaged in the retail business of dealer in dry goods, shoes, notions, etc., in the city of Key West on the 15th day of November, A. D. 1910." There is no other evidence as to the usual or ordinary course of the vendor's business, but from the agreed facts that she was a retail dealer in dry goods, shoes, notions, etc., the court trying the issues in replevin, a jury having been waived, was, under the circumstances, justified in finding that the sale to Goldstein was not in the usual or ordinary course of the vendor's business or trade. This being so, the judgment is affirmed.

SHACKLEFORD and COCKRELL, JJ.,
concur.

TAYLOR, HOCKER, and PARKHILL, JJ.,
concur in the opinion.

In re OPINION OF JUDGES.

(Supreme Court of Florida. Oct. 3, 1911.
Headnotes Filed Feb. 6, 1912.)

(Syllabus by the Court.)

COURTS (§ 208*)—SUPREME COURT—JURISDICTION—ADVISORY OPINION TO GOVERNOR.

Section 13 of article 4 of the Constitution does not authorize the Justices of the Supreme Court to give to the Governor at his request an opinion upon the constitutionality of statutes affecting his executive powers and duties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 492, 493; Dec. Dig. § 208; * Constitutional Law, Cent. Dig. § 128.]

In the matter of an advisory opinion to the Governor.

State of Florida, Supreme Court, Tallahassee.
July 17, 1911.

Hon. A. W. Gilchrist, Governor of Florida—
Sir:

We have the honor of acknowledging the receipt of your communication of July 13, 1911, which is as follows:

"To the Honorable Chief Justices and Justices of the Supreme Court of Florida—
Gentlemen:

"Section 24 of article 4 of the state Constitution provides that: 'The Treasurer shall receive and keep all funds, bonds, and other securities, in such manner as may be prescribed by law, and shall disburse no funds, nor issue bonds, or other securities, except upon the order of the Comptroller, countersigned by the Governor, in such manner as shall be prescribed by law.'

"Section 20, c. 6178, Laws of Florida, approved May 23, 1911, being 'An act to create a state school book commission, and to procure for use in the public schools of the state of Florida a uniform series of text-books, and to define the duties and powers of said commission, to make preparations for carrying this act into effect, and providing penalties for violation of same,' is as follows:

"'Sec. 20. That said text-book commission shall serve without compensation, and the members of the subcommission actually serving shall be paid a per diem of four dollars per day during the time that they are actually engaged not to exceed thirty days, and in addition shall be repaid all money actually expended by them in the payment of necessary expenses, to be paid out of the public school fund, and they shall make out and swear to an itemized statement of such expenses.'

"Sections 4 and 5 of article 12 of the state Constitution are as follows:

"'Section 4. The state school fund, the interest of which shall be exclusively applied to the support and maintenance of public

free schools, shall be derived from the following sources:

"'The proceeds of all lands that have been or may hereafter be granted to the state by the United States for public school purposes.'

"'Donations to the state when the purpose is not specified.

"'Appropriation by the state.

"'The proceeds of escheated property or forfeitures.

"'Twenty-five per cent. of the sales of public lands which are now or may hereafter be owned by the state.'

"'Section 5. The principal of the state school fund shall remain sacred and inviolate.'

"In the circumstances I respectfully request the opinion of the Justices of the Supreme Court, under section 13 of article 4 of the state Constitution, as to whether it is my duty, in pursuance of the above cited section 20 of chapter 6178, to countersign a warrant or warrants in payment of per diem and actual expenses of the subcommission, such warrants 'to be paid out of the public school fund.'"

The effect of your communication is to secure an opinion from the Justices of the Supreme Court upon the constitutionality of section 20, c. 6178, Laws of 1911, requiring the expenses of the subcommission of the text-book commission to be paid out of the public school fund. It is uniformly held under previous opinions of the Supreme Court Justices that they are not authorized upon the request of the Governor to give an opinion upon the constitutionality of statutes affecting the Governor's executive powers and duties. See Advisory Opinions to Governor, 39 Fla. 397, 22 South. 681; 50 Fla. 169, 39 South. 187; 54 Fla. 136, 44 South. 756.

Very respectfully,

W. A. HOCKER.
C. B. PARKHILL.
R. F. TAYLOR.
J. B. WHITFIELD.
R. S. COCKRELL.
T. M. SHACKLEFORD.

CARAS v. HENDRIX et al.

(Supreme Court of Florida. Jan. 6, 1912.)

(Syllabus by the Court.)

1. MARRIAGE (§§ 1, 2*)—NATURE OF CONTRACT—REGULATION.

At common law, marriage is regarded as a natural civil contract relation that is valid when consummated by the consent and cohabitation of competent parties. Such relation may be regulated by law in the interest of the general welfare.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 1, 2; Dec. Dig. §§ 1, 2*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. MARRIAGE (§ 13*)—NATURE OF RELATION—STATUTORY PROVISIONS.

Statutory enactments regulating the manner of licensing and solemnizing marriages and the keeping of a record thereof are generally regarded as directory, and a failure to comply with such statutory provisions does not render invalid or void the marriage relation entered between competent parties as at common law, unless the language used expressly or by implication makes the relation illegal when the requirements of the statute are not complied with.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 4, 5; Dec. Dig. § 13.*]

3. MARRIAGE (§ 18*) — VALIDITY — COMMON-LAW MARRIAGE.

The common law is in force in this state, except where it is modified by competent governmental authority. No statute of this state expressly or by fair implication renders invalid or void marriage contracts between competent parties that are consummated under the rules of the common law.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 4; Dec. Dig. § 13.*]

4. MARRIAGE (§ 13*)—LICENSES—STATUTORY PROVISIONS.

The statutes of this state upon the subject of issuing and recording marriage licenses and designating those who shall perform marriage ceremonies in so far as they affect the marriage status, are merely directory, and a marriage relation consummated between competent parties as at common law is valid in this state, even though the statutory requirements are not complied with.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 4, 5; Dec. Dig. § 13.*]

In Banc. Appeal from Circuit Court, Hillsborough County; J. B. Wall, Judge.

Suit by Maximo Caras against Edison Purvis Hendrix and another. From a decree for defendants, complainant appeals. Reversed.

Wall & McKay, for appellant. Thomas Palmer, for appellees.

WHITFIELD, C. J. This appeal is from a decree in partition proceedings. The only question presented for determination is whether a marriage good at common law is in this state void unless a license therefor is procured and the ceremony is performed by those designated for that purpose in the statute.

An agreed statement of facts sets forth that:

"First. That Maximo Caras, the complainant, at and prior to any of the dates hereinafter mentioned, was unmarried and was over the age of 21 years, and that Annie Purvis was also unmarried and was over the age of 21 years, and that there was no legal impediment whatsoever existing whereby these parties could not lawfully intermarry, but that prior to any of the dates hereinafter mentioned the said Annie Purvis had given birth to the defendant, Edison Purvis Hendrix, and that prior to her intermarriage with her codefendant, Will Hendrix, the said Edison Purvis Hendrix was known as Edison Purvis.

"Second. That while no marriage license

under the provisions of section 2055 of the Revised Statutes of the state of Florida, which was then in force, was ever issued or procured for the intermarriage of the complainant and the said Annie Purvis, and while no marriage ceremony was ever performed between the complainant and the said Annie Purvis by any regularly ordained minister of the gospel or by any judicial officer or notary public of the state of Florida, yet on or about the 25th day of December, A. D. 1892, the said complainant and the said Annie Purvis became acquainted with each other and a short while thereafter, in the county of Hillsborough of the state of Florida, to wit, on or about the 25th day of December, A. D. 1893, the said complainant and the said Annie Purvis agreed with each other to be husband and wife, and the said Annie Purvis immediately assumed the name of Annie Caras, and from the time of such agreement they cohabited and lived together in that relation until the time of the death of the said Annie Caras on or about the 10th day of March, A. D. 1910, and during all of said time the said parties not only cohabited and lived with each other as husband and wife, but they were known and received as man and wife by a large circle of acquaintances, and from the time they so began to live and cohabit with each other as husband and wife the said Annie Purvis, under the name of Annie Caras and as the wife of the complainant, joined with the complainant in the execution of a number of deeds and mortgages covering real estate, and in the execution of all other instruments and documents in which the law required the wife to join, the said Annie Purvis, under the name of Annie Caras and as the wife of the said complainant, joined with the complainant in the execution thereof, and in the city directories which were published for the city of Tampa the said complainant and Annie Purvis, under the name of Annie Caras, were set out and advertised as husband and wife, and from the time the said Annie Purvis commenced to live and cohabit with the said Maximo Caras as hereinbefore stated, she was never known by any other name than that of Annie Caras, and with the exception of a short period immediately after they began to cohabit and live together and when they resided on the island of Cuba, the said complainant and the said Annie Purvis, under the name of Annie Caras, had their own residence in the city of Tampa, Fla., and at the time of the death of the said Annie Caras they were living together in their own home, and the complainant took charge of the corpse and paid the funeral expenses. And it is hereby further agreed that the purchase price for the properties owned by the said Annie Caras at the time of her death was paid by the complainant, and that these two pieces of property

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

were not the only property which was purchased by the complainant and title to which was taken in the name of the said Annie Caras.

"Third. It is further agreed that the intent of this stipulation as to all the facts hereinbefore set forth is as follows: If, under the law of the state of Florida as it existed during the year 1893, what is known as a common-law marriage could exist, then the complainant was the husband of the said Annie Caras, and he and her child, the said Edison Purvis Hendrix, inherited in equal shares the real estate owned by her at the time of her death, but if under the law of the state of Florida, as it existed during the year 1893, a common-law marriage could not exist, then the said complainant was and is not an heir at law of the said Annie Caras, deceased, and he takes nothing by way of inheritance in the property of the said Annie Caras, deceased."

Upon these agreed facts the court held "that under the law of the state of Florida as it existed in the year A. D. 1893, no marriage could be contracted or exist unless a license was procured therefor, and said marriage was solemnized by a regularly ordained minister of the gospel, or some judicial officer or notary public of this state."

It was accordingly decreed that the complainant, Maximo Caras, was not the husband of Annie Caras and was not an heir of said Annie Caras with her only child, the defendant Edison Purvis Hendrix. From this decree the complainant appealed.

Section 2295 of the General Statutes provides that property of an intestate shall descend "to the children or their descendants and the husband, if the decedent be a married woman and the husband survive her."

Upon the subject of the issue of marriage license and proceedings thereon the following statutes were in force during the year 1893:

"2574 (2055). County Judge to Issue Marriage Licenses.—Every marriage license shall be issued by the county judge of the county wherein the woman resides, under his hand and seal, and it shall be the duty of said county judge to issue such license, upon payment of his fee of two dollars, if there appear to be no impediment to the marriage. If either of the persons to be named in the license be under the age of twenty-one years, the county judge shall require satisfactory evidence of the consent of the parent or guardian of such minor to the marriage; but no minor who has been before married shall be required to produce evidence of the consent of parent or guardian as aforesaid.

"2575 (2056). Who Authorized to Solemnize Matrimony.—All regularly ordained ministers of the gospel in communion with some church and all judicial officers and notaries public of this state are authorized to solemnize

the rights of the matrimonial contract, under the regulations prescribed by law.

"2576 (2057). Marriage Not to be Solemnized Without a License.—Before any of the persons named in the preceding section shall solemnize any marriage, he shall require of the parties a marriage license issued according to the requirements of section 2574, and within ten days after solemnizing the marriage he shall make a certificate thereof of the license, and shall transmit the same to the office of the county judge from which it issued.

"2577 (2058). Record of License and Certificate.—The county judge shall keep, in good and substantially bound books, a correct record of all marriage licenses issued, with the names of the parties and the date of issuing, and upon the return of the license and certificate he shall enter therein the name of the person solemnizing the marriage and the date of marriage and of the return. The original license and certificate shall be filed as evidence of the marriage.

"2578 (2059). When no Certificate is Made.—Whenever any marriage is or has been solemnized by any of the persons named in section 2575 and such person has not made a certificate thereof of the marriage license as required by section 2576, or when the marriage license has been lost or when by reason of the death or other cause the proper certificate cannot be obtained, the marriage may be proved by affidavit before any officer authorized to administer oaths made by two competent witnesses who were present and saw the marriage ceremony performed, which affidavit may be filed and recorded in the office of the county judge from which the marriage license issued, with the same force and effect as in cases in which the proper certificate has been made, returned and recorded."

[1, 2] At common law marriage is regarded as a natural civil contract relation that is valid when consummated by the consent and cohabitation of competent parties. Such relation may be regulated by law in the interest of the general welfare. Statutory enactments regulating the manner of licensing and solemnizing marriages and the keeping of a record thereof are generally regarded as directory, and a failure to comply with such statutory provisions does not render invalid or void the marriage relation entered between competent parties as at common law, unless the language used expressly or by implication makes the relation illegal when the requirements of the statute are not complied with.

[3, 4] The common law is in force in this state except where it is modified by competent governmental authority. No statute of this state expressly or by fair implication renders invalid or void marriage contracts between competent parties that are consummated under the rules of the common law. The statutes of this state upon the

subject of issuing and recording marriage licenses, and designating those who shall perform marriage ceremonies in so far as they affect the marriage status, are merely directory, and a marriage relation consummated between competent parties as at common law is valid in this state, even though the statutory requirements are not complied with. *Daniel v. Sams*, 17 Fla. 487; *Melster v. Moore*, 96 U. S. 78, text 79, 24 L. Ed. 826; 26 Cyc. 837, 840, and cases cited; *Bish*. on Mar., Div. & Sep. § 87.

The agreed facts show the consummation of a marriage relation valid at common law between *Maximo Caras* and *Annie Purvis* both competent parties, by consent and cohabitation as man and wife, and by their conduct towards each other and in their relations with third persons and the public generally. This is sufficient to make the husband an heir of the deceased wife who died intestate.

The decree is reversed.

TAYLOR, SHACKLEFORD, COCKRELL,
and **HOCKER, JJ., concur.**

SMITH v. STATE.

(Supreme Court of Florida. Jan. 6, 1912.)

(*Syllabus by the Court.*)

CONSTITUTIONAL LAW (§ 200*)—CONVICTION OF SECOND OFFENSE—EX POST FACTO LAW.

The Legislature may make it a felony to commit the second offense of selling liquor in a county voting against the sale of liquors, even though the prior conviction was had before the passage of the statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 575; Dec. Dig. § 200.*]

In Banc. Error to Circuit Court, Manatee County; *F. A. Whitney*, Judge.

Mack Smith was convicted of being a common liquor dealer, and brings error. Affirmed.

H. P. Bailey, for plaintiff in error. *Park Trammell*, Atty. Gen., and *C. O. Andrews*, for the State.

COCKRELL, J. Mack Smith was convicted in the circuit court for Manatee county of being a common liquor dealer, under section 3 of chapter 6179, Laws of 1911, and sentenced to a term of two years in the state prison. The section reads:

"Sec. 3. Whoever is convicted of selling or causing to be sold, any spirituous, vinous or malt liquors, in any county or precinct which has voted against the sale of such liquors, under the provisions of article XIX of the Constitution of the state of Florida, or whenever any person or persons, firm or association is convicted of selling or causing to be sold, or keeping for sale any spirituous, vinous or malt liquors, without his paying the license required by law, having been be-

fore convicted of the like offense, shall be deemed and adjudged to be a common liquor dealer, in violation of law, and shall be punished, upon conviction, by being fined not more than \$3,000.00, or by imprisonment in the State Prison not more than five years, or by both fine and imprisonment, in the discretion of the court."

The indictment alleges that the first conviction was had on May 13, 1911, before chapter 6179 went into effect, and Smith unsuccessfully moved that the cause be transferred to the county court, upon the ground that the law did not and could not so penalize an act committed prior to its passage; but such is not the meaning of the term "ex post facto," and the statute is broad enough to punish as felons all who had theretofore been adjudged guilty of selling liquor in a county or precinct that had voted against such sale. The selling for which he stands now convicted took place, as alleged, after the statute became effective, and that is the crime for which he is being tried.

The cases seem to be uniform in holding that the federal inhibition against ex post facto laws does not apply to such cases. *Ex parte Gutierrez*, 45 Cal. 429; *State v. Woods*, 68 Me. 409; *In re Ross*, 2 Pick. (Mass.) 165; *Commonwealth v. Graves*, 155 Mass. 163, 29 N. E. 579, 16 L. R. A. 256; *Sturtevant v. Commonwealth*, 158 Mass. 598, 33 N. E. 648; *Blackburn v. State*, 50 Ohio St. 428, 36 N. E. 18; *Rand v. Commonwealth*, 50 Va. 738.

The judgment is affirmed.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, and HOCKER, JJ., concur.

MCRAE v. STATE.

(Supreme Court of Florida, Division A. Jan. 3, 1912.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 1151*)—REVIEW—CONTINUANCE—DISCRETION OF COURT.

Where no abuse of discretion is shown, the denial of a motion for a continuance will not be disturbed by the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.*]

2. CRIMINAL LAW (§ 1166½*)—HARMLESS ERROR—SELECTION OF JURY.

Where none of the talesmen objected to by the defendant served on the jury, and it does not appear that any objectionable jurors were selected after the defendant's challenges were exhausted, alleged errors in rulings on challenges for cause may be immaterial. An accused has a right to an impartial jury, but not to any particular persons as jurors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3116, 3117; Dec. Dig. § 1166½.*]

3. CRIMINAL LAW (§ 838*)—EVIDENCE—RELEVANCY.

Where the question is whether the accused made a certain statement, the fact that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

others may have also made the statement may be immaterial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 888.*]

4. CRIMINAL LAW (§ 775*)—INSTRUCTIONS—ALIBI.

A charge that: "The defendant has set up an alibi; and the burden of proving it is on him, but he is not bound to prove it beyond a reasonable doubt, and, if upon the whole case the testimony raised a reasonable doubt that the defendant was present when the crime was committed, he should be acquitted"—is not prejudicial or burdensome to the defendant, since the only burden it put upon the defendant was to meet the testimony as to the defendant's guilt by raising a reasonable doubt that he was present when the crime was committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1832-1837; Dec. Dig. § 775.*]

5. CRIMINAL LAW (§ 1159*)—APPEAL—SUFFICIENCY OF EVIDENCE.

Where the evidence is entirely circumstantial, but it points strongly to the defendant's guilt, and the whole evidence is such that the jury could reasonably have found the defendant guilty, and no errors of law or procedure appear, the judgment will not be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Error to Circuit Court, Gadsden County; J. W. Malone, Judge.

Julius McRae was convicted of murder in the first degree, and brings error. Affirmed.

W. H. Ellis, for plaintiff in error. Park Trammell, Atty. Gen., and C. O. Andrews, for the State.

PER CURIAM. Julius McRae was convicted of murder in the first degree with a recommendation to mercy and took writ of error.

[1] A motion for a continuance, based largely on the alleged inability of the accused to secure counsel and to prepare his defense in the time allowed him, was denied.

No abuse of discretion by the trial court appears; and, as the accused was in fact ably represented and given ample opportunity to make his defense, the denial of a continuance will not cause a reversal of the judgment.

[2] The action of the court in excusing talesmen, and in holding others to be qualified jurors, does not appear to have injured the accused, as none of the jurors objected to by the accused served on the jury, and, although it does appear that the defendant exhausted his statutory number of peremptory challenges, it does not appear that any objectionable jurors were selected after the defendant's challenges were exhausted. The accused had a right to an impartial jury, but was not entitled to any particular persons as jurors.

[3] At the trial, it was shown by the state that the defendant said he thought the deceased had caused defendant and others with him to be arrested for gambling, and

the defendant was not permitted to show that others with him had stated that the deceased had caused their arrest. The object was to make it appear that the others who were arrested, and not the defendant here, had said the deceased caused them to be arrested.

This was immaterial, since it made no difference what the others had said if the defendant had said he thought the deceased caused their arrest.

[4] The court charged the jury that: "The defendant has set up an alibi; and the burden of proving it is on him, but he is not bound to prove it beyond a reasonable doubt, and, if upon the whole case the testimony raised a reasonable doubt that the defendant was present when the crime was committed, he should be acquitted."

This charge was not prejudicial or burdensome to the defendant, since its meaning is that, if the asserted alibi raises a reasonable doubt of the defendant's presence at the commission of the crime, he should be acquitted. The only burden upon the defendant was to meet the testimony as to the defendant's guilt by raising a reasonable doubt that he was present when the crime was committed.

[5] The evidence is entirely circumstantial, but it points strongly to the defendant's guilt, and the jury could reasonably and lawfully have found the verdict on the evidence adduced.

This being so, and no errors of law appearing, the judgment should be, and is hereby, affirmed.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

AYERS v. STATE.

(Supreme Court of Florida, Division B. Dec. 12, 1911. Headnotes Filed Feb. 12, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 798*)—CHARGING JURY — ON REASONABLE DOUBT.

It is not error to refuse to give a charge in a criminal trial that confines the doctrine of reasonable doubt to individual jurors, or that segregates the jury as a body into individual members, and requiring each of such members to be free from reasonable doubt before they can return a verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1940, 1941, 1943; Dec. Dig. § 798.*]

2. CRIMINAL LAW (§ 696*)—EVIDENCE—ADMISSIBILITY.

A state's witness, who was some distance from the deceased at the time he was killed, testified that "he believed" he heard the deceased exclaim, between two shots fired at the

time, calling the defendant's name in the exclamation. *Held*, that it was not error to refuse to strike this evidence, on the ground that the witness qualified it with the expression that "he believed" he heard the exclamation testified to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. § 696.*]

Error to Circuit Court, Marion County; W. S. Bullock, Judge.

William G. Ayers was convicted of murder in the first degree, and brings error. Affirmed.

Raymond B. Bullock, for plaintiff in error. Park Trammell, Atty. Gen., and C. O. Andrews, for the State.

TAYLOR, J. The plaintiff in error, in the circuit court of Marion county, was indicted, tried, and convicted of murder in the first degree, with a recommendation to the mercy of the court, by the jury, and sentenced to life imprisonment, and brings the judgment here for review by writ of error.

One of the errors assigned and argued here is the refusal of the trial judge to give the following instruction to the jury, requested by the defendant:

"The defendant is entitled to, and it is the sworn duty of every member of the jury to individually give him, the benefit of this reasonable doubt which may arise from the evidence or the lack of evidence; and until the jury, and each member thereof, can say that they, and each of them, have an abiding and honest conviction, to a moral certainty, of the truth of the charge against him as preferred in the indictment, it will be your duty not to find and return the defendant guilty. The court further instructs you that such belief, to a moral certainty, is not sufficient to convict and find the defendant guilty, unless such belief is the result of sworn evidence, which, in the mind of the jury and jurors, is sufficient to establish guilt beyond and to the exclusion of every reasonable doubt."

[1] There was no error in refusing to give this instruction. It was well calculated to mislead the jury into the idea that it was their duty to acquit the accused if any one or more of them entertained a reasonable doubt as to his guilt, whether the rest of them were free of any such doubt or not. The judge had already charged the jury fully and properly on the point of reasonable doubt; and it was not error to refuse this instruction, which sought to confine the question of reasonable doubt to individual members of the jury. Of course, a verdict must be concurred in by the unanimous vote of the entire jury, and no honest juror

will concur in a verdict of conviction if he entertains a reasonable doubt of the defendant's guilt; but the defendant has an ample remedy for the ascertainment of the fact as to whether any member of the jury failed to agree to the verdict returned by a polling of the jury, without the giving of a charge confining the question of reasonable doubt to any individual member or members of the jury. *Boyd v. State*, 33 Fla. 316, 14 South. 836; *Barker v. State*, 40 Fla. 178, 24 South. 69; *Cook v. State*, 46 Fla. 34, 35 South. 665; *Baldwin v. State*, 46 Fla. 115, 35 South. 220.

[2] A witness for the state testified that two shots were fired at the place where the homicide occurred, with some little interval between the reports of the gun; and that between these two reports "he believed he heard the deceased exclaim or say, 'Ayers, you son of a bitch.'" The defendant moved to strike out this evidence, on the ground that, because the witness used the expression "that he believed he heard," it was but the expression of the witness' opinion. This motion was overruled, and such ruling is assigned as error. There was no error in this ruling. While the witness qualified his statement with the expression that he "believed" he heard the remark testified to, yet it was not merely the expression of the witness' opinion. The sound of the deceased's voice, who was some distance away from the witness at the time, may have caught his ear in a confused or indistinct manner, so that he may not have been able to testify more positively to what the remark really was that the deceased made; therefore he very properly testified as to his belief of what it was that he heard the deceased say, in accord with the impression made upon his sense of hearing at the time.

The next assignment of error is the denial of the defendant's motion for a new trial, on the ground that the verdict is not supported by the evidence. There is a great volume of evidence in the case that it will subserve no useful purpose to set out, either in full or in detail, here. While this evidence is largely circumstantial, and is not as conclusive or satisfactory as it might have been, yet, if believed by the jury, we cannot, after the most careful consideration, say that the verdict returned is not sustained thereby.

Finding no error, the judgment of the court below in said cause is hereby affirmed, at the cost of Marion county; the plaintiff in error having been adjudged to be insolvent.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

SUNDAY et al. v. LOUISVILLE & N. R. CO.
(Supreme Court of Florida. Jan. 8, 1912.
Rehearing Denied Feb. 5, 1912.)

(Syllabus by the Court.)

EMINENT DOMAIN (§ 131*)—DAMAGES—MARKET VALUE.

The provision of the Constitution that, in condemnation proceedings by a corporation or individual, the owner of the property shall receive "full compensation * * * irrespective of any benefit from any improvement proposed by such corporation or individual," does not deny to the owner any real and reasonable enhancement in the market values of the property to be appropriated by reason of "any improvement proposed." If the property naturally, or in common with other property similarly conditioned, increases in market value in anticipation of the proposed improvement, before the appropriation, the compensation therefor is the fair actual market value at the time of the lawful appropriation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 353; Dec. Dig. § 131.*]

In Banc. Error to Circuit Court, Escambia County; J. Emmett Wolfe, Judge.

Condemnation proceedings by the Louisville & Nashville Railroad Company. From the award of compensation, John Sunday and Charles A. Born bring error. Reversed.

Jones & Pasco, for plaintiffs in error.
Blount & Blount & Carter, for defendant in error.

WHITFIELD, C. J. In condemnation proceeding, a judgment for \$4,000 was rendered as compensation for the property. The defendants took a writ of error, and contend that the compensation is insufficient.

At the trial the court, at the request of the petitioner, charged the jury that, "In fixing the market value of the property, the jury are not authorized to take into consideration the enhancement in the value of the property, if any, caused by the proposed improvement of the property for depot or right of way purposes by the railroad company. The market value, irrespective of the proposed improvement, is the measure of just compensation to be awarded by the jury." This charge was excepted to, and is assigned and argued as error. Other charges were given; but they do not sufficiently correct the apparent error in the quoted charge, so that it may fairly be said that the jury, in view of the testimony, could not reasonably have been misled by the quoted charge. The charges given at the request of the defendants are not in effect similar to the quoted charge complained of by them.

Section 29 of article 16 of the Constitution ordains that: "No private property nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed

by such corporation or individual, shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law."

The statute provides for "a jury of twelve men to be empanelled to try what compensation shall be made to the defendants for the property sought to be appropriated, irrespective of any benefit from any improvement proposed by the petitioner, which issue shall be tried in the same manner as the other issues of fact are tried." Section 2013, Gen. Stats. of 1906.

The Constitution contemplates and the statute requires that the issue submitted shall be what is "full compensation" for the property to be appropriated at its then fair actual value, irrespective of or without regard to any benefits that may accrue to the owner of the property from any improvement proposed by the petitioner; but the law does not deny to the owner any real and reasonable enhancement in the market value of the property to be appropriated by reason of "any improvement proposed." If the property naturally, or in common with other property similarly conditioned, increases in market value in anticipation of the proposed improvement, before the appropriation, the compensation therefor is the fair actual market value at the time of the lawful appropriation. *Glesy v. Cincinnati, Wilmington & Zanesville R. Co.*, 4 Ohio St. 308, text 331; *Lewis on Em. Dom.* (3d Ed.) §§ 695 and 7457, and authorities cited; *Chicago, K. & W. R. Co. v. Parsons*, 51 Kan. 408, 82 Pac. 1083; *Newgass v. Railway Co.*, 54 Ark. 140, 15 S. W. 188.

The testimony indicates that the amount allowed would have been full, or, perhaps, too much, compensation at some time before the proposed improvement was generally known of, and before the trial; but that at the time of the trial the property had, in anticipation of the improvement, enhanced in value in common with other property similarly conditioned; and that at the time of the trial it was fairly worth something more than was allowed. In view of the evidence and the probable effect of the charge on the verdict, the judgment is reversed.

TAYLOR, SHACKLEFORD, COCKRELL,
and HOCKER, JJ., concur.

In re OPINION OF JUDGES.

(Supreme Court of Florida. Jan. 8, 1912.)

(Syllabus by the Court.)

OFFICERS (§ 20*)—QUALIFICATIONS—UNMARRIED WOMAN.

In the absence of constitutional or statutory provisions governing the subject, an adult unmarried woman, who is a citizen and resident of this state, and who has not become disqualified under the laws of the state

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

to hold office, may be appointed to fill a vacancy in the office of county treasurer.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 24, 25; Dec. Dig. § 20.*]

In the matter of an advisory opinion to the Governor.

State of Florida, Executive Department.
Tallahassee, January 8, 1912.

To the Honorable Chief Justice and Justices of the Supreme Court of Florida—Gentlemen:

I have been officially informed that Mr. R. C. Creech, who was county treasurer of Palm Beach county, died on or about December 29, 1911.

The state Constitution imposes upon me the duty of making an appointment to fill the vacancy in the office of county treasurer of Palm Beach county, caused by Mr. Creech's death. In pursuance of a fixed policy followed by me in such cases, I requested the Democratic county executive committee of said county to recommend to me the name of a suitable person for appointment to fill the said vacancy.

The said committee has now formally recommended that I appoint Mrs. Anna L. Creech, of said county, to fill the unexpired term of Mr. R. C. Creech, deceased.

I respectfully request the opinion of the Justices of the Supreme Court, under section 13, article 4, of the state Constitution, as to whether a woman is qualified, under the Constitution and laws of this state, to hold office of county treasurer, and whether it would be a proper discharge of my duty to appoint and commission a woman to fill the vacancy existing in such office of county treasurer.

I have the honor to remain, very respectfully,

[Signed] Albert W. Gilchrist, Governor.

In the Supreme Court of Florida.
Tallahassee, Fla., January 8, 1912.

To His Excellency, Albert W. Gilchrist, Governor of Florida—Sir:

We have your request, under section 13 of article 4 of the Constitution, "as to whether a woman is qualified, under the Constitution and laws of this state, to hold the office of county treasurer," made vacant by the death of the former incumbent.

The Constitution provides that "the Legislature shall provide for the election by the qualified electors in each county of * * * a county treasurer." Section 6, art. 8. "When any office, from any cause, becomes vacant, and no mode is provided by this Constitution or by the laws of the state for filling such vacancy, the Governor shall have the power to fill such vacancy by granting a commission for the unexpired term." The statute provides that "every office shall be

deemed vacant * * * by the death of the incumbent," and in such a case "it shall be the duty of the Governor to fill such office by appointment." Sections 298 and 301, General Statutes. While the Constitution confines the electors of the state to male persons having stated qualifications, it does not prescribe the qualifications of those who may hold office under the state government, except in a few instances not material here.

The Constitution requires all county officers except assistant assessors of taxes to give a bond before they are commissioned by the Governor, and this may debar married women, who are not authorized to execute bonds that are binding on them personally.

In the case of *State ex rel. Attorney General v. George*, 23 Fla. 585, text 594, 3 South. 81, it is said: "There is no absolute connection between voters and officers, by which the qualifications for the latter should necessarily be determined by those for the former. Each is regulated to its own end; the former always by special provisions, the latter sometimes not at all, except, as in this state, the more important political and judicial places. So that, as to all other officers, the people, in the absence of other requirements, are left to their own discretion, limited only by a common understanding, equivalent to law, that prohibits electing to office any person who is not in some wise a member of the body politic."

In the absence of constitutional or statutory provisions governing the subject, an adult unmarried woman, who is a citizen and resident of this state, and who has not become disqualified under the laws of the state to hold office, may be appointed to fill a vacancy in the office of county treasurer.

Very respectfully,

[Signed] J. B. WHITFIELD,
R. F. TAYLOR,
T. M. SHACKLEFORD,
R. S. COCKRELL,
W. A. HOCKER,

Justices of the Supreme Court of Florida.

MERRELL v. RIDGELY et al.

(Supreme Court of Florida. Jan. 6, 1912.)

(Syllabus by the Court.)

1. EQUITY (§ 373*) — PLEADING — ADMISSION OF FACTS — DISMISSAL.

When a pleading termed an answer, to which replication is filed, is in reality a plea setting up no defense, an admission of the facts therein does not compel a dismissal of the bill.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 711-718; Dec. Dig. § 373.*]

2. EXECUTION (§ 272*) — SALE — BONA FIDE PURCHASER — NOTICE.

A recorded mortgage, covering a lot in a known subdivision by its proper name, but mistakenly referring to the wrong plat book,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

is notice to a purchaser of that lot at execution sale.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 781-788; Dec. Dig. § 272.*]

3. MORTGAGES (§ 581*) — FORECLOSURE — ATTORNEY'S FEES.

When the note provides for a certain attorney's fee, and the mortgage provides for a reasonable attorney's fee, the note is some evidence upon which the court may fix the fee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 211½, 1669-1679; Dec. Dig. § 581.*]

In Banc. Appeal from Circuit Court, Hillsborough County; F. M. Robles, Judge.

Suit by Vincent Ridgely and others against Herman Merrell. Decree for complainants, and defendant appeals. Affirmed.

Herman Merrell, in pro. per. McMullen & McMullen and Grant J. Aikin, for appellees.

COCKRELL, J. This is a suit to reform a mortgage and enforce it as a lien upon a lot in Lakeside subdivision of St. Petersburg, Fla. It appears that in February, 1908, J. F. Lindsey, now deceased, gave Vincent Ridgely a mortgage on realty described as lot No. 9, block 2, as the same is mapped and platted as Lakeside subdivision of the city of St. Petersburg, Fla., and recorded January 10, 1908, in Plat Book 3, p. 41, in office of clerk of circuit court of Hillsborough county, Fla. Herman Merrell claims superior title by virtue of an execution sale in 1910, and that on Plat Book 3, p. 41, is recorded a plat of Bayshore subdivision of St. Petersburg, showing a lot 9 in block 2, and, further, that he had no knowledge of the mortgage, except from the record in the clerk's office. It further appears that the plat of Lakeside was recorded on January 10, 1908, in Plat Book 4, p. 112.

It is stated in appellant's brief that there were two platted subdivisions of St. Petersburg, known, respectively, as Lakeside and Bayshore, about a mile apart; but we do not find this in the record.

[1] We confess to a degree of uncertainty as to the exact status of the pleadings. The so-called "answer" of Merrell neither admits nor denies one allegation of the bill, but sets up an independent fact to avoid the equity thereof, and should more properly be considered a plea. Again, the complainant joins issue on this "answer," and then upon the hearing admits all its allegations of fact. Ordinarily an answer proven calls for a dismissal of the bill as to the party answering. The replication to the "answer" is in the full form, containing the statement "that the said answer is uncertain, untrue, and insufficient to be replied unto," and the parties before the circuit court, as well as before this court, treat the cause as if a plea were set down for argument, or as if upon bill and answer.

[2] Despite the conclusion in the answer

that Merrell was a bona fide purchaser without notice, we think he had notice and bought the property subject to the mortgage. The failure to refer to the proper plat book goes rather to the existence of a subdivision of St. Petersburg known as Lakeside than to cause a patent ambiguity in the description, and yet Merrell admits the existence of such subdivision, in that he claims his title by the same name. The Lakeside subdivision being an existing entity, any one buying property in that subdivision would have no difficulty in ascertaining from the public records the existence of this mortgage upon a certain lot in Lakeside. There is no statute requiring plats to be recorded, and no surveyor would have difficulty in locating the lot upon the plat of Lakeside, so far as we are advised; nor are we advised but that Bayshore was another name for Lakeside, and that the two recorded plats are identical.

[3] It is further urged as error that the court adjudged the attorney's fee without proof as to its reasonableness. The master adjudicated the fee at \$108.66, which was one-tenth of the principal debt and interest. The note incorporated in the mortgage provided for 10 per cent. of the principal and interest as attorney's fee, and the mortgage further provided that a reasonable fee be allowed. We cannot say that the note itself was not some evidence upon which the master may have acted, and there is no intimation here that the amount allowed was unreasonable, nor does it appear to be so upon its face. In the cases heretofore decided by this court, the amount was not fixed by the parties or the statutes, or only the maximum was fixed. Carhart v. Allan, 56 Fla. 763, 48 South. 47.

We find nothing in this record of which the appellant may rightfully complain, and the decree is affirmed.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, and HOOKER, JJ., concur.

JENNINGS v. SAUNDERS CO.

(Supreme Court of Florida. Jan. 6, 1912.)

(Syllabus by the Court.)

EXECUTION (§ 288*)—SALE—PURCHASE OF CORPORATE STOCK—RIGHTS OF PURCHASER.

A purchaser of corporate stock at an execution sale succeeds to "all the rights and liabilities of the prior holder"; and, where the corporation holds the stock for the amount of the purchase price due thereon by the execution debtor, the corporation will not be required by mandamus to transfer the stock to the execution purchaser, before he has paid the amount of the purchase price due thereon.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 288.*]

In Banc. Error to Circuit Court, Escambia County; J. Emmett Wolfe, Judge.

Application by T. A. Jennings for an alternative writ of mandamus against the Saunders Company. From an order denying the writ, relator brings error. Affirmed.

Jones & Pasco, for plaintiff in error. E. C. Maxwell, for defendant in error.

PER CURIAM. An alternative writ of mandamus was issued by the circuit court for Escambia county, commanding the Saunders Company to transfer certain shares of its capital stock, or to show cause for not doing so.

The return shows that in the organization of the Saunders Company J. L. Sowell, Jr., subscribed to 75 shares of the stock at \$100 each, but the said Sowell has never paid the corporation for the stock, nor made any payment on account thereof, nor has the said stock ever been issued to him; that stock certificates Nos. 9 and 10 were filled in for 50 and 25 shares, respectively, of the stock designed to be issued to the said Sowell in accordance with his subscription and were signed by the president of the corporation, but were never signed by the secretary thereof, nor was the seal of the corporation attached thereto, nor were the said shares of stock ever issued or delivered to the said Sowell; that said Sowell delivered to the corporation his note, payable June 30, 1909, for \$750, due upon said subscription, and the note was held by the corporation for the purpose of issuing the stock, should payment therefor be made by Sowell in accordance with his subscription; that after the note became due and unpaid it was agreed between the corporation and Sowell that the subscription and note should be canceled and the stock returned, or the claim of Sowell surrendered; that the note was surrendered to Sowell; that at the time of the levy of the execution under which the relator claims the Saunders Company, by its secretary and treasurer, made return to the sheriff that nothing had been paid upon the subscription to the stock by Sowell, and that the company held the note of Sowell for the subscription price, and that T. A. Jennings, the relator, purchased the stock under the execution sale with full knowledge that no payment had been made on the stock; that respondent declined to issue the stock to relator, unless he paid for the same, which relator declined to do. The court overruled a demurrer to the return, and the relator, not desiring to further plead to the return, a judgment for the respondent was rendered, and a writ of error thereto was taken by the relator.

Even if Sowell was the owner of the legal or equitable title to the unissued shares of capital stock, the purchaser at the execution sale took his rights thereunder with full knowledge of and subject to the rights of the corporation to hold the stock until the

amount due thereon was paid. See section 2656 of the General Statutes of 1906. The relator has "all the rights and liabilities of the prior holder," and no other.

Judgment affirmed.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, COCKRELL, and HOCKER, JJ., concur.

GETER v. SIMMONS.

(Supreme Court of Florida, Division B. Dec. 19, 1911. Headnotes Filed Feb. 12, 1912.)

(Syllabus by the Court.)

EJECTMENT (§ 93*)—EVIDENCE—SUFFICIENCY.

On writ of error from a judgment in ejectment, the evidence examined, and found sufficient to sustain the verdict and judgment.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 93.*]

Error to Circuit Court, Duval County; R. M. Call, Judge.

Action between Wyatt J. Geter and Catherine Simmons. From the judgment, Geter brings error. Affirmed.

I. L. Purcell, for plaintiff in error. Cockrell & Cockrell, for defendant in error.

HOCKER, J. This cause was before this court in 1910, and the decision reversing the judgment below for lack of evidence to support it is found in 60 Fla. 67, 54 South. 91. There was afterwards another trial resulting in a verdict and judgment for defendant in error. The suit is in ejectment for the recovery of the west 20 feet of lot 5, in block 101, also the east 15 feet of lot 4 in block 101, situate in Jacksonville, Duval county, Fla. This judgment is here for review on writ of error. The sole question presented is on the sufficiency of the evidence to sustain the verdict. The underlying facts with reference to the legal ownership of the land embracing the land now in dispute are unusual and such as perhaps might naturally be expected from the lack of knowledge as to the rights in property and the general information peculiar to the older negro population of the Southern country. The case of Geter v. Simmons, reported in 57 Fla. 423, 49 South. 131, illustrates this remark.

We think it clear from the evidence in the instant case that Catherine Simmons has been an occupant of the land now in dispute for perhaps 40 or more years. She is an old-fashioned ignorant negro woman. While there is a conflict between her evidence and that of the plaintiff in error as to the character of her occupancy, there is evidence that she has for a great many years claimed the land upon which she has lived for so many years as her own; that she has from time to time rented rooms in the house on the land in which she now lives, has had exclusive

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

use of the house and lot, has planted trees, and kept a garden on it; and that Rhina Grant, from whom the plaintiff in error derives his legal title, admitted that this property belonged to the defendant in error Catherine Simmons. Rhina Grant was the sister-in-law of Catherine, and the relationship of the parties, the feelings which naturally grow out of the relationship, renders it particularly probable that Catherine should have been regarded as the owner of house and lot. A careful reading of the evidence creates this impression, and satisfies us that the judgment below was a correct one, which is hereby affirmed.

TAYLOR, P. J., and PARKHILL, J., concur.

WHITFIELD, C. J., and SHACKLEFORD, J., concur in the opinion.

COCKRELL, J., took no part, being disqualified.

JACKSON v. BULLOCK et al.

(Supreme Court of Florida. Jan. 6, 1912.)

(Syllabus by the Court.)

1. JUDGMENT (§ 713*)—CONCLUSIVENESS—IDENTITY OF CAUSES.

Where a second suit is not upon the same cause of action and between the same parties or their privies in interest as the first, a final adjudication in the first suit upon the merits is not conclusive in the second suit as to questions determined in the first suit. The test of the identity of causes of action, for the purpose of determining the question of res adjudicata, is the identity of the facts essential to the maintenance of the suits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1234-1241; Dec. Dig. § 713.*]

2. JUDGMENT (§ 715*)—CONCLUSIVENESS—IDENTITY OF ISSUES.

The facts necessary to show the right of the public in the use of a street are not the same as the facts that are necessary to show the right of an abutting owner, who takes or reserves title to land bounded by a street, to have the use of the street in connection with the rightful use of his abutting property, as against one who is bound by the granted or reserved rights of the abutting owner in the use of the street.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1244-1247; Dec. Dig. § 715.*]

3. JUDGMENT (§ 702*)—CONCLUSIVENESS—MATTERS CONCLUDED.

In a suit brought by the owner of land abutting on a street to enforce such owner's rights in the use of the street, a plea of res adjudicata that, in a suit between the town authorities and the person who obstructs the street, the street was adjudged to be not a public street, but private property, is not good as against the private rights of the abutting owner to the use of the streets in connection with his abutting property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1227; Dec. Dig. § 702.*]

In Banc. Appeal from Circuit Court, Hamilton County; Ira J. Carter, Judge.

Suit by Pliny Bullock and another against Minnie M. Jackson. From a decree for complainants, defendant appeals. Affirmed.

F. P. Cone, M. F. Horne, and Russell L. Frink, for appellant. A. B. & O. C. Small and S. S. Sandford, for appellees.

WHITFIELD, C. J. This appeal was taken by the defendant, Minnie M. Jackson, from an order overruling a plea of res adjudicata in a suit brought by an alleged abutting landowner to enjoin an alleged obstruction of a street, called Spring street, on the south side of complainants' land.

The bill of complaint in effect alleges that the predecessor in title of the complainants was the owner of land, and laid out and dedicated to public use streets upon the land; that the land was sold, reserving to the grantor certain portions of the lands, with stated privileges to the grantor and her heirs in the use of the mineral waters of a spring located on the land conveyed, and called White Sulphur Springs; that the purchasers of the property, under whom the defendant claims, took with a reservation of the complainants' property "as being bounded on the south by a street running eastward from the said White Sulphur Springs"; that at the time the defendant acquired an interest in the land over which said street passes the said land was charged with the use of a public street; that the defendant has erected a house in the street and constructed fences across the street, so as to prevent its use, as a street, by complainants in connection with property abutting on the street. An injunction and other relief is prayed.

The plea of the defendant sets up an adjudication in a prior suit between the defendant and the town authorities of the town of White Springs, in which the land is now located, wherein it is averred the street in question was adjudged to be not a public street, but the private property of the defendant here. This plea was overruled, and the defendant appealed therefrom.

[1] Where a second suit is not upon the same cause of action and between the same parties or their privies in interest as the first, a final adjudication in the first suit upon the merits is not conclusive in the second suit as to questions determined in the first suit. The test of the identity of causes of action, for the purpose of determining the question of res adjudicata, is the identity of the facts essential to the maintenance of the suits. *Pral v. Pral*, 58 Fla. 496, 50 South. 867, 28 L. R. A. (N. S.) 577.

[2] The facts necessary to show the right of the public in the use of a street are not the same as the facts that are necessary to show the right of an abutting owner, who takes or reserves title to land bounded by a

street, to have the use of the street in connection with the rightful use of his abutting property, as against one who is bound by the granted or reserved rights of the abutting owner in the use of the street.

[3] If, as alleged, the defendant's interest in the street is subject to the rights of the complainants to use it in connection with abutting property, as contemplated by the former owner, under whom both parties claim, the plea of *res adjudicata* is not good against the complainants, whose private rights in the use of the street as an abutting owner were not adjudicated in the prior suit. While the plea may be good as to some of the allegations of the bill of complaint, it is not good as to other allegations of a private right of the complainants that may state an equity.

The order appealed from is affirmed.

TAYLOR, SHACKLEFORD, COCKRELL,
and HOCKER, JJ., concur.

JACOBS v. SCHEURER.

(Supreme Court of Florida. Jan. 8, 1912.)

(*Syllabus by the Court.*)

1. JUDGMENT (§ 779*)—LIEN.

Under the statute a judgment may be a general lien on the defendant's real estate without reference to the record of his title, and land actually conveyed before the judgment is rendered is not affected by the lien of the judgment, where the liability on which the judgment was recovered had no relation to the property and accrued subsequent to its conveyance by the judgment debtor.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1342; Dec. Dig. § 779.*]

2. EXECUTION (§ 272*)—SALES—TITLE AND RIGHTS OF PURCHASER.

Where a conveyance of land is duly recorded before the levy of an execution on the land, the purchaser at the execution sale is, under the statute, not a purchaser of the land without notice of the prior conveyance, and takes subject thereto.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 781-788; Dec. Dig. § 272.*]

In Banc. Error to Circuit Court, Hillsborough County; J. B. Wall, Judge.

Action by John Scheurer against S. Jacobs. Judgment for plaintiff, and defendant brings error. Affirmed.

H. S. Hampton, for plaintiff in error. H. S. Phillips, for defendant in error.

WHITFIELD, C. J. In an action of ejectment, Scheurer recovered certain real estate, and Jacobs took a writ of error.

It appears that on May 19, 1886, John T. Lesley by deed conveyed to Scheurer the land in controversy with other lands; that in the record of the deed on August 9, 1886, the description of this land was omitted; that on June 3, 1889, a judgment was procured against Lesley for a liability that had

no relation to said property and accrued subsequent to May 19, 1886; that on March 16, 1907, the conveyance from Lesley to Scheurer was again recorded, showing that it covered the property in controversy; that an execution was issued on the judgment and levied on the land as the property of Lesley on June 2, 1907, and a sale of the land under the execution of July 1, 1907, was made to S. Jacobs; that Jacobs had no personal knowledge of the improper record of the conveyance at the execution sale; that Jacobs was in possession of the property when Scheurer brought ejectment therefor. The court rendered judgment for the plaintiff.

The defendant Jacobs argues here that, as the first record of the conveyance omitted the description of the land, the purchase of it by him at the execution sale, without actual notice of the conveyance, gave him a good title as against Scheurer.

[1] The judgment rendered against John T. Lesley was a general lien on his real estate without reference to the record of his title, and as he had, before the judgment was rendered, conveyed the land, it was not subject to the judgment against him when the liability on which the judgment was recovered "had no relation to the property and accrued subsequent to the" conveyance in 1886.

[2] The conveyance by Lesley to Scheurer made in 1886 was properly recorded on March 16, 1907, before the levy of the execution under which Jacobs purchased; and under the statute such record was notice to the purchaser at the execution sale on July 1, 1907, and therefore Jacobs is not a purchaser without notice, and consequently took his conveyance subject to the title of Scheurer, of which he had constructive notice.

The judgment is affirmed.

TAYLOR, SHACKLEFORD, COCKRELL,
and HOCKER, JJ., concur.

ACKER v. BELL.

(Supreme Court of Florida, Division B. Dec. 12, 1911. Headnotes Filed Feb. 6, 1912.)

(*Syllabus by the Court.*)

1. MILITIA (§ 8*)—ENLISTMENT OF MINOR.

Under the Constitution and statutes of Florida, a minor over the age of 18 years is bound by his enlistment into the military service of the state, even though the consent of his parents was not obtained for such enlistment.

[Ed. Note.—For other cases, see Militia, Cent. Dig. §§ 14-18; Dec. Dig. § 8.*]

(*Additional Syllabus by Editorial Staff.*)

2. MILITIA (§ 2*)—ENLISTMENT—"ORGANIZATION."

The word "organization" as used in Act Cong. May 27, 1908, c. 204, 35 Stat. 399 (U. S. Comp. St. Supp. 1909, p. 379), that the organi-

zation, armament, and discipline of the organized militia in the several states shall be the same as that which is now or may hereafter be prescribed for the regular army of the United States, does not relate to or include the enlistment of a soldier, but relates to the distribution of the personnel of the army or militia into units.

[Ed. Note.—For other cases, see *Militia*, Dec. Dig. § 2.*

For other definitions, see *Words and Phrases*, vol. 6, pp. 5053, 5054.]

Error to Circuit Court, Escambia County; J. Emmet Wolfe, Judge.

Petition of Willock L. Bell for the discharge of his son from the custody of Walter Acker, Jr. Writ granted, and respondent brings error. Reversed.

Emmett Wilson, for plaintiff in error.
Scott M. Loftin, for defendant in error.

PARKHILL, J. On the 2d day of August, 1911, the defendant in error filed his petition for a writ of habeas corpus, seeking the discharge of Bryant Merritt Bell, the son of petitioner, from the custody of Walter Acker, Jr., as the commanding officer of Company M First Regiment of the National Guard of Florida. The discharge of Bryant Merritt Bell was sought upon the ground that his enlistment as a private in said company was illegal and without authority of law, in that he enlisted on the 1st day of June, 1911, when 20 years old, being then and now under the age of 21 years, and without the consent and against the wishes of his father, and that his father is entitled to the custody of his said minor son.

The writ issued, and Acker, for return thereto, alleged that he is the captain commanding said Company M First Regiment, Florida National Guard, and that he only requires said Bryant Merritt Bell to appear for regular and special drills of said company, and that otherwise he has not restrained the liberty of the said Bell. A motion to quash the return was sustained, and Bryant Merritt Bell was discharged from custody of said Acker. Thereupon a writ of error was sued out to this court.

Under the assignments of error and pleadings herein, the only question presented is whether the consent in writing of parents or guardians of a minor over the age of 18 years is necessary for the valid enlistment of such minor in the National Guard of Florida.

According to the provisions of section 1 of article 14 of the Constitution of 1885 of this state, "all able-bodied male inhabitants of this state, between the ages of eighteen and forty-five years, that are citizens of the United States, or have declared their intention to become citizens thereof, shall constitute the militia of the state."

Section 670 of the General Statutes of 1906 of this state provides: "That portion of the

militia organized as a land force shall be known and designated as the National Guard of Florida, and shall be composed of able-bodied volunteers between eighteen and forty-five years of age. Every applicant for enlistment shall furnish satisfactory proof of good character, and shall, before taking the oath of enlistment, be subject to a physical examination conforming, as nearly as possible, to the requirements for enlistment in the United States army."

Like unto the statute of this state is the act of Congress entitled "An act to promote efficiency of the militia, and for other purposes"—Act Jan. 21, 1903, c. 193, 32 Stat. 775 (U. S. Comp. St. Supp. 1909, p. 377), as amended by Act May 27, 1908, c. 204, 35 Stat. 399 (U. S. Comp. St. Supp. 1909, p. 379), and as amended by Act April 10, 1910, c. 185, 36 Stat. 329—declaring in section 1:

"That the militia shall consist of every able-bodied male citizen of the respective states and territories and the District of Columbia * * * who is more than eighteen and less than forty-five years of age, and shall be divided into two classes: The organized militia, to be known as the National Guard of the state, territory or District of Columbia, or by such other designations as may be given them by the laws of the respective states or territories, the remainder to be known as the reserved militia," etc.

"An enlistment," said Mr. Justice Brewer, in the case of *In re Morrissey*, 137 U. S. 157, 11 Sup. Ct. 57 [34 L. Ed. 644], is not a contract only, but effects a change of status. It is not, therefore, like an ordinary contract, voidable by the infant. At common law an enlistment was not voidable either by the infant or by his parents or guardians. *King v. Inhabitants of Rotherford Greys*, 2 Dowl. & R. 628, text 634; s. c., 1 B. & C. 345, text 350; *King v. Inhabitants of Lytchet Matraverse*, 1 Man. & Ry. 25, text 31; s. c., 7 B. & C. 226, text 231; *Commonwealth v. Gamble*, 11 Serg. & R. (Pa.) 93; *United States v. Blakeney*, 44 Va. 405, text 411-413."

In *United States v. Blakeney*, supra, Baldwin, J., said: "Thus it will be seen that in England neither the common law nor the statute law protects minors from the effect of their contracts of enlistment; and no one has ever supposed that parents or guardians have the right to reclaim them from military service." He points out that the whole difficulty in the subject arises from the failure to discriminate between the public or national law and the municipal or domestic law. "It seems to me obvious," says he, "that the enlistment of a minor capable of bearing arms does not fall within the general rule of the municipal law in regard to the incapacity of infants, under the age of 21, to bind themselves by contract. Nor am I disposed to regard the enlistment as an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

exception to that rule. The rule, I think, has no application to the subject. The capacity of all citizens or subjects to bear arms to bind themselves to do so by voluntary enlistment is in itself a high rule of the public law to which the artificial rule of the municipal law forms no exception. The rule of the public law is subject to but two conditions, the ability of the party to carry arms, and his consent to do so; and these conditions may exist in as full force at the age of 18 as at the age of 21. * * * We know as a matter of fact that at the age of 18, a man is capable intellectually and physically of bearing arms; and that it is the military age recognized by the whole legislation of Congress, and of the state of Virginia, and of all the states of the Union, perhaps without exception."

In *Commonwealth v. Gamble*, 11 Serg. & R. (Pa.) 93, Gibson, C. J., put the case on the broad ground of public policy, which requires that a minor be at liberty to enter into a contract to serve the state, whenever such contract is not positively forbidden by the state itself, during which service parental authority over him is suspended, though not annihilated. This, he said, is the common law of England.

It is competent for the Legislature to declare by a new statute a minor to be of full age and capable of acting for himself at 18 instead of 21 years, and emancipate the child from the control of its parents. And so it seems clear that the statutes governing this case contemplate the military, not the civil, age of consent to obligatory engagements.

It will be observed that by the statutes above quoted no consent in writing or otherwise is required from parents or guardians, and no exception is given to minors who do not obtain such consent. As Congress and the Legislature have authorized the minor Bell in this case to engage in the service of this state by enlisting in the militia or National Guard without requiring the previous consent of his parent to the contract of enlistment, and no contention being made that such contract has not been fairly made with an infant of reasonable discretion, his contract will be deemed to have a semblance of benefit to him, and to be essential to the public welfare, and therefore binding to all intents and purposes upon him and his parent.

The enlistment of the minor, Bell, is not controlled by the provisions of section 1117 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 813), which is as follows: "No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardian; provided that such minor has such parent or guardian entitled to his custody or control."

[2] The minor, Bell, has not been enlisted in the military service of the United States. The provisions of section 1117 of the Revis-

ed Statutes of the United States are not made applicable to the enlistment of Bell by the act of Congress of May 27, 1908, that "the organization, argument and discipline of the organized militia in the several states shall be the same as that which is now or may hereafter be prescribed for the regular army of the United States," and the provisions of section 672 of the General Statutes of 1906 of Florida to the same effect. The word "organization," as used in said act, does not relate to or include the enlistment of a soldier. Organization relates to the distribution of the personnel of the army or militia, both commissioned and enlisted, into units. It provides for the distribution of the personnel into different arms and corps, such as infantry, cavalry, artillery, staff corps, medical corps, signal corps, etc., and the distribution of the personnel in each arm of the service corps into different units, such as divisions, brigades, companies, platoons, sections, squads, etc., and, further, into different ranks or grades such as generals, colonels, lieutenant colonels, majors, captains, lieutenants, sergeants, corporals, privates, etc. Enlistment is the contract of service that a soldier, as distinguished from the officer, enters into with the state or the United States. The enlistment may be different in each state, some for seven years, some for five years, some for three years, with varying provisions for enlistment, and yet the organization of all may be the same; but it is essential to the effectiveness and efficiency of the forces called into the national service that the organization thereof should be the same—one harmonious whole.

Neither are the provisions of section 1117 of the Revised Statutes of the United States made applicable to or controlling of the enlistment of Bell by the provision "that every officer and enlisted man of the militia who shall be called forth (by the President) shall be mustered for service without further enlistment, and without further medical examination," etc. Section 5, Act May 27, 1908, c. 204, 35 Stat. L. 399 (U. S. Comp. St. Supp. 1909, p. 379).

The provision that, when called into service by the President, no further enlistment is necessary, simply does away with the delay necessary to the physical examination or other prerequisites of a similar nature to the enlistment of the soldier, and has no reference to the necessity of the consent of his parents or guardian. In the provision of section 5, c. 204, quoted above, the words "mustered" and "enlistment" are both used. A soldier may be either enlisted or mustered into the military service of the United States. If a man be already enlisted in the National Guard of Florida, he may be called forth by the President without further enlistment, but he must be mustered into the service of the United States, but when he presents himself upon the call of the President to be mustered into the service of the United

States, and it appears that the enlisted man is a minor and the consent of his parents or guardian has not been given thereto, he shall not be mustered by the provisions of section 1117 of the Revised Statutes of the United States.

The enactment of section 1117 of the Revised Statutes of the United States, requiring the consent of the parents or guardians of the minor to his enlistment, shows the necessity for just such a provision, and that when the duty to serve is by law placed upon minors over 18 years of age, and they are allowed by law to enter into a contract of enlistment, and no right is reserved by the law specifically to the parents or guardians to object, then the right of the state to the services of such minors must be considered paramount to the control of the parents or guardians. And so we find that the Congress has sometimes changed the law in reference to requiring the consent of the parents or guardians, leaving that provision or reservation out of the statute when the exigencies of war arose, and restoring it upon the return of peace.

If the minor, Bell, had been mustered into the service of the United States, either the volunteer or regular army thereof, or upon the call of the President, he would be clearly entitled to his discharge, as was done in the case of *In re Burns* (C. C.) 87 Fed. 796. In that case Malachi G. Burns, being 19 years of age, enlisted in the Massachusetts militia as a private on May 4, 1898. On May 9, 1898, he was mustered into the service of the United States volunteer army; his parents not having consented thereto. The contention of counsel in the instant case that this conclusion would lead to the anomalous situation "of the parent of a minor being bound by his enlistment until the National Guard was called into the service of the United States, and then the parents or guardian could step in and secure the discharge of all minors who had not obtained the consent of their parents or guardian at a time above all others when it would be most embarrassing to the government," is fully answered by District Judge Lowell in the case of *In re Burns*, supra, as follows: "If it be said that this construction of the statutes which permits the parents or guardians of a minor to prevent his enlistment in the active military forces of the United States unduly hampers the National Government in the prosecution of the present war, it may be answered that the entire matter is within the control of Congress, which can require military service from any citizen of the United States, whatever his age, and without the consent of any one. If the Acts of 1864 and 1865, as amended by the Act of 1872, are unwise, they can be repealed or modified at once."

This young man, however, seeks his dis-

charge from the National Guard of Florida. We think it clear that, by the statutes of this state and the United States, the militia, known as the National Guard of the state, consists of able-bodied male citizens or volunteers between 18 and 45 years of age, and that, so long as it is not sought to muster them into the service of the United States, the contract of enlistment of a minor is not voidable either by the infant or by his parents or guardians. In *re Morrissey*, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644.

The legislation on this subject by the United States is simply this: That the militia known as the National Guard of the state consists of able-bodied male citizens, who are more than 18 and less than 45 years of age (32 U. S. Stats. 775), but, when under the age of 21 years, they shall not be mustered into the military service of the United States without the written consent of their parents or guardians. Section 1117, U. S. Rev. Stats. If the legislation is unwise, or if it unduly hampers the national government, it may be repealed or modified, as Judge Lowell said in the case of *In re Burns*, supra.

It seems, however, that this legislation is founded on reason, and has been enacted with deliberation. There is reason for requiring the consent of parents or guardians for enlistment of a minor in the regular or volunteer army of the United States that does not exist when he enlists in the militia of his own state. In the service of the United States the minor is taken entirely away from parental control, from civil life and labor, and becomes solely a soldier for a protracted period of time, exposed to the hardships and dangers of actual service. In the militia he remains at home, devoting practically all his time to civil occupations, and only doing military service in his home state, under local officers and for short periods of time, and, when the exigency calling him into active service passes, he returns to his home and civil life at once. Service in the militia is of a personal benefit to the minor, too, as it gives him the training that will fit him for service in the time of war, when the national government may force him into its service, and he will be the better able to take care of himself and find it easier to become an officer and enjoy the privileges and opportunities attendant thereon. In this way, too, the state is enabled to train its youth for military life at a time when the ability to learn and physical development is easiest.

The judgment discharging the minor, Bryant Merritt Bell, from custody, is erroneous, and is hereby reversed.

TAYLOR and HOCKER, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

INTERNATIONAL KAOLIN CO. et al. v. VAUSE.

(Supreme Court of Florida. Jan. 6, 1912.)

(*Syllabus by the Court.*)

1. TRIAL (§ 45*)—RECEPTION OF EVIDENCE—OFFER OF PROOF.

In a suit to enforce a mortgage, the defendant calling for proof, it is not enough that the bonds be physically before the master. They must be offered or received in evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 110-114; Dec. Dig. § 45.*]

2. TRIAL (§ 411*)—RECEPTION OF EVIDENCE—OBJECTIONS AND WAIVER.

Objections to evidence are waived by failure to have a ruling thereon, but not a failure to offer evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 411.*]

3. APPEAL AND ERROR (§ 926*)—REVIEW—PRESUMPTIONS.

Where bonds are properly in evidence as to some parties, the fact that they are copied into the transcript raises no conclusive presumption that they were properly used in evidence as to all parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3735-3747; Dec. Dig. § 926.*]

In Banc. Appeal from Circuit Court, Lake County; W. S. Bullock, Judge.

Bill by Francis Vause, trustee, against the International Kaolin Company and others. From a decree for complainant, defendants appeal. Reversed.

See, also, 60 Fla. 324, 53 South. 644.

Hocker & Duval, for appellants. Thomas E. Wilson, for appellee.

COCKRELL, J. From the former appeal in this case, 55 Fla. 641, 46 South. 3, and the kindred case of Florida Clay Co. v. Vause, 57 Fla. 407, 49 South. 35, will be found much of the history of the case as it now stands.

[1] Pending this foreclosure of mortgage, and after much evidence had been taken, the holder of the legal title was made a party. It filed an answer in effect a general denial calling for proof, which included, of course, proof of the execution of the bonds secured by the mortgage. This defendant, though notified of the hearing before the master, was not present, and the taking of the evidence proceeded ex parte.

The report of the master is before us, and, while we can glean from that report the physical presence of these bonds before him at the time, it does not appear that they were at any time offered or received in evidence. The absence of the party cannot place him in a worse position than if its counsel were silently present, and, as there was no proffer of the bonds, there was no dereliction in failing to interpose an objection to their introduction in evidence.

[2, 3] Under rule 18 (37 South. viii) objections to evidence not ruled upon by the

chancellor before or at the final hearing are considered by this court as waived, but this rule does not cover an entire failure to proffer evidence. Nor does the further provision of the rule that every matter purporting to be evidence found copied by the clerk into the record will be presumed to have been used in evidence in the court below help the appellee. It appears affirmatively that the bonds were filed in evidence before the holder of the legal title was made a party, and was therefore before the court as to all former parties. We have before us the master's report which from its silence shows affirmatively that the bonds were not reoffered, and the decree based thereon in no wise indicates that other evidence was taken.

We regret that we are compelled to reverse the decree in this prolonged litigation, but the failure to reoffer the bonds before the master deprived the holder of a substantial right that the rules of law permit him to assert.

If the new defendant desires a different master, it should apply to the circuit court therefor within ten days after the mandate is sent down.

Decree reversed.

WHITFIELD, C. J., and TAYLOR and SHACKLEFORD, JJ., concur.

HOCKER, J., did not participate.

CITY OF HAZLEHURST v. BYRD.
(No. 15,594.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

CRIMINAL LAW (§ 562*)—TRIAL—WEIGHT OF EVIDENCE.

One cannot be convicted of an offense upon evidence which merely raises a suspicion of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1263; Dec. Dig. § 562.*]

Appeal from Circuit Court, Copiah County; D. M. Miller, Judge.

"To be officially reported."

Sam Byrd was convicted of unlawfully selling intoxicants, and he appealed. Reversed and remanded.

W. B. Miller, for appellant. Claude Clayton, Asst. Atty. Gen., for appellee.

McLAIN, C. Sam Byrd was convicted in the city court of Hazlehurst upon an affidavit charging that he "did then and there willfully and unlawfully have in his possession intoxicating liquors, to wit, whisky, with intention or for the purpose of selling same, in violation of the ordinance of said city." Upon this charge he was tried, convicted, and sentenced "to pay a fine of \$100 and all costs of prosecution, and to stand committed until fine and costs are paid." From this judg-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

ment he appealed to the circuit court, and was there convicted, and the court pronounced this judgment: "For such his offense of having whisky for sale he be fined the sum of \$100 and sentenced to the county jail for the period of 30 days, and all costs of this prosecution be taxed, and that he stand committed until said fine and costs are paid." From this judgment he appeals to this court.

After a thorough consideration of this record, we are convinced that under the facts of this case, and the well-settled rules of criminal law, there is nothing in this record showing that the possession of this liquor by the defendant was with any intent to violate the law as defined by Code of 1906, § 1797, as amended by Laws of 1908, c. 114. The facts may raise a suspicion; "but the wisdom of the law is such that it refuses to allow any person to be punished for a crime, however strong and well-founded may be the suspicion." *There must be proof.* The proof falls far short of showing guilt of defendant. In support of this view we cite the cases of *Stansberry v. State*, 53 South. 783, and *McComb City v. Hill*, 56 South. 346.

In our opinion, the case should be reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment is reversed, and the cause remanded.

WILLOUGHBY v. STATE. (No. 15,322.)
(Supreme Court of Mississippi. Feb. 12, 1912.)
PERJURY (§ 29*)—INDICTMENT—VARIANCE.

An indictment for perjury charged that defendant, while a witness for the state in a prosecution for violation of the liquor laws, testified that he had bought intoxicating liquor of accused, and that upon an appeal from a conviction he changed his testimony, and testified that he did not buy intoxicating liquors from the accused, and it appeared that his testimony on the appeal was that he did not remember; that he could not recall; that he might, or he might not. *Held*, that while it was not necessary for the evidence to be in the exact language used in the indictment, and while the indictment would have sustained a conviction had it alleged substantially the testimony on appeal, and averred that in fact the witness did remember having bought intoxicating liquor and that he did recall having done so, yet in this case there was a fatal variance between the allegations and the proof.

[Ed. Note.—For other cases, see *Perjury*, Cent. Dig. §§ 97-106; Dec. Dig. § 29.*]

Appeal from Circuit Court, Lincoln County; D. M. Miller, Judge.

Lee Willoughby was convicted of perjury, and he appeals. Reversed and remanded.

A. A. Cohn, for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

McLEAN, J. The appellant was a witness in the prosecution, before the mayor of

Brookhaven, of one Carrie Powell for violating the liquor laws. He then and there testified that he had purchased from Carrie Powell two bottles of beer, for which he paid 50 cents. Carrie was convicted. From this conviction she appealed to the circuit court, and upon the trial in that court the appellant was again placed upon the witness stand, and instead of testifying, as he did before the mayor's court, that he bought two bottles of beer, said that "he did not remember whether he bought any beer from Carrie Powell or not; that he could not recollect; that at the time he testified before the mayor against Carrie Powell he was under the influence of whisky and was drunk." Carrie Powell was acquitted because of insufficient evidence; the prosecution relying alone upon the testimony of this young man. After this the grand jury indicted the appellant for perjury. The indictment charged the appellant with having testified before the mayor of Brookhaven that "he, the said Willoughby, had bought intoxicating liquors from the said Carrie Powell on or about the above-mentioned date," and, further, that said Carrie Powell was convicted before the mayor, from this conviction she appealed to the circuit court, and, when said cause came on to be tried in the circuit court of Lincoln county, "the said Willoughby did then and there appear and tender himself as a witness on behalf of the city of Brookhaven, and was received to give evidence on behalf of the said city of Brookhaven, and did then and there testify," etc., "and thereupon the said Willoughby, desiring and intending to cause and procure a verdict to pass for the said Carrie Powell and acquit her of said charge, changed his testimony from what he had testified to in the mayor's court aforesaid, and then and there, to wit, before the circuit court, swore and gave evidence as follows: That he, the said Willoughby, did not buy intoxicating liquors from the said Carrie Powell on or about the 16th day of April, 1910, as aforesaid, whereas in truth and in fact he had sworn that she had sold him intoxicating liquors," etc.

The state, in order to support the allegations of the indictment, introduced evidence which clearly supported the allegations of the indictment as to the testimony of Willoughby upon the trial before the mayor of Brookhaven, and the evidence was also clear and positive that the appellant, when testifying before the circuit court, said that "he didn't remember whether he bought any beer from Carrie Powell or not; that he could not recollect—that he might, or he might not." The counsel for the appellant seasonably and timely objected to this evidence, upon the ground that there was a fatal variance between the evidence and the allegations in the indictment. The objections were overruled, and exceptions taken. The court

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

gave for the state the following instruction: "The court instructs the jury, for the state, that if you believe from the evidence in this case beyond a reasonable doubt that Lee Willoughby bought intoxicating liquors from Carrie Powell on or about April 16, 1910, in the city of Brookhaven, and afterwards appeared in the circuit court as a witness for the city in the trial of the said case of the city of Brookhaven against Carrie Powell on an affidavit charging the said Carrie Powell with the unlawful sale of intoxicating liquors, and knowingly, willfully, falsely, corruptly, and feloniously testified and swore that he did not buy liquors from the said Carrie Powell, in substance and effect, with the felonious and corrupt intent to cause a verdict of not guilty to pass for the said Carrie Powell, then he is guilty and you should so find." This was the only instruction given for the state. The jury returned a verdict of guilty. Thereupon the defendant was sentenced to the penitentiary.

We have carefully searched the books in order to ascertain if any authority could be found to support this conviction. We have failed to find any. The Assistant Attorney General, who ably, in both printed and oral argument, represented the state, has failed to find any authority or to show any sufficient reason why the conviction should stand. There is a manifest variance between the allegations in the indictment and the evidence in support thereof. One of the fundamental rules of the criminal law is that the indictment must with sufficient certainty point out to the defendant in a perjury case substantially the words which are alleged to have been spoken. It is not necessary for the evidence to be in the exact words of the language used in the indictment; but the language used in the indictment and that proven upon the trial must be substantially the same. Bishop's New Criminal Procedure, vol. 2, § 916, is as follows: "In stating the substance and effect, reasonable fullness and particularity are required; for, within a distinction already mentioned, they pertain, not to inducement, but to the gist of the offense. It is not adequate to say simply that the defendant swore falsely concerning a thing. The direct meaning of what is said must be given. *Nor will any setting out which varies the sense of what was sworn to be accepted as its substance or effect.* Yet a departure in mere form is immaterial." In Chitty's Criminal Law, p. 213, it is said: "These averments or assignments of perjury, as they are technically termed, should be specific and distinct, in order that the defendant may have notice of what he is to come prepared to defend." See, also, Roscoe's Criminal Evidence, p. 684.

It is manifest that an indictment for perjury charging a person with having sworn that "he did not buy certain things," where

the evidence shows that the testimony was "that he didn't remember whether he bought or not—that he couldn't recollect," is a fatal variance. In order for the conviction to be good under the facts of this case, the indictment should have alleged substantially what the witness testified to in the circuit court, coupled with an averment that in truth and in fact the witness did remember of having bought beer, that he did recollect of having done so, or words to this effect. *State v. Coyne*, 214 Mo. 344, 114 S. W. 2d, 21 L. R. A. (N. S.) 993.

Reversed and remanded.

HELENA-GLENDALE FERRY CO. v. STATE. (No. 15,473.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

COMMERCE (§ 63*)—INTERSTATE COMMERCE—PRIVILEGE TAX.

A tax on the privilege of operating a ferry, where the ferry company is exclusively engaged in ferrying passengers across a river from one state to another, is a burden on interstate commerce, which a state may not impose.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 103-122; Dec. Dig. § 63.*]

Appeal from Circuit Court, Tunica County; Sam C. Cook, Judge.

The Helena-Glendale Ferry Company was convicted of operating a ferry without payment of the privilege tax required by statute, and appeals. Reversed and remanded.

J. T. Lowe and W. R. Satterfield, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

MAYES, C. J. Section 3814 of the Code of 1906 provides that "each steam ferry operated in the state, in whole or in part, on any stream," shall pay a privilege tax of \$150. The Helena-Glendale Steam Ferry Company is owned by Don G. Owen and H. C. Murnan as partners. The domicile of the partnership, its members, and the ferryboat, is at Helena, Phillips county, Ark. In October, 1910, the owners were indicted in Tunica county, Miss., for exercising the privilege of operating a steam ferry in this state without paying the privilege tax required by the statute above quoted. By agreement a trial was had before the judge, sitting as judge and jury, on an agreed statement of facts, and the court found the defendants guilty and fined them in the sum of \$750 and costs, from which conviction an appeal is prosecuted to this court.

In addition to the facts already stated, the agreed facts show that the ferry company at the time of the indictment was engaged in ferrying passengers and freight for hire across the Mississippi river from the city of Helena, Ark., to the landing known as Glen-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dale, in Tunica county. It is further shown that the ferry company owned the landing at Glendale, and makes regular trips from Helena to Glendale; that the sole business engaged in by the ferry company consists in ferrying passengers and freight from Helena, Ark., to Glendale, Miss., and back, Glendale being just opposite Helena and directly across the river. The ferryboat never stops at the Mississippi side, except to load and unload freight and passengers. In other words, all the business engaged in by this ferry company is simply to come from the Arkansas side to the Mississippi side, and return from the Mississippi side to the Arkansas side. It makes just this one landing in Mississippi, and is exclusively engaged in ferrying passengers and freight from Mississippi to Arkansas and back. The question is: Has the state of Mississippi the right to levy this tax?

An examination of the case of Gloucester Ferry Company v. Commonwealth of Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158, seems to settle this question. In that case the United States Supreme Court expressly holds that a state has no power to levy any tax so as to impose any burden on interstate commerce. The court says: "It matters not that the transportation is made in ferryboats which pass between the states every hour of the day. The means of transportation of passengers and freight between the states does not change the character of the business as one of commerce, nor does the time within which the distance between the states may be traversed. Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of passengers and property and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed—that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties or other exactions. * * * Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation. Its nonaction is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products against those of other states. It was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regula-

tion, that the power to regulate commerce with foreign nations and among the states was vested in Congress."

The court further says that if such a tax—speaking of a tax imposed upon the capital of all corporations engaged in foreign or interstate commerce for the use of wharves, etc.—"can be levied at all, its amount will rest in the discretion of the state. It is idle to say that the interests of the state would prevent oppressive taxation. Those engaged in foreign and interstate commerce are not bound to trust to its moderation in that respect. They require security. And they may rely on the power of Congress to prevent any interference by the state until the act of commerce—the transportation of passengers and freight—is completed. The only interference of the state with the landing and receiving of passengers and freight which is permissible is confined to such measures as will prevent confusion among the vessels, and collision between them, insure the safety and convenience, and facilitate the discharge or receipt, of their passengers and freight, which falls under the general head of port regulations," etc.

While it is true that this case is speaking of a tax imposed upon the capital of the corporation engaged in interstate commerce, while the tax under consideration is a mere privilege tax, the principle involved in each case is the same. The court holds that, when one is engaged in interstate commerce exclusively, *no burdens* can be imposed upon it. The harm resulting to interstate traffic by allowing any state to impose a privilege tax is just the same in effect as if the tax imposed is a property tax. It is imposing a burden by taxation, by whatever name the tax may be called, or by whatever method it may be imposed. A state might impose so great a privilege tax as to prohibit a ferryboat from landing altogether. So it is said by the court in the above case: "It is idle to say that the interests of the state would prevent such tax, because those engaged in interstate commerce cannot be compelled to trust to its moderation in that respect. They require security. And they may rely on the power of Congress to prevent any such oppressive taxation on the part of the state."

In the above case the Supreme Court of the United States holds that the only burdens which the state may impose upon interstate commerce are those known as "harbor duties or port charges exacted by the state from vessels in its harbors, or from their owners, for other than sanitary purposes are sustained. We say for other than sanitary purposes, for the power to prescribe regulations to protect the health of the community and prevent the spread of disease is incident to all local municipal authority, however much such regulations may interfere with the movements of commerce. But independently of such measures the state may prescribe regulations for the government of

ELLIS v. STATE. (No. 15,582.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

Appeal from Circuit Court, Winston County; G. A. McLean, Judge.

G. F. Ellis was convicted of assault and battery, and appeals. Affirmed.

Rodgers & Brantley, for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.**McINTYRE v. STATE.** (No. 15,644.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

Appeal from Circuit Court, Yalobusha County; N. A. Taylor, Judge.

Ned McIntyre was convicted of assault and battery, with intent to kill, and appeals. Affirmed.

Creekmore & Stone, for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.**SMITH v. STATE.** (No. 15,455.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

Appeal from Circuit Court, Yazoo County; W. A. Henry, Judge.

Anna Smith was convicted of vagrancy, and appeals. Affirmed.

Holmes & Holmes, for appellant. Jack Thompson, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.**CADNEY v. STATE.** (No. 15,513.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

Appeal from Circuit Court, Claiborne County; H. C. Mounger, Judge.

Mat Cadney was convicted of petit larceny, and appeals. Affirmed.

R. B. Anderson, for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.**DAVENPORT v. STATE.** (No. 15,621.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

Appeal from Circuit Court, Newton County; C. L. Dobbs, Judge.

Mose Davenport was convicted of selling liquor, and appeals. Affirmed.

Jesse D. Jones, for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.**GULF & S. I. R. CO. v. WESTERFIELD.** (No. 15,387.)

(Supreme Court of Mississippi. Jan. 31, 1912.)

Appeal from Circuit Court, Marion County; A. E. Weathersby, Judge.

Action by George Westerfield against the

Gulf & Ship Island Railroad Company. Dismissed.

B. E. Eaton and May & Sanders, for appellant.

PER CURIAM. Appeal dismissed.**LANDAU v. H. STRAUSS, Inc.** (No. 15,438.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Action between A. Landau and H. Strauss, Incorporated. From the judgment, Landau appeals. Affirmed.

Mayes & Longstreet and F. M. Peyton, for appellant. Flowers, Fletcher & Whitfield, for appellee.

PER CURIAM. Affirmed.**NEUMEYER & DIMOND v. WILLIAMS.**

(No. 15,446.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action between Neumeyer & Dimond and E. Cliff Williams. From the judgment, Neumeyer & Dimond appeal. Affirmed.

F. V. Brahan, for appellants. Baskin & Wilbourn, for appellee.

PER CURIAM. Affirmed.**STATE, to Use of LAMPTON, v. EDWARDS et al.** (No. 15,359.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

Appeal from Chancery Court, Hinds County; G. G. Lyell, Chancellor.

Action by the State, to the use of Thad B. Lampton, against G. R. Edwards and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Geo. Butler and F. M. West, for appellant. Potter & Hindman, for appellees.

PER CURIAM. Affirmed.**ROE v. STATE.** (No. 15,343.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

Appeal from Circuit Court, Webster County; G. A. McLean, Judge.

Rece Roe was convicted of an attempt to rape, and appeals. Affirmed.

Dunn, Gould & McKeigney, for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.**McCOY v. STATE.** (No. 15,477.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Az McCoy was convicted of an illegal sale of liquor, and appeals. Affirmed.

Powell & Thompson, for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

RIST v. STATE. (No. 15,524.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

Appeal from Circuit Court, Warren County; H. C. Mounger, Judge.

W. H. Rist was convicted of obtaining money by false pretenses, and appeals. **Affirmed.**

W. E. Mollison, for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

PER CURIAM. **Affirmed.****CHEEKS v. STATE.** (No. 15,412.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Jack Cheeks was convicted of burglary, and appeals. **Affirmed.**

Powell & Thompson, for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

PER CURIAM. **Affirmed.****MOSES v. STATE.** (No. 15,653.)

(Supreme Court of Mississippi. Jan. 31, 1912.)

Appeal from Circuit Court, Lincoln County; D. M. Miller, Judge.

Charles Moses was convicted of crime, and appeals. **Dismissed.****PER CURIAM.** Appeal dismissed.

(129 La.)

No. 18,853.

A. M. BLODGETT CONST. CO. v. CHENEY LUMBER CO., Limited.

(Supreme Court of Louisiana. Jan. 2, 1912.)

*(Syllabus by the Court.)***1. CONTRACTS (§ 295*)—PERFORMANCE—SUFFICIENCY.**

Where a contract for the construction of a dam is silent as to whether the wing walls shall be straight or perpendicular or at an angle, and it is shown that both kinds are in use, though the construction at an angle is preferable, the contractor does not breach his contract by furnishing perpendicular walls.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1353; Dec. Dig. § 295.*]

2. CONTRACTS (§ 305*)—EQUITABLE ESTOPPEL—GROUNDS—PERFORMANCE OF CONTRACT.

When the owner stands by without objection, and sees the contractor constructing perpendicular walls and accepts the work after completion, he will not be heard several months afterwards, and after the walls have been in use, to say that the construction of perpendicular walls is not a fulfillment of the contract by the builder.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1467-1475; Dec. Dig. § 305.*]

3. CONTRACTS (§ 322*)—ACTIONS FOR BREACH—BURDEN OF PROOF.

Since the defendant seeks to escape from the obligation of his contract by alleging that the work sued for was defective, he must prove his allegation, and the proof does not sustain his contention, for it is most unlikely that a

small quantity of water passing beneath the gate, due to the absence of grooves, which plaintiff should have furnished, caused the destruction of the whole work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1615-1639; Dec. Dig. § 322.*]

4. CONTRACTS (§ 312*)—PERFORMANCE—SUFFICIENCY.

The evidence tends to prove that the destruction of the dam was due to an insufficient foundation, owing to the nature of the soil where the dam was located, and, as this place was chosen by both parties, the defendant cannot now hold the plaintiff responsible for the selection of this site.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 312.*]

5. DAMAGES (§ 19*)—ELEMENTS—PROXIMATE CAUSE OF INJURY.

Where a foundation gives way because of the nature of the soil beneath, and causes the walls and works above to fall, the proximate cause of the damage must be held to be the nature of the soil beneath the foundation, and not the construction of the work above.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 19.*]

Appeal from Sixth District Court, Parish of Ouachita; J. P. Madison, Judge.

Action by the A. M. Blodgett Construction Company against the Cheney Lumber Company, Limited. From a judgment for plaintiff, defendant appeals. **Affirmed.**

Clarke & Sholars, for appellant. Stubbs, Russell & Theus, for appellee.

BREAUX, C. J. This is an action brought to recover the sum of \$2,983.34, less credits aggregating the sum stated in the petition and a credit of a small amount allowed by the judge of the district court as the price for constructing a concrete dam by plaintiff on defendant's land, according to contract.

Plaintiff, according to the terms of this contract, bound itself to furnish the contractor all labor and material except cement, gravel, and timber and filling, which defendant promised to furnish, the dam, including wing walls, to measure 189 feet long, 14 feet high, 10 feet wide at the bottom, and 3 at the top as per sketch.

The contract contains stipulations about gates for the concrete, also about the filling, spiking, a spilling 60 feet wide, 7 feet high. Specifications are given for devices for raising and lowering gates by means of lever racks and poll which plaintiff was to furnish. Plaintiff claims to have completed the work according to contract.

The defendant denies that plaintiff constructed the works in a complete workmanlike manner; states that the walls before mentioned were to have been built at a decided angle to the dam and floodgates according to plans and specifications by constructing straight instead of walls at an angle. The pressure on the walls was greater than it should have been, and thereby endangered the whole barrier across the stream

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

on defendant's land known as the "Chevriere" stream; that the purpose in having the dam constructed was to regulate and control the stage waters of defendant's cypress brake, containing about 4,000 acres of land, which is above a watershed just above its lumber manufacturing plant, and, while controlling those waters, allow sufficient to flow also to maintain its reservoir on the south side of the dam; that the floodgates did not answer the purpose. They could not be easily handled. They were too heavy. Defendant complained of certain tie beams.

The defense sets up a number of grounds in support of the complaint that the contract had not been completed according to plans and specifications.

Plaintiff's suit was filed in May, 1909. After issues joined, the cause was heard, and a number of witnesses were examined. The court was about to decide when an agreement was entered into by counsel to reopen the case for the introduction of further testimony.

First. Whether or not there was a groove in the concrete base for the floodgates of the dam.

Second. Whether or not the polls, racks, and pinions (comprising the raising and lowering device) were installed on the gates in accordance with the contract, and, if not, the cost of installing same.

A short time thereafter the dam was washed away and destroyed, and thereupon the defendant filed an appearance in which it represented that the dam had broken, and had become entirely useless; that seven of the floodgates were wrenched loose and entirely destroyed; and that the remaining three were useless.

With the court's leave, an amended answer was thereafter filed, trial of the case resumed and other evidence was heard.

The court decided in favor of plaintiff, save as to one or two small items.

The defendant appealed.

The result is that there is evidence before and after the destruction of the dam, and the conflict in the testimony of the witnesses is as great after the destruction as it was before. The contradiction is irreconcilable, as is nearly always true when expert testimony is heard to prove the facts at issue.

[1] The want of angles in the walls gives rise to the first proposition for discussion. Those side walls are of some importance, and are even indispensable. They were unquestionably straight. Had they been at an angle, they would have been more efficient in resisting the weight of the water that rested against the dam and these walls. The waters flowing against a direct wall come in contact with it in a perpendicular line, while in an oblique line the impact is less pronounced. The testimony does not absolutely condemn straight walls as adjuncts to a dam, although a decided preference is expressed for the wing walls at an angle.

This might be a far more serious objection were it not that the contract is silent in regard to the wing walls as to whether they were to be straight or at an angle. The sketch which is referred to in the contract shows that straight lines were to be followed in constructing these walls.

[2] The representative of the defendant saw the wing walls while they were in the process of construction, and did not offer the least objection. After the completion of the work, he accepted it, and it was in use some time before fault was urged.

Finally, it was not at all proven that the ruin of the work was due to the defectiveness in these walls. The break, as we infer from the testimony, began at or near the center, and not on either of the sides.

[3] The groove in which the gates of the dam were to be set was not made on the flooring on which these gates were to rest, but the gates rested on the concrete foundation. The objection of defendant is that it was not water-tight as it should have been had the groove not been omitted.

They were provided for in the contract, and doubtless should have been made. The testimony does not sustain the view that the absence of these grooves was such a defect as to warrant us in decreeing that the whole work was worthless. It is not likely that a small quantity of water running at the bottom of a heavy weighted gate on a smooth concrete surface will cause a whole dam to break. That is the weight of the testimony on the subject, with which we find no difficulty in agreeing.

Mr. Parker, a civil engineer employed by plaintiff, testified (and in this he does not seem to meet with reasonable contradiction) that:

"The groove was not shown on the original sketch, but in making a more complete plan it was shown, as it would to some extent increase the water tightness."

The weight of the testimony does not show that it endangered the whole or any part of the work.

[4] The soil foundation on which the dam rested was not sufficiently firm. This is another point of difference between plaintiff and defendant. The contention on the part of the latter is that the faulty foundation was the cause of the dam giving way.

The following is part of an entry appearing in the transcript:

"Defendant formally abandons the allegation that the concrete foundation was not built or constructed to the depth required or provided for in the contract, plans, and specifications."

This does away with the objection to the foundation to the extent specially stated, and leaves plaintiff with little to complain about the concrete foundation.

[5] If the dam gave way because of the action of the water below the concrete, there is evidence—and that of a witness of plain-

tiff—that the wreckage and destruction of this foundation was due to the “utter insufficiency of the soil foundation, on which the works rested; and, second, the failure of the Blodgett Company to construct the works according to contract.”

If the foundation was unsafe, if it was quicksand or blue mud, kind of soapstone, selected by all parties concerned, the works as performed by the Blodgett Company do not appear to have been the cause. The bottom having given way, the top had to fall, and the fall cannot, in the presence of the testimony, be charged to those who constructed the top under the facts and circumstances.

The manager of the defendant was present at times during the construction of the work. On one occasion, although at first objecting, he said that he was satisfied and gave approval to what had been done.

Judgment affirmed.

(129 La.)

Nos. 18,775, 18,927.

GATES v. OTIS.

(Supreme Court of Louisiana. Jan. 15, 1912.
Rehearing Denied Feb. 12, 1912.)

(Syllabus by the Court.)

ATTACHMENT (§ 25*)—BILLS AND NOTES (§ 129*)—NONRESIDENCE—ACTION ON NOTE.

Defendant's domicile in the state of Louisiana was not changed by his temporary residence for business purposes in the state of Texas; and the attachment sued out against the defendant as a nonresident was properly dissolved. The balance due on the notes in suit, after the sale and credit of the collateral, became exigible, under the terms of the contract, at the option of the plaintiff, on the failure of the defendant to furnish further security as stipulated in the contract.

Evidence fails to sustain the defense of want and failure of consideration.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 61-72; Dec. Dig. § 25; Bills and Notes, Dec. Dig. § 129.*]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Action by John W. Gates against C. D. Otis. Judgment dissolving writ, and plaintiff appeals. Judgment on the merits for plaintiff, and defendant appeals. Affirmed on both appeals.

J. W. Williams and McCoy, Moss & Knox, for plaintiff. Robert R. Stone, for defendant.

LAND, J. On December 22, 1910, the plaintiff sued the defendant as a nonresident of the state of Louisiana, and caused a writ of attachment to issue, under which two local banks were garnished.

Defendant moved to dissolve the attachment, with damages, on the ground that he

was a resident and citizen of Lake Charles, Calcasieu parish, La.; and that the affidavit that the respondent was a nonresident was false and untrue to the knowledge of the plaintiff. The motion was tried, and judgment was rendered dissolving the writ of attachment, at the cost of the plaintiff, who thereupon appealed.

Prior to January, 1910, the defendant, with his family, had resided for a number of years in the city of Lake Charles, La., where he conducted a nursery business in the name of his wife. In December, 1909, negotiations began between the plaintiff, a well-known capitalist, and the defendant, looking to the establishment of a large nursery enterprise near Port Arthur, Tex. These negotiations culminated in the formation, in April, 1910, of a Texas corporation, the Port Arthur Nursery Company, capitalized at \$40,000, represented by 400 shares of the par value of \$100 each. In the meantime, under a verbal understanding with the plaintiff, the defendant proceeded to Port Arthur and went to work as general manager at a salary of \$150 per month. On the organization of the company, defendant received 180 shares of stock, which was paid in by the plaintiff, who took the nine notes of the defendant for \$2,000 each, dated December 31, 1909, maturing in five years, and bearing 6 per cent. per annum interest from date. These notes were secured by a pledge of the 180 shares of stock issued to the defendant. Defendant was employed by the company as general manager for the year 1910, and his duties as such required him to live nearly all the time on the premises of the nursery company near Port Arthur. Defendant's family remained during the year at his usual place of residence in Lake Charles. On December 21, 1910, the defendant sold out his stock in the corporation, and dissolved his connection with the company. On the next morning, his property was attached in Lake Charles. It is true that in December, 1909, and through most of the year 1910, the defendant manifested an intention of becoming a resident of the state of Texas; but this intention was never carried into effect, and was abandoned before the institution of this suit. On September 29, 1910, the defendant wired the plaintiff that the situation was unbearable, and requested him to purchase his shares of stock. Later the defendant agreed to sell at \$90 per share, and the sale was made, and the proceeds were credited on the notes sued on as of date December 21, 1910. Defendant lived on the premises of the nursery company, because he was the manager of that corporation, and his continued sojourn there was dependent on the tenure of his employment. Had the enterprise proved successful, and the defendant had been retained as general manager.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

he in all probability would have fixed his permanent residence in the state of Texas. Defendant, as it was, maintained his home in the city of Lake Charles during the year 1910, and did not dispose of his business or property in the state of Louisiana. He also paid his poll taxes for the years 1909 and 1910 as a resident of the parish of Calcasieu.

Defendant's residence in Texas was temporary and uncertain in its nature, and lacked the animus manendi necessary to constitute a domicile or habitual residence. C. C. 38. The Code makes a distinction between residence and domicile; the latter being called "principal establishment," or "habitual residence." One may have several residences, but can have only one domicile. The Code of Practice provides that a defendant must be sued in the parish of his domicile.

On December 21, 1910, the defendant sold his stock in the nursery company and resigned his office as general manager. He thereupon ceased to have even a *business* residence in the state of Texas. The attachment was sued out the next day.

We are of opinion that the writ of attachment was properly dissolved.

Defendant excepted to the action as premature, and demurred to the petition. The exceptions were referred to and tried with the merits. The defendant then answered, admitting his signature to the notes, but pleading want of consideration. For further answer, the defendant averred that the plaintiff contributed the whole capital stock of the Port Arthur Nursery Company, and had certificates issued to dummy stockholders, in violation of the laws of the state of Texas; that defendant subscribed to 180 shares of the capital stock of said corporation, under an agreement with plaintiff, as agent and promoter, that the payment of said notes would not be exacted from defendant, but that the profits of the concern should be applied to the liquidation thereof; that plaintiff fraudulently turned over to said corporation real property at a fictitious and exorbitant valuation, in lieu of cash, and then loaned the corporation \$60,000 to erect its buildings, thereby evading the laws of the state of Texas; that, as alleged part payment of the capital stock, the plaintiff charged said nursery company with \$600, paid to one of his personal employes whom he had discharged; that said corporation was never legally organized, and therefore the notes given in payment of stock subscriptions to plaintiff, as agent and promoter, are illegal, null and void, and uncollectible for want of consideration; that, should the court hold that said notes were given to the plaintiff personally, then, in the alternative, the defendant pleads want and failure of consideration, for the reason that plaintiff promised, if defendant would assist him in starting the nursery company and subscribe for

stock in same, he would employ him as manager for five years at a salary of \$1,800 per annum; that plaintiff would buy the defendant's nursery stock in Lake Charles, La., and Winnie, Tex., valued at \$2,500, for the use of said nursery company, and that the plaintiff would carry defendant's stock in said corporation until the same should be paid out of the profits of the concern; that defendant was induced by said promises of the plaintiff to subscribe to the stock of the nursery company and to give the notes sued on; that when said company was organized the defendant was given only one year's employment at the salary fixed, his nursery plants were not purchased, and he became manager only in name; that in the summer of 1910, during the absence of plaintiff in Europe, the defendant was forced to pay, under protest, \$540 interest on said notes, despite his aforesaid agreement with the plaintiff; that plaintiff and his private secretary ran the nursery to suit themselves, loaning money to said corporation to build costly improvements, unnecessary and ruinous to the small capitalization of the nursery company, without authority from its stockholders or directors, thereby creating a debt of \$60,000; that defendant gladly joined with the other alleged stockholders in agreeing to sell their stock for the purpose of liquidating the corporation, and transferring it to other hands; that defendant made no complaint against the failure to keep the promises made to him when he subscribed to the stock of the nursery company—plaintiff having assured him that he would stand the loss personally due to this method of liquidating the corporation. Defendant, in the alternative, pleaded set-offs in the amount of \$540, paid as interest under protest, and reconvened for \$5,000, as damages for the illegal attachment of his property. Plaintiff pleaded estoppel against defendant's attack on the organization or the acts of the corporation, known as the Port Arthur Nursery Company, in its purchase of land or other property, or its conduct with its employes, for the reason that the defendant was a stockholder and director of said corporation, and acquiesced in all of its acts which he is now seeking to attack.

The case was tried, and there was judgment for plaintiff for \$2,310, with 5 per cent. per annum interest from December 21, 1910, until paid, and dismissing the reconventional demand of the defendant as in case of nonsuit. Defendant has appealed.

Each of the notes sued on set forth a pledge of 20 shares of the capital stock of the Port Arthur Nursery Company, with authority to the holder to sell the same on the nonperformance of the promise evidenced by the instrument; that is, on or before five years after date, to pay the plaintiff or order \$2,000 at Port Arthur, Tex., with interest at the rate of 6 per cent. per annum, in-

terest payable semiannually, until paid. The instrument contained the following stipulation:

"And that if in the opinion of the holder hereof the value of the said collateral should at any time be less than two thousand dollars, the undersigned shall on demand furnish such further security as will be satisfactory to the holder hereof, and in case of failure so to do, this note thereupon at the option of the holder thereof shall become due and payable forthwith, and the whole or any part or parts of said securities, or substitutes or additions may be sold as herein provided at the option of the holder thereof."

The petition alleges, and the documents annexed show, that on December 21, 1910, the defendant sold the collateral for \$16,200, which amount was credited on the notes sued on. The petition further alleges a demand on the defendant to furnish further security for the balance of the indebtedness, and the failure and refusal of the defendant to do so; and that thereupon the plaintiff exercised the option of declaring said notes to be due and payable.

The five-year term of payment was conditioned on the continued existence of collateral security, in the hands of the holder, in value not less than the principal of each note. As the whole includes all of its parts, any unpaid balance due on each note was subject to all the stipulations and conditions of the contract, which was, in effect, no security, no time. Before the sale of the collateral, it had depreciated at least 10 per cent. in value, and this depreciation gave the holder of the notes the right to call for additional security. We cannot conceive how this right was affected by the voluntary sale of the collateral by the defendant. The crediting of the proceeds of the sale on the notes operated merely as a partial payment.

The consideration of the notes sued on was the sum of \$18,000 paid in money or property by the plaintiff for the 180 shares of stock issued to the defendant.

Whatever may have been the negotiations between the plaintiff and the defendant, they were merged in the subsequent written contracts between the parties, to wit, the notes, the stock subscription list, the charter, and the contract of employment. All the parol agreements and promises pleaded by the defendant were denied under oath by the plaintiff, and have not been proven by a preponderance of the evidence.

The testimony of the defendant is clearly insufficient to rebut the presumption arising from his own written contracts, and to overcome the adverse testimony of the plaintiff.

Defendant's averment that the other stockholders were mere dummies is disproved by the evidence. All of them lost \$10 per share, and all except one, in settling their notes held by the plaintiff, paid the difference in money. Plaintiff testified that he disposed of all the stock acquired from defendant at \$82.50 per share, at a loss of \$27.50 per share. The enterprise under the management of the defendant proved a financial failure. There was a loss of more than \$10,000 in the operation of the nursery proper. While the capital stock was fixed at \$40,000, it was understood that the plaintiff would advance \$60,000 for permanent improvements. This sum was advanced during the year 1910, and was expended in the erection of buildings, greenhouses, and other betterments. These improvements were considered to be worth as much as they cost, and were not treated as a factor in the stock liquidation that took place on December 21, 1910, at 90 cents on the dollar of par value.

On the organization of the nursery company, the plaintiff transferred to the corporation real estate valued at \$21,600; and the preponderance of the evidence shows that the valuation was not grossly excessive, as charged in defendant's answer. The same may be said of the purchase of a warehouse by the corporation. The averment that the plaintiff charged to the corporation the sum of \$800, paid to one Cobb for a personal debt of the plaintiff, is not sustained by a preponderance of the evidence. The plaintiff testified that he, as president, employed Cobb to work exclusively on the nursery grounds; and that Cobb was subsequently discharged by the defendant, its general manager. Cobb then sued plaintiff individually for damages, and the suit was charged to the company. Plaintiff afterwards refunded \$300 of the amount so charged. After a careful review of the evidence, we conclude that the defendant has failed to establish, by a preponderance of the evidence, any of the defenses set up in the answer.

The evidence shows that on December 21, 1910, the defendant failed and refused to furnish further security for the balance due on the notes in controversy, and declined to accept plaintiff's compromise offer to cancel the notes on the payment of 50 per cent. of the balance due thereon.

It is therefore ordered that the judgment dissolving the attachment be affirmed, at the cost of the plaintiff and appellant.

It is further ordered that the judgment on the merits be affirmed, at the cost of the defendant and appellant.

NABORS v. BROWN et al.

(Supreme Court of Alabama. Jan. 16, 1912.)

1. APPEAL AND ERROR (§ 627*)—FILING OF TRANSCRIPT—DELAY.

An appeal was taken September 10, 1910. The transcript was not filed until November 21, 1911, so that the term of the Supreme Court, commencing November 14, 1910, passed before the case was placed on the docket. An affidavit of appellant's attorney, filed since the submission, averred that the transcript was not received from the clerk until after the adjournment of the last term of the Supreme Court. *Held*, that the appeal must be dismissed, on motion of appellee, filed the first day it could be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3126; Dec. Dig. § 627.*]

2. APPEAL AND ERROR (§ 628*)—DELAY IN FILING TRANSCRIPT—EXCUSE.

An affidavit, excusing delay in the filing of a transcript on appeal, must be filed before the submission of the case.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 628.*]

Appeal from Circuit Court, Tallapoosa County; S. L. Brewer, Judge.

Action between B. F. Nabors and R. E. Brown and another. From a judgment for the latter, the former appeals. Dismissed.

Riddle, Ellis, Riddle & Pruett, for appellant. Bridges & Oliver, and Joel F. Webb, for appellees.

SIMPSON, J. [1] It appears from the record that the appeal was taken on the 10th day of September, 1910, and the transcript was not filed until November 21, 1911, so that the entire term of this court, commencing November 14, 1910, passed before the case was placed upon the docket. The statute requires appeals taken in vacation to be made returnable to the next term of the Supreme Court, and under our decisions such appeal must be dismissed, on motion seasonably made, at the next ensuing term of the court. *Winthrow & Gordon v. Woodward Iron Co.*, 81 Ala. 100, 2 South. 92; *Sears v. Kirksey*, 81 Ala. 98, 2 South. 90; *Porter et al. v. Martin et al.*, 139 Ala. 318, 35 South. 1006; *Southern Railway Co. v. Abraham Bros.*, 161 Ala. 317, 49 South. 801. Since the submission of this case, the appellant has filed an affidavit of his attorney, to the effect that he did not receive the transcript from the clerk of the court until after the adjournment of the last term of this court.

[2] In addition to the fact that the affidavit should have been filed before the submission of the case, the case of *Street v. Street*, 113 Ala. 333, 21 South. 138, does not support the contention of the appellant, for the reasons that, in that case, the transcript was filed before the expiration of the term to which it was returnable, and the motion to dismiss was not filed until after the time prescribed by statute, which facts are emphasized in the opinion of the court. In this case, the

motion to dismiss was filed at the first day when it could be considered, to wit, at the first call of the division of the succeeding term of this court. In order to keep up the continuity of his appeal, the appellant should have had the case docketed and continued at the term to which the appeal was returnable.

The appeal in this case must be dismissed.

Appeal dismissed. All the Justices concur, save **DOWDELL, C. J.**, not sitting.

CHAMBLY v. WILLIAMS.

(Supreme Court of Alabama. Jan. 18, 1912.)

1. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where, in ejectment by an heir of the deceased owner, defendant claimed title only through coheirs, the error in admitting evidence to show the title or possession of the deceased owner during his lifetime was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

2. EJECTMENT (§ 110*)—TITLE OF PLAINTIFF—EVIDENCE—INSTRUCTIONS.

Where in ejectment by an heir of the deceased owner defendant's sole claim of title was as grantee of coheirs, and the heir was, under the undisputed evidence, entitled to his undivided share, the court properly charged that, if the jury believed the evidence, they should find for plaintiff for an undivided interest.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 110.*]

Appeal from Circuit Court, Chambers County; S. L. Brewer, Judge.

Ejectment by W. W. Williams against George W. Chambly. Judgment for plaintiff, and defendant appeals. Affirmed.

Barnes & Denson, for appellant. E. M. Oliver and N. D. Denson, for appellee.

MAYFIELD, J. This action is statutory ejectment. All parties claim title through a common source, that of David S. Williams, who died in 1890; the land in question forming his homestead or a part of it. David S. Williams left surviving him a widow and nine children; the widow dying in 1896, and one of the children dying, without issue, in 1900 or 1901. David S. Williams dying intestate, the title to the land descended to his remaining eight children, and their descendants. The defendant, Chambly, claimed title through conveyances by three of the children of David S. Williams, and by J. W. Reed, who was a grandson of said Williams. The plaintiff claimed title as an heir of Williams. After the evidence was all introduced, the trial court, at the request of the plaintiff, in writing, instructed the jury that, if they believed the evidence, to find for the plaintiff for an undivided eighth interest in the land, which the jury did; and the court entered judgment accordingly. From that judgment defendant appeals.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] Four errors are assigned and argued by appellant. The first two assignments are based upon a ruling of the court, allowing the plaintiff, as a witness, to be asked by his counsel, "Who claimed to own the land in question at that time?" and the answer thereto, "My father, David S. Williams."

The third assignment was based upon the action of the court in allowing the same witness to testify as to the length of time his father was in possession of the land, using and claiming it as his own.

In the view we take of the case, after a close examination of the record and all the evidence, we are of the opinion that, if there could have been any error by the court in admitting this testimony (and we do not say that there could under the peculiar facts of this case), it was clearly without injury or detriment to the defendant. His title depended solely upon that of David S. Williams, and the only effect or purpose of this evidence was to show the title or possession of David S. Williams during his lifetime.

As we read the record, there was no attempt on the part of defendant to show any title to the land in question, except to that which he acquired by deeds and conveyances from the heirs of David S. Williams, and there was no evidence—certainly none sufficient—to carry the question to the jury that the defendant or any one else had ever acquired the plaintiff's interest in these lands, which interest the undisputed evidence shows was an undivided eighth which he was entitled to recover. While it is true, as contended by appellant, that defendant claimed title through one Reed, it is also shown without dispute that Reed owned, and claimed title, only as an heir of said David S. Williams.

[2] While some of the evidence showed an attempted sale of these lands for partition, it was not sufficient to carry that question to the jury, for there was no evidence that the defendant or any one else had ever thus acquired title in or to these lands, or any part thereof; and, as the defendant's sole claim of title was that from a part of the heirs of the said David S. Williams, the plaintiff was unquestionably entitled to recover his undivided one-eighth thereof. Consequently the trial court did not err in so instructing the jury.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

BELLVIEW CEMETERY CO. v. McEVERS.
(Supreme Court of Alabama. Jan. 18, 1912.)

1. EQUITY (§ 148*)—BILL—MULTIFARIOUSNESS.

Under Code 1907, § 3095, which declares that a bill is not multifarious which seeks alternative or inconsistent relief growing out of the same subject-matter or relating to the same parties, a bill seeking to enjoin both the

establishment and the use of a cemetery and the closing of a road thereby is not multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.*]

2. HIGHWAYS (§ 16*)—ESTABLISHMENT BY USER—PLEADING EXISTENCE OF HIGHWAY.

In a suit to enjoin the closing of a highway an averment that the road had been established and used by the public for a period of more than 20 years under a claim of right, that the persons under whom complainant claimed title had for more than 20 years acquiesced in the use of the road and aided in its maintenance, that the public and complainant had acquired an easement in the land and road by prescription sufficiently charged that the road was a public one.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 16.*]

3. HIGHWAYS (§ 1*)—ESTABLISHMENT—"PUBLIC HIGHWAY."

A public highway is one under the control of and kept by the public, and must have been established either by regular proceeding for that purpose or general use by the public for 20 years or dedicated by the owner of the soil.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3291-3306; vol. 8, p. 7678.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by C. F. McEvers against the Bellview Cemetery Company to abate a nuisance. From a decree overruling demurrers to the bill respondent appeals. Affirmed.

See, also, 168 Ala. 535, 53 South. 272.

The amendment as to the road is as follows: "Sec. 17. Complainant avers that said bias road has been established and used by the public for a period of more than 20 years under a claim of right, and the persons under whom respondent claims title to said land for more than 30 years before this suit, and more than 20 years before respondent obtained title to said land, acquiesced in the use of said road and aided in maintaining said road, and the public and this complainant have acquired an easement in said land, and said road has been established by prescription. Complainant further avers that the establishment of said cemetery will result in the closing of said road, that said cemetery lots are laid off thereon, and said cemetery inclosure constitutes an obstruction in and across said road, and a public nuisance, which ought to be abated."

Black & Davis, for appellant. Blevins & Woodall, for appellee.

ANDERSON, J. This is the second appeal on demurrer in this case (168 Ala. 535, 53 South. 272), and this one presents no question not heretofore considered, other than the last amendment to the bill of complaint, which attempts to describe the road as a public one, and not as a mere permissive way as it was held to be, under the then aver-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ments of the bill, considered in the former opinion.

[1] A majority of the court held that the bill was not multifarious because it sought to enjoin both the establishment and use of the cemetery and the closing of the road also. Regardless of the rule as to multifariousness prior to the present Code, section 3095 of the Code of 1907 expressly declares: "A bill is not multifarious which seeks alternative or inconsistent relief growing out of the same subject-matter or founded on the same contract or transaction, or relating to the same property between the same parties." Here the bill seeks to enjoin or prevent certain actual or threatened wrongs by the same respondent against the property of the complainant. The threatened injuries, though to be inflicted in different ways, tend to accomplish the same purpose; that is, interfere with the use and enjoyment of the complainant's home and to depreciate the value thereof. We repeat that the bill was not subject to the demurrer for multifariousness. A majority of the court held that the bill was not subject to demurrer as to the cemetery feature of same upon the theory that it made out a case of a real, as distinguished from an imaginary, nuisance; that the maintenance of the cemetery in question, under the conditions charged in the bill, would seriously impair the health and enjoyment of the complainant's premises.

[2] We are of opinion that the last amendment of the bill sufficiently charged that the "Bias Road" was a public one, and the chancery court properly overruled the demurrers raising this question.

[3] "A public highway is one 'under the control and kept by the public, and must be either established in a regular proceeding for that purpose, or generally used by the public for 20 years, or dedicated by the owner of the soil and accepted by the proper authorities.'" *Lewman v. Andrews*, 129 Ala. 174, 29 South. 692; *McDade v. State*, 95 Ala. 28, 11 South. 375; *Harper v. State*, 109 Ala. 66, 19 South. 901. The last amendment avers that the road was used and controlled adversely by the public for more than 50 years.

The decree of the chancery court is affirmed.

Affirmed. All the Justices concur except DOWDELL, C. J., not sitting.

JONES v. JONES:

(Supreme Court of Alabama. Jan. 16, 1912.)

1. HUSBAND AND WIFE (§ 285½*)—SEPARATE MAINTENANCE.

Suits for alimony in the nature of separate maintenance without divorce are authorized under the statute and chancery procedure.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1074; Dec. Dig. § 285½.*]

2. HUSBAND AND WIFE (§ 288*)—SEPARATE MAINTENANCE—ACTIONS—AGREEMENT.

That a wife has not joined in executing conveyances as she agreed to do in a separation agreement would not be a defense to an action for separate maintenance in which the agreement is set forth as bearing on alimony, if she had never been requested to do so.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1077; Dec. Dig. § 288.*]

3. HUSBAND AND WIFE (§ 296*)—SEPARATE MAINTENANCE—PLEADING.

That a wife had refused to join in executing conveyances as she agreed to do in a separation agreement should be set up by plea or answer as a defense to an action by her for maintenance, and not by demurrer.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1089; Dec. Dig. § 296.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Suit by Mary McC. Jones against C. Clarke Jones. From a decree overruling a demurrer to the bill, defendant appeals. Affirmed.

Stallings & Drennen, for appellant. Sam Will John, for appellee.

MAYFIELD, J. This is a suit in equity, by the wife against the husband, and seeks alimony in the nature of maintenance without praying for divorce.

[1] Such suits have been repeatedly sanctioned by this court, and held to be authorized under our statutes as to divorce proceedings and our system of chancery procedure. *Brady v. Brady*, 144 Ala. 414, 39 South. 237; *Hinds v. Hinds*, 80 Ala. 225; *Murray v. Murray*, 84 Ala. 363, 4 South. 239; *Brindley v. Brindley*, 115 Ala. 474, 22 South. 448; *Clisby v. Clisby*, 160 Ala. 572, 49 South. 445, 135 Am. St. Rep. 110. The bill in this case is evidently modeled after the bill discussed and considered in the above case of *Clisby v. Clisby*, and, like that in the latter case, alleged a contract between the husband and wife to live separate and apart, with condition that the former should provide for the support of the latter and of their child, during the term of separation, by the payment of stipulated allowances monthly. It further alleged breaches of this contract, by the failure to pay the stipulated amounts, or the full sum thereof, as and at the times agreed on.

The bill, however, does not seek a specific enforcement of this contract; but it is made a part of the bill for the information of the court, in determining the rights of the parties to alimony or maintenance, and the amount thereof, if allowed. In *Clisby's Case*, supra, it was said: "The object and purpose of such a bill as this is, not to sever the ties of matrimony, but to provide for the wife during the separation. The parties still remain husband and wife, with the rights and disabilities of husband and wife continuing, and, as said by Stone, C. J., time may bring better counsels and reunite the family, and courts must deal with the pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ceeding with this possibility in view. Courts in this proceeding cannot take property from one and give it to the other. The only duty which the court can enforce is maintenance, and for this purpose it can only deal with the incomes of the parties, having no power to compel either to labor for the other; nor should the court divest either of the corpus of his estate. The duty of the husband to provide for the wife is a public and moral duty, as well as a duty by contract. The amount of the alimony is measured by the means of the husband and the position of the parties in life; but this must not go beyond the husband's means. The necessity of the maintenance in this case is increased, because of the fact that the wife is required to support two of the children, which arrangement seems to have been contemplated by the parties when the separation took place. The allowance, in a case like this, ought not to be a fixed or permanent amount. It should always be left open, that it may be increased or diminished as the circumstances or necessities may change." 160 Ala. 575, 576, 49 South. 446, 447, 135 Am. St. Rep. 110. "It is made to appear that the suit is wholly the fault of the husband, whatever may be the fault of both as to the separation, into which latter question we do not inquire. Had he performed his agreement which he made with her, * * * as he should have done, the bill would not have been filed, or, if filed, would not have shown the wife entitled to relief, and would have been dismissed, at her costs." 160 Ala. 577, 49 South. 447, 135 Am. St. Rep. 110.

The equity and the sufficiency of the bill in *Clishy's Case* were thoroughly tested on three appeals to this court, and by this court sustained. We find no merit in any of the special grounds of demurrer, assigned to this bill, not heretofore passed upon by this court.

[2] The bill sufficiently shows that complainant has complied with her part of the agreement set up. It is true it does not show that she has joined with her husband in the execution of conveyances, as she stipulated to do; but it is also true that it is not shown that she has ever had the opportunity of so doing, and, of course, there rests upon her no duty so to do, until thereto requested by her husband.

[3] If she has been so requested, and has refused, this should be set up in a plea or answer, and not by demurrer. The bill amply alleges facts sufficient to show that the complainant is entitled to the relief prayed against the defendant, and is not subject to any of the grounds of demurrer interposed or urged on this appeal.

The decree of the chancellor, overruling the demurrer to the bill, was proper, and is hereby affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

MONTEVALLO MINING CO. v. SOUTHERN MINERAL LAND CO.

(Supreme Court of Alabama. Jan. 30, 1912.)

1. ADVERSE POSSESSION (§ 100*)—EXTENT OF POSSESSION—COLOR OF TITLE—CONSTRUCTIVE POSSESSION UNDER DEED.

Where one enters upon land under a deed or color of title, improvement of a portion of it will usually be construed as possession of the whole coextensive with the boundaries described in the written instrument under which he claims title, if there be no antagonistic possession; and this is particularly true where the person so entering makes a notorious claim to the whole by any acts suitably asserting his claim of ownership.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 547-574; Dec. Dig. § 100.*]

2. ADVERSE POSSESSION (§ 100*)—EXTENT OF POSSESSION—COLOR OF TITLE—POSSESSION BY PURCHASER FROM VENDOR WITHOUT TITLE.

Where a vendor conveys two separate and distinct tracts of land to only one of which he has title, an entry upon and occupancy of that tract to which his title is good will not, without more, operate as a disseisin of the owner of the other tract to which the vendor had no title.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 547-574; Dec. Dig. § 100.*]

3. ADVERSE POSSESSION (§ 115*)—QUESTIONS FOR JURY IN GENERAL.

On the evidence in a suit to quiet title, held, that the question of defendant's adverse possession of the land was a question for the jury.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 691-701; Dec. Dig. § 115.*]

Appeal from Shelby County Court; W. B. Browne, Special Judge.

Ejectment by the Southern Mineral Mining Company against the Montevallo Mining Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

A. Latady, for appellant. McMillan & Haynes and Thetford & Mackenzie, for appellee.

DOWDELL, C. J. This is a common-law action in ejectment by the Southern Mineral Land Company, appellee here, against the Montevallo Mining Company, appellant, to recover the possession of a 40-acre tract of land, namely, the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 12, township 22 S., range 4 W., in Shelby county. The defendant, entering into the consent rule, pleaded not guilty, and also the statute of limitations of 10 years, setting up adverse possession under color of title. The plaintiff introduced in evidence a complete chain of paper title from the government down to itself, and upon this evidence alone rested its case, making no pretense of actual possession in it or in any of its predecessors in grant, but relying upon constructive possession under its legal title.

For the purpose of showing color of title,

the defendant introduced in evidence deeds embracing proximately 1,400 acres which included the 40-acre tract or subdivision in dispute. The different tracts constituting the 1,400 acres, including the particular 40 shown in the color of title, were contiguous. The deeds introduced in evidence by the defendant formed a connected chain reaching back as far as the year 1857. The defendant did not deny the superior paper title of the plaintiff, but sought to show in connection with the color of title offered adverse possession for the period necessary to constitute a bar to plaintiff's right of recovery. On the conclusion of all of the evidence, the trial court, at the request of the plaintiff in writing, gave the general affirmative charge to find for the plaintiff. The giving of this charge constitutes the only assignment of error on this appeal. The plaintiff made no pretense of ever having had actual possession of the land, but, as already stated, relied on its legal title and constructive possession that the legal title draws to it. The defendant and its predecessors in grant had actual possession of the other lands constituting the 1,400-acre tract described in the deed offered as color of title to the 40-acre tract in dispute, and operated an ore mine on a portion of the lands described, outside of the particular 40.

The question presented is that of a vendor conveying by single deed two distinct tracts of land, to one of which he has the legal title, and to the other he has not the legal title, and how far and to what extent actual possession by the vendee under the deed of the tract to which the vendor had the legal title may be extended to the other tract described in the deed to which he had no legal title.

[1, 2] This question was under consideration in the case of *Woods v. Montevallo Coal & Transportation Co.*, 84 Ala. 560, 3 South. 475, 5 Am. St. Rep. 393, where it was said by this court (speaking through Somerville, J.): "How far color of title to the land, accompanied by actual occupancy of a part, will extend the occupant's possession constructively to the whole tract included in the deed, is not definitely settled, and, we may add, is a subject full of difficulty. The general rule is that where one enters upon a tract of land, with a deed or color of title to it, his actual occupation and improvement of a portion of it will usually be construed as a possession of the whole, coextensive with the boundaries described in the written instrument under which he claims title, if there be no antagonistic possession. *Burks v. Mitchell*, 78 Ala. 61, and cases cited; *Farley v. Smith*, 39 Ala. 38. Particularly is this true where the person so entering makes a notorious claim to the whole by any acts suitably asserting his claim of ownership. *Crowell v. Bebee*, 10 Vt. 33, 83 Am. Dec. 172. "The authorities limit the application of this rule by the further principle that,

where the vendor conveys two separate and distinct tracts of land, to only one of which he has title, an entry upon and occupancy of that tract of which his title is good will not without more operate as a disseisin of the owner of the other tract to which the vendor had no title. *Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190; *Stewart v. Harris*, 9 Humph. (Tenn.) 714. A sufficient reason for this, perhaps, is that such actual possession of the occupant is perfectly consistent with the constructive possession of the real owner of the other tract which the law attaches to the true title, and does not therefore per se disturb it. Nor is there anything in one's occupation of his own land to which he has title which would impute notice to another that he claims an unreasonably extended possession constructively asserted under a paper title, which may be either unrecorded, or, if recorded, does not necessarily operate as notice to strangers. *Fenno v. Sayre*, 3 Ala. 458. But such constructive possession of the occupant may, of course, become adverse by acts of dominion or ownership properly asserted over the unoccupied tract, in the absence, we repeat, of any actual possession by the true owner. And it is evident that less notoriety and even less frequency of such acts of ownership will be required with possession under color of title than without it. *Hodges v. Eddy*, 38 Vt. 327; *Trial of Title to Land* (Sedg. & Wait 2d Ed.) § 771. The use made of the land must be suited to its nature, adaptability, and locality. In a recent case it was said that the cutting and removing timber from wild land unfit for any other use might amount to a possession, and, if accompanied by color of title, might constitute a disseisin. *Childress v. Calloway*, 76 Ala. 128, 133; *Rivers v. Thompson*, 46 Ala. 335; *Burks v. Mitchell*, 78 Ala. 61. In another case it was held, where the occupant cleared, fenced, and improved 200 acres of the tract consisting of 1,500 acres, and paid taxes on the whole, cutting trees from the uninclosed part for fencing, firewood, and timber, his actual possession of the part extended over the whole by color of title which he held to it. *Munro v. Merchant*, 28 N. Y. 9. The doctrine of adverse possession rests upon the presumed acquiescence of the party against whom it is held and such acquiescence again presumes knowledge. All the law requires, therefore, is that the possession, or rather the acts of dominion by which it is sought to be proved, shall be of such character as may be reasonably expected to inform the true owner of the fact of possession and an adverse claim of title. *Foulke v. Bond*, 41 N. J. Law, 547; *Farley v. Smith*, 39 Ala. 44. It is sufficient if such owner has either knowledge or notice of such fact of possession and claim, which, as said by Baron Parke in *May v. Chapman*, 16 Mees. & Wels. 355, 'mean not merely express notice, but knowledge or the means of knowledge to

which the party willfully shuts his eyes." *Wells v. Sheerer*, 78 Ala. 142." The principles stated in the cited case were reaffirmed in *Henry v. Brown*, 143 Ala. 446, 39 South. 325, and we have quoted at length from the *Woods Case* because opposing counsel in the case at bar seem to differ in their understanding of what was there decided. The court in that case recognized the limitation put upon the general rule of extending the possession under color of title to the boundaries described in the instrument in cases where the vendor conveys two separate and distinct tracts to only one of which he has the legal title.

[3] The deeds introduced in evidence by the defendant "*without more*" (italics ours) would have been insufficient to have extended the defendant's possession constructively to the 40-acre tract in dispute, and of which the plaintiff had constructive possession under its legal title, so as to effect a disseisin of the plaintiff. And, if this had been all of the evidence, the court would have been justified in giving the general charge in favor of the plaintiff. But there was *more*. In connection with the deeds introduced by the defendant as color of title, there was evidence on the part of the defendant which tended to show an asserted claim of ownership by the defendant and its predecessors in grant for 25 years or more, and that such claim of ownership was one of general notoriety. There was evidence, also, which tended to show acts of dominion by the defendant and its predecessors in the cutting of timber on the tract in dispute for mining purposes on adjacent lands of the defendant; such cutting of timber by the defendant being at divers times and extending over a period of more than 20 years. It was open for the jury to infer from all of the evidence that the land was only suitable for timber, except a very small part near the north line, which was cultivated by one Harris, who occupied adjacent land under a lease, and by mistake crossed the line into the 40 in dispute, clearing and cultivating a few acres. There was also evidence tending to show that the man Harris continued in this cultivation after discovery of the mistake in recognition of the defendant's claim of ownership. There was an absence of evidence tending to show actual possession or any acts of dominion or ownership by the plaintiff over the land. It was open for the jury under all of the evidence to infer knowledge or notice by the plaintiff of the defendant's asserted claim of title, and of its acts of ownership or dominion over the land, and its, the plaintiff's, acquiescence in the defendant's claim of title.

In this state of the evidence, under the principles laid down in *Woods v. Montevallo Co.*, *supra*, the question of adverse possession of the land in dispute by the defendant

became a question for the determination of the jury, and the trial court therefore erred in giving the general affirmative charge in favor of the plaintiff. For this error the judgment must be reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, SAYRE, and SOMERVILLE, JJ., concur. SIMPSON, McCLELLAN, and MAYFIELD, JJ., concur in the conclusion.

LOUISVILLE & N. R. CO. v. HUTCHERSON.

(Supreme Court of Alabama. Jan. 9, 1912.)

1. TRIAL (§ 139*)—QUESTIONS FOR JURY—PEREMPTORY INSTRUCTIONS.

Where there is evidence tending to support plaintiff's case, affirmative charges for defendant are properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 338-341; Dec. Dig. § 139.*]

2. MASTER AND SERVANT (§ 289*)—INJURIES—CONTRIBUTORY NEGLIGENCE.

Where a servant was injured in opening a door on the top of a refrigerator car, which fitted down so that it was even with the roof and only a chain extended, he could not, as a matter of law, be held guilty of contributory negligence in using a chain to open the door.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

3. APPEAL AND ERROR (§ 1005*)—REVIEW—DENIAL OF MOTION FOR NEW TRIAL.

Where the evidence was conflicting, and its preponderance depended upon the credence given it, the action of a trial court in denying a new trial will not be reviewed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3943-3954; Dec. Dig. § 1005.*]

Appeal from City Court of Montgomery; William H. Thomas, Judge.

An action by Richard H. Hutcherson against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. T. Goodwyn, for appellant. Hill, Hill & Whiting, for appellee.

MCCLELLAN, J. Action for personal injury, by the servant against the master (appellant). The issues raised by the two counts, viz., 1 and 5, were submitted to the jury. Both proceeded under the first subdivision of the employer's liability statute. Code, § 8910.

[1] The plaintiff was, when injured, engaged in raising a ventilator door in the top of a refrigerator car, which door was intended to fit, when down, flush with the roof surface of the car. Attached by a staple near the unhinged edge of the door was a chain, to the end of which there was a pin for use in latching the door, when open, to a level corresponding with the holes in an up-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

right (from the car roof) iron piece. The first count described the defect and means of injury as follows: "Which chain * * * was weak, insecure, or otherwise defective, * * * and while he [plaintiff] had a hold of said chain in the performance of his duties as aforesaid said chain broke or came a loose, and thereby he fell," etc. The fifth count contained this description of the defect: "The door on the top of said car from which plaintiff fell as aforesaid was weak, insecure, decayed, or otherwise defective, and as a proximate consequence thereof * * * the chain attached thereto and forming a part thereof broke or came a loose from said door," causing the injury.

There was evidence, and inference therefrom, tending to support material quoted averments of these counts. Hence the affirmative charges requested by defendant (appellant) could not have been properly given. The plaintiff testified that the "chain broke"; that "the chain was old and rusty"; that "the chain was old and rusty, and that it broke." On the cross-examination he testified "that this was the first time a chain ever broke or pulled out with him." If a distinction is to be taken between the breaking of the chain and the pulling out of the chain, it was for the jury to determine to which theory of fact they would give their credence. In either case the broad averments that the chain "broke or came a loose," comprehended the status shown by either phase of the testimony of the plaintiff. Other testimony tended to show that the chain pulled out—came loose.

The quoted averments of count 5 also found support in the testimony. It was shown, by some of the evidence, that the chain broke or came loose; that the staple, attaching the chain to the door, pulled out; that one important office or function of the chain was to raise the door, there being no other means of getting a hold of the door to raise it, when it was down flush with the roof of the car or below the level. From this testimony, and the circumstances attending the event, obviously it was open to inference, at least, that the door was weak, decayed, insecure, or otherwise defective. Being so, the court could not properly take the questions from the jury, as the affirmative charge sought to do.

[2. 3] Nor were the pleas of contributory negligence conclusively proven. Aside from any other consideration in respect thereto, that phase of the testimony tending to show that the chain's office or function was to afford the means to lift the door—the only means when it was flush with or below the roof surface—required the jury's decision to be taken. If the jury credited this testimony, it could not be said that the plaintiff was negligent in using the chain to raise the

door. That the testimony upon the several issues was in conflict, of course, emphasizes the correctness of, rather than refutes, the conclusion that the material issues in the case were for the jury's determination. There was, hence, no error in overruling the motion for a new trial. The evidence was in conflict. Its preponderance for or against the several contentions of the respective litigants depended upon the credence given it. In such a case it cannot be said, on appeal, that the trial court erred in denying a new trial.

We have treated all of the assigned errors urged in brief for appellant. No error appearing, the judgment is affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

CENTRAL OF GEORGIA RY. CO. v. GROESBECK & ARMSTRONG.

(Supreme Court of Alabama. Jan. 16, 1912.)

1. COMMERCE (§ 61*)—INTERSTATE COMMERCE—REGULATION.

Act Feb. 28, 1907 (Acts 1907, p. 225), imposing a penalty on railroad companies for failure to deliver freight cars to prospective shippers within a specified time after demand, is violative of Const. U. S. art. 1, § 8, providing that Congress shall have the power to regulate commerce among the several states, in so far as it may affect cars which may be needed in interstate commerce or may be used therein, so that they cannot be supplied.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 61.*]

2. COMMERCE (§ 10*)—POLICE POWER OF STATES.

The grant to Congress of the power to regulate interstate commerce, in the absence of action by Congress, does not deprive the states of their police power to impose reasonable regulations on interstate carriers for the protection of the lives, health, and safety of the people.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8; Dec. Dig. § 10.*]

3. COURTS (§ 97*)—DECISION—FEDERAL QUESTIONS—SUPREME COURT.

A decision of the Supreme Court of the United States that a state statute is an interference with interstate commerce is binding on the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-334; Dec. Dig. § 97.*]

4. STATUTES (§ 61*)—CONSTRUCTION—VALIDITY.

Statutes should not be held invalid, if there is a reasonable doubt as to their validity.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 56, 196; Dec. Dig. § 61.*]

Certified Question from Court of Appeals.

Action by Groesbeck & Armstrong against the Central of Georgia Railway Company. From a judgment for plaintiff, defendant appealed to the Court of Appeals, which certified a question to the Supreme Court. Question answered.

See, also, 57 South. 382.

Steiner, Crum & Well, for appellant. R. D. Crawford, for appellee.

MAYFIELD, J. [1] The Court of Appeals have submitted or referred to us the following constitutional question:

"Under the provisions of the statute (Act approved April 18, 1911 [Acts 1911, p. 449] § 1), the following question is hereby submitted to the Supreme Court for determination:

"Are the provisions of the act of the Legislature of Alabama approved February 28, 1907 (Acts 1907, p. 225), providing a penalty to be imposed on railroad companies for failure to deliver freight cars to prospective shippers within a specified time after demand made, violative of or in conflict with that clause of the Constitution of the United States which provides that 'Congress shall have power to regulate commerce with foreign nations and among the several states,' etc. (Const. U. S. § 8, art. 1), or that provision of the Constitution of the United States which provides that no person shall be deprived of property without due process of law (Const. U. S. art. 14 [fourteenth amendment] § 1)?"

We answer that so much of the provisions of the act in question as imposes a penalty on railroad companies for failure to deliver freight cars to prospective shippers within a specified time after demand made is, under the decisions of the Supreme Court of the United States (which, of course, control us in this decision), violative of section 8, art. 1, of the Constitution of the United States.

[2] The states possess the power to protect the public health, the public morals, and public safety by any legislation, appropriate to those ends, which does not encroach upon any rights guaranteed by the national and state Constitutions. The mere grant to Congress of the power to regulate interstate commerce did not, of itself and without legislation on the part of Congress, impair the right or authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of the people. The police powers of the state, as great and broad as they are, cannot be exercised, as the Supreme Court of the United States has often decided, in regard to a subject which has been exclusively confided to Congress by the Constitution of the United States. If a state statute invades the domain of legislation which thus belongs by virtue of the national Constitution to Congress, it is void, no matter under what class of powers it may fall, nor how closely allied it may be to powers conceded to belong to the states. *Henderson v. New York*, 92 U. S. 271, 23 L. Ed. 543; *Smith v. Turner*, 7 How. 408, 12 L. Ed. 702; *Hannibal v. Husen*, 95 U. S. 473, 24 L. Ed. 527; *Brennan v. Titusville*, 153 U. S. 299, 14 Sup. Ct. 829, 38 L. Ed. 719.

[3] And what is and what is not an inter-

ference with or regulation of interstate commerce is a question for the final decision of the Supreme Court of the United States, and as to which state courts must yield. The Supreme Court of the United States, in the case of *Houston & Texas Central Railroad Co. v. Mayes*, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772, has construed a Texas statute very much like the one in question, and held that it was void, because in violation of the commerce clause of the federal Constitution. The headnotes to that case read as follows:

"An absolute requirement that a railroad engaged in interstate commerce shall furnish a certain number of cars on a specified day to transport merchandise to another state, regardless of every other consideration except strikes and other public calamities, transcends the police power of the states and amounts to a burden upon interstate commerce; and articles 4497-5000, Rev. Stat. Texas, being such a requirement, are, when applied to interstate commerce shipments, void as a violation of the commerce clause of the federal Constitution.

"Such a regulation cannot be sustained as to interstate commerce shipments as an exercise of the police power of the state."

It was also held in that case that, until Congress had passed laws regulating interstate commerce, the state could pass reasonable laws as to such subject; but, since Congress had passed laws in minute detail upon the subject, the states were no longer entitled to exercise the power. The court, however, in striking down the Texas statute, said, among other things: "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting, and ventilation of passenger cars, the furnishing of feed and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather." "While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where by reason of an unexpected turn in the market, a great public gathering, or an unforeseen

rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance." This decision has been followed in a number of cases, and statutes and regulations of railroad business, similar to the Texas statute, have been stricken down. See *Southern Ry. Co. v. Commonwealth*, 107 Va. 771, 60 S. E. 70, 17 L. R. A. (N. S.) 364; *McNeill v. Southern R. Co.*, 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142; *St. Louis, I. M. & S. R. Co. v. Hampton* (C. C.) 162 Fed. 693.

[4] We are unable to see how the statute in question can stand, under the rules of law announced by the Supreme Court of the United States and above quoted. Recognizing the rule of construction, that statutes should never be stricken down by courts, if there is a reasonable doubt as to their validity, we have endeavored to distinguish this statute from the Texas statute condemned in the above case; but we have been unable to do so.

CENTRAL OF GEORGIA RY. CO. v. GROESBECK & ARMSTRONG.

(Court of Appeals of Alabama. Jan. 16, 1912.)

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by Groesbeck & Armstrong against the Central of Georgia Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, in obedience to the opinion of the Supreme Court (57 South. 380) on certified question.

Steiner, Crum & Well, for appellant. R. D. Crawford, for appellee.

PELHAM, J. Appellee, who was engaged in shipping lumber in car load lots, instituted this suit in the court below to recover of appellant, a common carrier, the penalty provided by an act of the Legislature of Alabama approved February 28, 1907 (Acts 1907, p. 225), for failure, upon demand made, to furnish freight cars to prospective shippers within a specified time. The complaint is based squarely on the act of the Legislature above referred to, and seeks only to recover the penalty provided by it for failure to comply with its provisions. The defendant common carrier demurred to the complaint, and assigned as ground of demurrer, among others, that the penalty provision of the act in question, on which the plaintiff based its cause of action and right to recover the stipulated penalty, is unconstitutional and void, in that it violates section 8 of article 1 of the Constitution of the United States, which grants to Congress the power to regulate commerce among the several states.

Under the provisions of the statute regulating the consideration of appeals by this court approved April 18, 1911 (Acts 1911, p. 449, § 1), the question raised by the defendant's demurrer to the plaintiff's complaint as above set forth, going to the constitutionality of the provisions of the act approved February 28, 1907, penalizing railroad companies for failure to furnish cars to a prospective shipper, was

submitted by this court to the Supreme Court of Alabama for determination. On the submission the Supreme Court held that "so much of the provisions of the act in question as imposes a penalty on railroad companies for failure to deliver freight cars to prospective shippers within a specified time after demand made is, under the decisions of the Supreme Court of the United States (which, of course, control us in this decision), violative of section 8, article 1, of the Constitution of the United States." *C. of G. Ry. Co. v. Groesbeck & Armstrong* (Ala. Sup., present term) 57 South. 380. The provisions of the statute in question imposing a penalty being unconstitutional and void, it follows that the trial court was in error in overruling the defendant's demurrers to the plaintiff's complaint.

Reversed and remanded.

BLAIR v. RIDDLE.

(Court of Appeals of Alabama. Jan. 18, 1912.)

1. BAILMENT (§ 16*)—CONVERSION BY BAILEE—ACTS CONSTITUTING.

A bailee who refused to deliver the goods to the bailor or to a buyer from him, and who did not deliver them to any one having a superior right, could not question bailor's right to dispose of the goods, and relieve himself of liability for conversion.

[Ed. Note.—For other cases, see *Bailment*, Cent. Dig. §§ 64-74; Dec. Dig. § 16.*]

2. TROVER AND CONVERSION (§ 34*)—PLEADINGS—ISSUES—PROOF—VARIANCE—"ON OR ABOUT."

There is no variance between a complaint in trover alleging that the conversion occurred on or about October 18th and the proof that it occurred on October 21st (citing 6 Words and Phrases, p. 4966).

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. § 214; Dec. Dig. § 34.*]

3. TROVER AND CONVERSION (§ 46*)—MEASURE OF DAMAGES.

The measure of damages for conversion is the value of the property at the time of the conversion with interest; but, where the evidence shows fluctuations in value after the conversion, the jury in their discretion may fix the value at a higher or the highest price attained since the conversion.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. § 263; Dec. Dig. § 46.*]

4. APPEAL AND ERROR (§ 1171*)—TRIVIAL ERRORS—ERRONEOUS INSTRUCTIONS—AMOUNT OF VERDICT.

Where the verdict in trover either represented the finding of the highest value of the property since the conversion without any interest, or represented a lower valuation with interest thereon, the error, if any, in allowing interest from the date of the conversion on a higher valuation on a subsequent date, as authorized by an instruction, did not justify a reversal; the enhancement of the verdict as a result of the error being trivial in amount.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4546-4554; Dec. Dig. § 1171.*]

Appeal from Circuit Court, Coosa County; H. P. Merritt, Special Judge.

Action by D. H. Riddle against George Blair. From a judgment for plaintiff, defendant appeals. Affirmed.

Lackey & Bridges and Whitson & Harrison, for appellant. Riddle, Ellis, Riddle & Pruett, for appellee.

WALKER, P. J. Many of the propositions advanced in behalf of the appellant have been disposed of adversely to him by the rulings on the former appeals. *Riddle v. Blair*, 148 Ala. 461, 42 South. 560; *Riddle v. Blair*, 163 Ala. 814, 51 South. 14.

[1] The evidence without conflict showed that Tom Dawson was the bailor of the cotton seed alleged to have been converted; that whatever right he had to it was acquired by the plaintiff (the appellee); and that the defendant, the bailee, refused to deliver it on the plaintiff's order. There was no evidence tending to show that the defendant delivered the seed to any one having a right to it superior to that of the bailor or his vendee. In view of these facts, under the former rulings in the case, the defendant was in no position to question the bailor's right to make disposition of the property.

[2] One of the counts of the complaint alleged that the conversion was "on or about the 18th day of October, 1904." There was evidence tending to prove that the conversion took place on the 21st day of October, 1904. The allegation as to time was somewhat indefinite and uncertain, and it cannot be said that there was a variance between it and the evidence on the subject. 6 Words and Phrases, p. 4966. The court was not in error in giving the affirmative charge requested by the plaintiff.

[3] In trover ordinarily the measure of damages is the value of the property at the time of the conversion with interest; but, if the evidence shows fluctuation in value after the conversion, the jury, in their discretion, may fix the value at a higher or the highest price attained since the date of the conversion. *Ryan et al. v. Young*, 147 Ala. 660, 41 South. 954.

[4] It is questionable whether the written charge as to the measure of damages which was given at the request of the plaintiff imports anything more than the propositions just stated. But, if it may be construed as asserting or involving the proposition that the jury could award the highest value with interest from the date of the conversion on the amount so ascertained, and if the incorrectness of that proposition is assumed, still the record shows that the defendant could not have suffered such injury as a result of the giving of that charge as to constitute it a ground of reversal. The verdict, when considered in the light of the evidence, proves that, if the jury ascertained its amount by fixing a value on the converted property as of a date subsequent to the conversion and adding interest on that amount from the date of the conversion, the difference between the item of interest added to the valuation

adopted by the jury to make the amount of the verdict and what that item would have been if it had been based on the value of the property at the time of the conversion could not have amounted to as much as three dollars. The amount of the verdict indicates that it represented the jury's finding of the highest value of the property since the date of the conversion, without any allowance of interest; but if it represented a lower valuation of the property with interest on that valuation added, and if it was error to allow interest from the date of the conversion on a higher valuation as of a subsequent date, yet the enhancement of the verdict as the result of that error in instruction was too trivial in amount to justify a reversal. *Sanford v. Richardson*, 1 Ala. 182; 3 Cyc. 446. Affirmed.

HADNOT et al. v. STATE.

(Court of Appeals of Alabama. Jan. 16, 1912.
Rehearing Denied Feb. 1, 1912.)

1. WITNESSES (§ 268*)—TRAILING OF HUMAN BEINGS BY TRAINED DOGS—CROSS-EXAMINATION.

Where evidence of the trailing of accused by dogs trained to track human beings was admitted, accused must be given the fullest opportunities by cross-examination to inquire into the breeding and testing of the dogs which have a proximate tendency to shed light on the question of the value as evidence of the conduct of the dogs.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 931-948; Dec. Dig. § 268.*]

2. WITNESSES (§ 268*)—TRAILING OF HUMAN BEINGS BY TRAINED DOGS—CROSS-EXAMINATION.

Where a state's witness testified on direct examination as to the circumstances of dogs trailing accused, questions on cross-examination as to whether the witness remembered that he had a man charged with resisting arrest, and whether the dogs were ever known to quit the trail and hunt rabbits, were properly excluded because failing to limit the capacity of the dogs as trailers at the time they were used to furnish evidence against accused.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 931-938; Dec. Dig. § 268.*]

3. CRIMINAL LAW (§ 384*)—EVIDENCE—ADMISSIBILITY.

Evidence may be excluded when it is such as to furnish a basis for nothing more than mere conjecture or remote inferences in reference to the transaction in issue.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 848; Dec. Dig. § 384.*]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

James Hadnot and another were convicted of crime, and they appealed. Affirmed.

Mark D. Brainard and Eugene Ballard, for appellants. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. [1] When evidence of the trailing of the defendant in a criminal case by dogs trained to track human beings has

been admitted against him, he should have the fullest opportunity by cross-examination to inquire into the breeding and testing of the dogs, and into any facts or circumstances tending to show that, by reason of their unreliability, or of their lack of proper training, the incriminating value of the evidence was impaired. *Richardson v. State*, 145 Ala. 46, 41 South. 82. But the facts or circumstances so sought to be brought out must be such as would have a proximate tendency to shed light upon the question of the value as evidence of the conduct of the dogs on the occasion which is the subject of investigation. *Simpson v. State*, 111 Ala. 6, 20 South. 572.

[2] In the present case a witness for the state, who had testified as to the circumstances of dogs trailing the defendants, was, on his cross-examination, asked two questions: (1) If he remembered that he had a man charged with resisting arrest, a negro boy; and (2) if these dogs were ever known to quit the trail and hunt rabbits. An exception was reserved to the action of the court in sustaining an objection to each of these questions. Neither of the questions necessarily suggested that the answer to it might have a logical tendency to prove that at the time of the occurrence under investigation the dogs had not been properly trained to trail human beings, or that at that time they were unreliable for that purpose. The purpose of the questions may have been to elicit evidence of the behavior of the dogs when they were immature and before they had been trained or tested. The fact that on some occasion long before the date of the one in question, and before the dogs had had any training, they quit the trail of a man or boy and hunted rabbits, could not reasonably tend to rebut evidence tending to prove that at the time they trailed the defendants they had been properly trained and tested and could be relied upon persistently to trail a person upon whose track they had been put. Conceding that it is permissible in such a case for the conduct of the dogs on other occasions to be inquired about for the purpose of showing their capacity or lack of capacity to furnish evidence tending to connect a certain person with the commission of the offense charged, yet certainly the court may so limit the investigation as to exclude evidence of the behavior of the dogs before their capacity in this respect had been developed, and to confine it to instances of their behavior having a tendency to illustrate to what extent, if any, they could be expected to keep on the trail of a human being at or about the time in question. When, in the prosecution of such an inquiry, a question is asked which on its face indicates that it may elicit an answer referring to the details of the behavior of the dogs on an occasion so separated in time from the one under investigation, or under such dissimilar conditions

and surroundings, as not fairly to illustrate their traits or capacity as trailers at the time they were used to furnish evidence against the defendant, the court is not to be put in error for sustaining an objection to it. Unless it is permitted in this way to limit the scope of the inquiry, the time of the court might uselessly be consumed by recitals of instances of the behavior of the dogs on occasions so remote in time from the one that has been depose about, or under conditions so substantially dissimilar, that they could have but a remote tendency to shed light upon the question of the probative value of the evidence so sought to be assailed.

[3] Evidence may be excluded when it is such as to furnish a basis for nothing more than mere conjectures or remote inferences in reference to the transaction under investigation. *Wells Amusement Co. v. Means*, 56 South. 594. We are of opinion that it was not made to appear that the questions objected to called only for evidence legally relevant to the issue, and that the court cannot be charged with error for sustaining the objections to them.

Affirmed.

FRAZER v. SELLERS.

(Court of Appeals of Alabama. Jan. 16, 1912.)
TROVER AND CONVERSION (§ 9*)—ACTS CONSTITUTING—DEMAND AND REFUSAL.

A plaintiff, in detinue for a mule, obtained possession thereof by the sheriff, acting under a writ of seizure, turning it over to him. He turned it over to a tenant informing him that it was involved in a lawsuit and was subject to redelivery. Later he dismissed the suit, but withheld possession from defendant for a considerable time. *Held*, that plaintiff's act in exercising dominion over the mule and appropriating it to his own use by hiring it to his tenant constituted, as to defendant, a conversion, authorizing defendant to recover in trover without proving a demand and refusal to deliver.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 58-83; Dec. Dig. § 9.*]

Appeal from Circuit Court, Bullock County; Mike Solly, Judge.

Action by C. W. Sellers against S. T. Frazer. From a judgment for plaintiff, defendant appeals. **Affirmed.**

Norman & Sons and Tom S. Fraser, for appellant. Ernest L. Blue and R. E. L. Cope, for appellee.

PELHAM, J. This appeal is prosecuted from a judgment denying appellant's motion for a new trial in a trover suit brought by appellee against appellant in the circuit court of Bullock county, claiming damages for the conversion of a mule, in which suit the appellee as the plaintiff below recovered judgment against the defendant, the appellant here. The original case was tried and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

judgment rendered against the defendant at the spring term of the court in 1909, and the motion for a new trial was not heard and judgment entered denying the motion until February 7, 1911; but the bill of exceptions shows an agreement between the parties that the motion was seasonably made and continued from term to term until the term at which it was finally considered and acted upon. The motion was heard by another judge than the trial judge who presided at the trial of the case, and the bill of exceptions shows that the motion was submitted on an agreement between counsel and admissions made by them in open court as to the proceedings had and what was shown by the evidence on the original trial. From these agreements and admissions as set out in the bill of exceptions, it appears that prior to the institution of the trover suit the appellant had brought a detinue suit against appellee for possession of the mule which at that time was in appellee's possession. The sheriff under process issuing in the detinue suit seized the mule, taking it from the possession of appellee and putting it in the possession of appellant. Neither the plaintiff nor the defendant in the detinue suit made bond to obtain or retain possession of the mule, but the sheriff turned it in the appellant's lot, put it in his custody and under his care and control. The appellant took possession of the mule, and two or three days after it was turned over to him rented it to one of his negro tenants and put it in the possession of the tenant. In "a short time after this" (as recited by the bill of exceptions as the agreed evidence before the court in the trial of the trover suit) the appellant dismissed the detinue suit, but did not return or offer to return the mule to the defendant in the detinue suit. From time to time the parties, through their attorneys, negotiated for the return of the animal, and a discussion was had by them, representing the parties, looking to bringing a friendly suit for the purpose of settling the question of legal ownership; but no action was taken, and, the appellant having failed to return the mule to the appellee for several months after the detinue suit had been dismissed, the appellee brought a suit in trover against the appellant for conversion of the animal. The plaintiff's complaint was in the statutory form and was tried on issue made by defendant's filing a plea of the general issue; the trial resulting in a verdict and judgment for the appellee, the plaintiff in the trover suit. It is from an order denying defendant's motion for a new trial in that suit that this appeal is prosecuted by appellant.

The mule was taken from the possession

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of the appellee by the sheriff, acting under a writ of seizure issued in the detinue suit brought by appellant, and turned over to appellant, who took possession and disposed of the property by turning it over to his tenant. The tenant's possession of the property was the appellant's possession so far as the appellee's rights were concerned. It makes no difference that the appellant told the tenant, when turning the animal over to him, that it was involved in a lawsuit and was subject to redelivery to him (appellant) should he lose the case. The appellee was none the less deprived of the property to which he had the right of immediate possession upon dismissal of the detinue suit because appellant had disposed of the property in his possession to another conditionally, and as between himself and the appellee the appellant was responsible for the failure of the tenant to return the property from whatever cause, as the tenant had received possession from the appellant who could not avoid his duty or escape his liability for failure to deliver the property to appellee by turning possession over to another, conditionally or otherwise. As to the appellee the conditions and arrangements between appellant and his tenant whereby the tenant was given possession of the mule are *res inter alios acta*. The act of the appellant in taking possession of the animal, exercising dominion over it, and appropriating it to his own use by hiring it to his tenant, was undoubtedly unauthorized and an assumption of ownership sufficient to constitute a conversion of the mule; and to withhold the possession thus acquired from appellee for a considerable length of time after dismissing the detinue suit, which in itself was an admission of appellee's right to possession, was a denial or defiance of appellee's right to immediate possession that would be sufficient to support appellee's right to recover in trover, and there was, under such circumstances, no necessity for a demand and refusal to deliver. *Glaze v. McMillian*, 7 Port. 279; *Haas v. Taylor*, 80 Ala. 459, 2 South. 633. Besides, the agreed statement of facts set out in the bill of exceptions shows negotiations between the parties through their attorneys after the detinue suit was dismissed during the course of which a demand was made for a return of the property and a refusal or failure to deliver after making repeated promises to do so.

Under the statement of agreed facts and admissions as set out in the bill of exceptions, the court below is not shown to be in error in refusing appellant's motion for a new trial, and the case will be affirmed.

Affirmed.

NAFTEL v. STATE.

(Court of Appeals of Alabama. Jan. 18, 1912.)

1. WITNESSES (§ 372*)—BIAS—CROSS-EXAMINATION—ADMISSIBILITY.

In a prosecution of N., a deputy sheriff, for assault and battery, the court excluded a question asked the man assaulted, as to whether he did not employ lawyers to bring a damage suit against the sheriff, "for an alleged assault and battery committed on him by N., the deputy sheriff." *Held* no error, since it did not appear but that the alleged assailant referred to in the question was another deputy sheriff with the same surname as defendant, and the fact that the prosecutor employed lawyers to sue the sheriff for assault and battery committed by another deputy sheriff would have no tendency to show bias on the part of the witness.

[Ed. Note.—For other cases, see *Witnesses*, Dec. Dig. § 372.*]

2. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR.

It is harmless error to overrule an objection to a question on redirect examination where the answer of the witness is a mere repetition of a statement made on cross-examination.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

3. CRIMINAL LAW (§ 761*)—TRIAL—INSTRUCTIONS.

In a prosecution for assault and battery, alleged to have been committed by a deputy sheriff on a person whom he was arresting, where the evidence was conflicting whether the assaulted party resisted arrest, it was no error to refuse to charge that if the jury found that the assaulted party shot at the deputy sheriff, his arrest was lawful, and he had no right to resist, since it assumed as a fact that he had resisted arrest.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1754-1764; Dec. Dig. § 761.*]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Eugene Naftel was convicted of assault and battery, and he appeals. *Affirmed*.

Objections to evidence sufficiently appear in the opinion of the court. Charge 2 is as follows: "If the jury believe from the evidence that Dumler shot at Deputy Sheriff Bridges on the night of the alleged assault, then his arrest is lawful, and Dumler had no right to resist his arrest."

Goodwyn & McIntyre, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. [1] On the cross-examination by the defendant's counsel of the person charged to have been assaulted he was asked if, before he went before the grand jury in this case, "he had not employed lawyers to bring a damage suit against Mr. Hood, the sheriff, for an alleged assault and battery committed on him by Naftel, the deputy sheriff." The question was not so framed as necessarily to indicate that the defendant had any connection with the matter in-

quired about. The inquiry may have been in regard to an occurrence long antedating the one under investigation, and the alleged assailant referred to in the question may have been another deputy sheriff having the same surname as the defendant; and this may have been suggested as a ground of objection to the question. The fact that the witness at some time in the past may have employed lawyers to sue the sheriff for an assault and battery alleged to have been committed by a deputy sheriff other than the defendant would have no tendency to prove that the witness had an interest or bias against the defendant. It is not made to appear that the court was in error in sustaining the objection to the question.

[2] The appellant is in no position to complain of the action of the court in overruling his objection to the question asked the witness Waller on his redirect examination by the solicitor, as the answer to the question was a mere repetition by the witness of a statement which had been elicited from him on his cross-examination by the counsel for the appellant.

[3] Written charge 2 requested by the appellant was properly refused, as it assumed as a fact that Dumler resisted arrest, though the evidence on that subject was in conflict. It is manifest that there was no error in the refusal of the other written charges requested by the defendant.

Affirmed.

BREWER v. STATE.

(Court of Appeals of Alabama. Jan. 11, 1912.)

HABEAS CORPUS (§ 75*)—LEGALITY OF DETENTION—PRIMA FACIE CASE.

Where a return to a writ of habeas corpus shows a requisition for the prisoner, made by the Governor of the state from which he is alleged to have fled, a copy of an affidavit made before a magistrate charging the prisoner with the crime, and certified as authentic by the Governor of the state making demand, and the warrant of the Governor of this state authorizing the arrest, there was no error in denying the writ.

[Ed. Note.—For other cases, see *Habeas Corpus*, Dec. Dig. § 75.*]

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Habeas corpus by H. F. Brewer to obtain his discharge from arrest under extradition proceedings. From an order denying such relief, petitioner appeals. *Affirmed*.

L. A. Sanderson, for appellant. R. C. Brickell, Atty. Gen., William L. Martin, Asst. Atty. Gen., and John V. Smith, for the State.

WALKER, P. J. The return to the writ of habeas corpus and the evidence offered in support of it showed: (1) A demand or requisition for the petitioner (the appellant), made by the Governor of the state of Cali-

fornia, from which he is alleged to have fled, upon the Governor of this state; (2) a copy of an affidavit made before a magistrate, charging the petitioner with the commission of the crime of murder in the state of California, and certified as authentic by the Governor of that state; and (3) the warrant of the Governor of Alabama authorizing the arrest of the petitioner. The papers showing these facts were regular on their face, and were not subject to any of the objections interposed to their admission in evidence. There was no error in the order or judgment appealed from. *Barriere v. State*, 142 Ala. 72, 39 South. 55.

Affirmed.

MARSH v. STATE.

(Court of Appeals of Alabama. Jan. 9, 1912.)

LARCENY (§ 40*) — VARIANCE BETWEEN ALLEGATIONS AND PROOF—"COW."

A person indicted for larceny of a cow under Code 1907, § 7324, providing that theft of a "cow or animal of the cow kind" is grand larceny, cannot be convicted of a larceny of a steer calf, since by common understanding the word "cow" includes only the female of the species, and a person cannot be convicted of the larceny of articles other than those named in the indictment, and hence on a trial under an indictment for the theft of three cows, where the proof was of the taking of a cow and two steer calves, there was evidence on which it might have been found that the cow and one calf had been given to accused by his mother, who owned them, a refusal to charge that proof of larceny of a steer calf was not proof of larceny of a cow was reversible error.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 102-126; Dec. Dig. § 40.*

For other definitions, see Words and Phrases, vol. 2, p. 1706.]

Appeal from Circuit Court, Wilcox County; B. M. Miller, Judge.

Richard Marsh was convicted of larceny, and he appeals. Reversed and remanded.

Godbold & Van De Voort, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. In an indictment for the larceny of an animal, it is sufficient to describe the animal by such name as in the common understanding embraces it, without designating its sex. Code 1907, § 7326. It is therefore evident that under the provisions of the above statute an indictment for the larceny of a dog, a sheep, a goat or a hog would be sufficiently made out by proof of the larceny of either a male or a female of the particular species of animal named in the indictment. It does not follow, however, that in cases where, by common understanding, a certain word embraces only the male or the female of a certain species of animal, and the animal, the subject of the alleged larceny, is described in the indictment by

that term which denotes only the male or the female of such species, the allegations of the indictment are met by proof of the larceny of an animal of the species but not of the gender denoted by the term used in the indictment. It will not be contended, for instance, that an indictment charging the larceny of a bull is made out by evidence of the theft of a cow.

The theft of a "cow or an animal of the cow kind" is made grand larceny by our statutes. Code, § 7324. All the provisions of a statute are to be construed according to the fair import of their terms, and if the word "cow" as used in the above statute includes or was intended to include both the male and the female of the bovine species, the words "or animal of the cow kind" appearing in the statute are of no import and have no field of operation. The truth is that a cow is a female of bovine animals. In its most common acceptation it is a mature female of such animals, but the general tendency among the courts is to treat the word "cow" as including an immature female of such species, and for that reason our Supreme Court has held that a "heifer" is a cow. *Parker v. State*, 39 Ala. 365.

Construing all of the provisions of the above section 7324 together, we are of the opinion that when, in this state, an indictment charges the larceny of a "cow," its allegations are only met by proof of the larceny of a female animal of the cow kind. "A cow is a female animal of the bovine species; hence under an indictment for stealing a cow, a defendant cannot be convicted of stealing a bull." *State v. McMinn*, 34 Ark. 160.

In the present case the defendant was indicted for the larceny of three cows. The evidence, without dispute, showed the asportavit by the defendant of one cow and two steer calves or yearlings. The defendant claimed that he obtained the cattle from his mother, who claimed title to them. There was some evidence in the case tending to show that defendant's mother owned the cow, and the prosecutor had, by mistake, marked the cow in *his* mark, and that the cow was the mother of *one* of the yearlings. The jury, therefore, might have found that the *cow* and *one* of the yearlings belonged to the mother, but that the other yearling or calf belonged to the prosecutor, and that the defendant was guilty of the larceny of that animal and of *only* that animal. This being the situation of the evidence, the defendant asked the court in writing to charge the jury that "proof of the larceny of a steer calf is not proof of the larceny of a cow." The court refused to give this charge to the jury, and in doing so committed reversible error. While it is true that the prosecutor is not bound, in order to secure a conviction, under an indictment charging the larceny of several articles, to prove the lar-

ceny of the exact number of articles alleged in the affidavit or indictment (Bates v. State, 152 Ala. 77, 44 South. 695; State v. Murphy, 6 Ala. 845), nevertheless if, in making out his evidence, the prosecutor shows the larceny of articles other than those named in the indictment it is evident that the defendant cannot legally be convicted of the larceny of the articles not named in the indictment, and the defendant, as a matter of right is entitled to have the court to so instruct the jury. Our Code forms of indictment are simple in the extreme, and it is essential that when the forms are adopted they should be followed in all material particulars. It is against common right that a man should be charged in an indictment with the larceny of one article and be tried and convicted under that indictment for the larceny of an article different from the one named in the indictment.

Whether, under the indictment in the present case, the defendant could legally have been convicted of the larceny of *only* the cow, if the evidence had been confined to the question of the larceny of the cow only, is not before us. The court submitted the question of guilt vel non of the defendant of the larceny of all three of the animals, about which evidence was offered to the jury, and in doing so committed an error for which the judgment in this case must be reversed.

Reversed and remanded.

CAMERON v. HAAS BROS. PACKING CO.
(Court of Appeals of Alabama. Dec. 21, 1911.
Rehearing Denied Jan. 30, 1912.)

1. TRIAL (§ 143*)—CONFLICTING EVIDENCE—QUESTIONS FOR JURY.

Where, in an action for the price of goods, the plaintiff testified that defendant said she would pay for the goods in question, and that credit was extended on such statement, and such testimony was contradicted on every material point, the determination of its credibility is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

2. FRAUDS, STATUTE OF (§ 158*)—PROMISE TO ANSWER FOR DEBT OF ANOTHER—CREDIT GIVEN TO PROMISOR.

Where, in an action for the price of goods against a person, other than the one to whom the goods were delivered, there is no written request or agreement shown that the goods were to be charged against the promisor, evidence that the goods were charged to the person to whom they were delivered, and that the bill was first presented to him for payment, while admissible to show that the goods were not sold on the sole credit of defendant, is not conclusive thereof.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 158.*]

3. FRAUDS, STATUTE OF (§ 26*)—PROMISE TO ANSWER FOR DEBT OF ANOTHER—CREDIT GIVEN TO PROMISOR.

Where, in an action for the price of goods, there is evidence that the goods in question, though delivered to a third person, were sold

on the sole credit of the defendant, a finding for the plaintiff would be proper, even though there was no written promise to pay the debt.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 35-42½; Dec. Dig. § 26.*]

Appeal from City Court of Mobile; O. J. Semmes, Judge.

Action by Haas Bros. Packing Company against Florence M. Cameron. From a judgment for plaintiff, defendant appeals. Affirmed.

Ervin & McAleer and Tisdale J. Touart, for appellant. Elliott G. Rickarby and Leigh & Chamberlain, for appellee.

DE GRAFFENRIED, J. It appears from the evidence in this case that the New Waldorf Café was furnished a lot of meat by the appellee at various times during the years 1910 and 1911, and that the meats so furnished the café were charged on the books of appellee to the New Waldorf Café. It further appears that the appellant is the mother of C. S. Cameron, and that some time in the early part of the year 1910 the said C. S. Cameron bought the New Waldorf Café from its then proprietor, and continued the business until shortly before this suit was brought. C. S. Cameron appears to have been the only son of his mother, and she seems to have furnished the money for the purchase of the café, and to have employed herself about the business, acting, usually, in the capacity of cashier. It further appears from the evidence that Mell Worthington was an employé of appellee, and that it was through him that the arrangements were made for the sale by appellee of meats to the New Waldorf Café. On this subject, his testimony was as follows: "I know Mrs. Florence Cameron, the defendant, and she did have a conversation with me in reference to buying meats for the New Waldorf Restaurant. She said she would pay for the meats that were furnished. She promised to pay for the meats that were furnished to the New Waldorf Restaurant by Haas Bros. Packing Company. That conversation was had either before or just after they taken charge of the place; it was in the first two or three days. The account that was made within the first two or three days has been settled, and it was on the promise that she would pay that we continued to furnish the meats. I was there a good many times during the time the defendant was running the business. She taken part in the conducting the business. She acted as cashier, and I have seen her locking up the place at night, and I have seen her give orders to help about what they should do. I have had no conversation with her relative to the balance due, and I have made no attempt to collect it. * * * Under the agreement I had, the mother was to pay for the meats. * * *

She said that if the meats were furnished she would pay for them herself. She did say that she would see them paid. She also said she would pay them."

[1] The above evidence was before the jury, and while it was contradicted in every material point, its credibility was for the jury, and if they believed it they had a right to use it as a basis upon which to found their verdict. At the conclusion of the court's oral charge to the jury, and before the jury retired, the appellant, in writing, requested the court to give the following charge to the jury: "The court charges the jury that if they are reasonably satisfied by the evidence that the business conducted under the name of the New Waldorf Café was that of C. S. Cameron, and that the defendant had no interest in such business, and that such facts were known to Haas, and thereafter the goods were sold to and charged to the New Waldorf Café, that the defendant would not be liable for such goods so sold to such café, unless defendant gave a written promise to pay such debt." The court refused to give this charge to the jury, and the appellant reserved an exception to the action of the court in so doing.

In the case of *Pake v. Wilson*, 127 Ala. 240, 28 South. 665, the Supreme Court say: "It has been settled and is well understood, in cases like this, that if the goods were sold on the sole credit of the defendant, his promise is original, and not within the statute; but if any credit was given to the person to whom the goods were delivered the promise is collateral, and within the statute of frauds." The same principles are announced in the following other well-considered cases: *Fuller v. Gray*, 124 Ala. 388, 27 South. 458; *Webb v. Hawkins L. Co.*, 101 Ala. 630, 14 South. 407; *Smith Bros. & Co. v. Miller*, 152 Ala. 485, 44 South. 390; *Clark v. Jones & Bro.*, 87 Ala. 474, 6 South. 362.

[2] In cases like the present, it is material to know to whom the goods were charged on the plaintiff's books, and to whom the bill was first presented for payment, whether to the defendant or to the party to whom they were actually delivered. But, though the debiting of the third party on the plaintiff's books and the presentation of the account to him for payment may be given in evidence against the plaintiff, nevertheless such evidence is not *conclusive* evidence against the right of the plaintiff to recover, in the absence of a written agreement by the defendant to pay the debt. Such evidence tends to show that the plaintiff gave credit to the third party, but is not conclusive evidence that he did so. *Browne on the Statute of Frauds*, § 188.

[3] It is evident that the jury, from the evidence of *Mell Worthington*, which we have above quoted, were, if they believed that evidence, authorized to infer that the

goods sold by appellee to the New Waldorf Café were sold upon the sole credit of the defendant; and it is therefore apparent that the court below committed no error in refusing to give to the jury the charge above quoted. *Pake v. Wilson*, supra.

There is no error in the record, and the judgment of the court below is affirmed.

Affirmed.

JOHNSON v. STATE.

(Court of Appeals of Alabama. Jan. 18, 1912.)

1. CRIMINAL LAW (§ 1032*)—TRIAL—PLEA OF NOT GUILTY—EFFECT.

Accused, having pleaded not guilty and gone to trial on an indictment, cannot, on appeal, raise the objection of uncertainty.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2627; Dec. Dig. § 1032.*]

2. PERJURY (§ 19*)—INDICTMENT—SUFFICIENCY.

An indictment for perjury, charging that accused, on an application to set aside a default in a civil suit, being duly sworn by the clerk of the court, who had authority to administer oaths, falsely swore that he was taken ill and unable to appear, being in substantial accordance with Code 1907, § 7161, form 82, prescribing the form of indictment in such cases, is sufficient.

[Ed. Note.—For other cases, see *Perjury*, Cent. Dig. § 65; Dec. Dig. § 19.*]

3. PERJURY (§ 32*)—PROSECUTIONS—EVIDENCE—ADMISSIBILITY.

Under an indictment charging that accused, on an application to set aside a default, being duly sworn by the clerk of the court, who had authority to administer oaths, falsely swore that he was, by illness, prevented from appearing, accused's affidavit to set aside the default was admissible.

[Ed. Note.—For other cases, see *Perjury*, Cent. Dig. §§ 108-116; Dec. Dig. § 32.*]

4. CRIMINAL LAW (§ 845*)—INSTRUCTIONS—EXCEPTIONS.

An exception to a charge as a whole, which contains several propositions of law, some of which are correctly stated, will not be sustained, though other propositions are correct.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2026; Dec. Dig. § 845.*]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Calvin Johnson was convicted of perjury, and he appeals. Affirmed.

The indictment is as follows, omitting the formal charging part: "Calvin Johnson, on an application to set aside a judgment in a civil action in the city court of Montgomery, in which Sampson Wood and Lucinda Wood were plaintiffs, and the said Calvin Johnson the defendant, being duly sworn by the clerk of said court, who had authority to administer such oath, falsely swore that on June 8d last, while on a train en route from Atlanta, he was taken so ill that he required the attention of a physician; that he reached Montgomery on Saturday night, and went at once to where he resides, about one mile

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

beyond Picket Springs, and went to bed, and was confined to his bed continuously until June 9th; that he was in a painful condition; that he was not able to think about inquiring of his attorney relative to his case—the matters so sworn to being material, and the oath of said Calvin Johnson in relation to such matters being willfully and corruptly false.” The affidavit introduced was an affidavit in support of a motion to set aside judgment by default and grant the defendant therein a new trial.

The oral charge of the court is set out in full in the transcript, and the following portions were excepted to: “Now, it is admitted by the defendant that he did swear falsely in that affidavit with regard to coming home on Saturday night. The court does not think it material whether he came home Saturday morning or not; so that part of the affidavit, so far as constitutes a crime is concerned, I charge you is not sufficient. It is admissible in evidence, gentlemen, as contended for by the solicitor, who does not contend for anything, except what is material in this affidavit. It is admissible in evidence in this view of the case, for you are to determine whether or not defendant did swear falsely in regard to the material parts of the affidavit. For whatever light it may shed on the case, the whole affidavit is admissible in evidence, and goes to you, and you may consider the whole affidavit. But gentlemen, the material part of the affidavit is this—that part of it which swears that he was too sick at the time this case was set, and when the judgment was taken against him, to come to court. He swears that he was too sick, in that affidavit—that is material—if he was too sick, that judgment ought not to have been taken against him, and was a good ground for a motion. Was that sworn falsely? That is the question for you to determine.”

Warren S. Reese and Hill, Hill & Whiting, for appellant. R. C. Brickell, Atty. Gen., and William L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. [1, 2] The defendant did not in the trial court, by demurrer, motion to quash, or otherwise, raise any question as to the sufficiency of the indictment. Having pleaded not guilty and gone to trial on the indictment without interposing any objection to it, the objections, now for the first time suggested to it, going merely to the question of its being sufficiently definite and specific in its averments descriptive of the proceeding in which the alleged perjury is charged to have been committed, are, on appeal, to be treated as having been waived. *Wilson v. State*, 128 Ala. 17, 29 South. 569; *Oakley v. State*, 135 Ala. 15, 33 South. 23. But it may be added that the indictment

substantially follows the form given in the Code for an indictment for perjury committed in a civil proceeding (Code, § 7161, form 82); and that its averments conform to the requirements of the law as decided in many cases. *Barnett v. State*, 89 Ala. 165, 7 South. 414; *Walker v. State*, 96 Ala. 53, 11 South. 401; *Smith v. State*, 103 Ala. 57, 15 South. 866; *Bradford v. State*, 134 Ala. 141, 32 South. 742.

[3] There was no merit in the objection made to the introduction in evidence of the affidavit signed and sworn to by the defendant. The evidence showed that it was made and used in the proceeding mentioned in the indictment, and there was no lack of correspondence between this evidence and the averments of the indictment. *Williams v. State*, 68 Ala. 551; *Bradford v. State*, 134 Ala. 141, 32 South. 742.

[4] The part of the court's oral charge to which an exception was reserved embodied several distinct propositions, some of which, at least, were distinctly favorable to the defendant, and the giving of those propositions in charge could not have constituted a valid ground of objection or exception by him. As to one or more other propositions contained in that part of the charge, it was plainly not subject to criticism. The exception having been reserved to the part of the charge set out as a whole, it cannot be sustained, even though it be conceded that it embodied a legally incorrect proposition, which was not separately excepted to.

Affirmed.

MATHES v. STATE.

(Court of Appeals of Alabama. Dec. 21, 1911.
Rehearing Denied Jan. 30, 1912.)

1. INDICTMENT AND INFORMATION (§ 137*)—MOTION TO QUASH—GROUNDS.

A motion to quash an indictment for murder, on the ground that, before proceeding to organize the grand jury, the judge drew from the jury box sufficient additional jurors to complete the juries required, was properly overruled, in view of Jury Law (Laws 1909, p. 314) § 20, providing that whenever there are not enough jurors in attendance to form the juries required, the judge shall draw from the box the names of as many jurors as he may deem necessary, and shall then proceed to impanel or complete the impaneling of the juries, and section 23 providing that no objection to an indictment on any ground going to the formation of the grand jury can be taken except on the ground that the grand jurors who found the indictment were not drawn by the officer designated by law to draw the same.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.*]

2. CRIMINAL LAW (§ 1031*)—APPEAL—NECESSITY OF OBJECTIONS AND EXCEPTIONS.

A conviction for murder will not be reversed on appeal because a person who had not been drawn as a grand juror served on the grand jury returning the indictment, where no

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

objection was taken or exception reserved in the court below.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2622, 2626, 2631; Dec. Dig. § 1031.*]

3. HOMICIDE (§ 300*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

In a prosecution for murder, a charge that if the jury should find that, at the time of the killing, defendant was free from fault in bringing on the encounter between himself and deceased, and he had the right as a reasonable man to believe from the language and conduct of deceased, taken in connection with his previous threats, that he was in danger of death or great bodily harm, that to have attempted to retreat would have been dangerous to life and limb, and that he actually believed that he was in danger, they should acquit defendant, was properly refused, since it made defendant's belief as to his danger, and his understanding as to what was necessary to entitle him to act in self-defense, the test of that right, rather than what the law requires as sufficient to authorize such action.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

4. HOMICIDE (§ 300*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

In a prosecution for homicide, a request to charge as to self-defense which ignores the element of retreat is properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

5. HOMICIDE (§ 300*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

In a prosecution for murder, the court refused to charge that the danger that will excuse one killing another in self-defense need not be real or actual, that although it afterwards appear that the appearances of danger were false, and that the deceased never intended to do the defendant any harm and had no weapon, yet if the jury find that the appearance of danger was such as to produce a reasonable belief in the mind of defendant that his life was in danger, or that he was about to suffer great bodily harm, and there were no other means open by which to avoid the danger, but by taking the life of deceased, the jury should acquit. *Held* no error, since it singles out a part of the evidence and gives it undue prominence and limits the question of freedom from fault, and duty to retreat to a restricted time, and also because the request is confusing in its tendency, and involved in its statements as to defendant's duty to retreat.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

6. HOMICIDE (§ 300*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

In a prosecution for murder, the court refused to charge that if the jury found that deceased was a violent or dangerous man and had threatened to kill defendant, that defendant did not bring on the difficulty, and there was no reasonable mode of escape left open to him without increasing his peril, that the deceased assaulted defendant, and attempted to carry out his previous threats, and that defendant fired the fatal shot in the honest belief that there was a present impending necessity to strike or shoot to save himself from death or great bodily harm; they should acquit defendant, and that it was immaterial whether the danger was real or apparent provided it was such as to convince a reasonable man that it was necessary for him to act in order to save himself. *Held* no error, since it authorized defendant to act on his honest belief as to the necessity of taking the life of deceased with-

out regard to whether his belief was such a belief as would have been entertained by a reasonably prudent man, and this error in the request was not cured by the further statement that whether the danger was real or apparent made no difference provided it was such as to convince a reasonable man that it was necessary to act to save himself, since this does not require a real or apparent necessity for killing deceased, but merely a necessity for some action on the part of defendant to save himself.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

7. HOMICIDE (§ 300*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

In a prosecution for murder, the court refused to charge that if the jury found that, at the beginning of the difficulty between defendant and deceased, defendant merely answered one verbal epithet with another, this did not deprive defendant of the privilege of defending himself, provided he did not fight willingly; that if the defendant did not cause the difficulty, he might protect his person from assault and injury by opposing force to force so far as necessary, taking care that he used no more violence than was required to repel the attack. *Held* no error, since the request ignored the element of retreat, and also because it was unintelligible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

Appeal from Circuit Court, Baldwin County; A. E. Gamble, Judge.

Andrew J. Mathes was convicted of murder in the second degree, and he appeals. Affirmed.

The following charges were refused to the defendant: (1) "In this case the proof shows that the killing was done in a sudden encounter. The defendant sets up the defense that he did the killing in his own necessary self-defense. If you believe from the evidence introduced that at the time of the killing the defendant was free from fault in bringing on the difficulty, and had a right as a reasonable man to believe from the language and conduct of Ward, taken in consideration with his previous threats, that the defendant at the time was in danger of death or great bodily harm, and that to have attempted to retreat out of the danger in which he was at the time would have been dangerous to life and limb, and if the defendant actually believed that he was in danger, then he had a right to shoot Ward in what he understood to be his necessary self-defense." (2) "It is not necessary that there should be actual danger of death or great bodily harm, in order to justify the taking of human life; but if the jury is satisfied from all the evidence that the circumstances attending the firing of the fatal shot were such as to impress upon the defendant, and the defendant believed from such circumstances, that he was in imminent peril of danger to life or limb at the time he fired the fatal shot, and that his action in so firing was necessary in order to prevent death or great bodily harm to a person,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

then the jury must acquit the defendant, unless they further believe that the defendant was not free from fault in bringing on the difficulty." (3) "The court charges the jury that the danger that will excuse one killing another need not be real or actual. It may now be known that all the appearances of danger were false, and Ward never intended to do the defendant any harm, and that he did not have a weapon; yet, if the jury believe from all the evidence in this case that the appearance of danger surrounding the defendant at the time was such as to produce a reasonable belief in the mind of the defendant that his life was in danger, or that he was about to suffer great bodily harm, and that there were no other reasonable means at the time open to the defendant to avoid the danger, but by taking Ward's life, the defendant being without fault at the time, the law holds him harmless, and the jury must acquit." (4) "The court charges that if the jury should believe from the evidence that the deceased, Ward, was a violent, dangerous, turbulent, or bloodthirsty man, and that he had threatened to kill the defendant, and if the jury further believe from the evidence that the defendant did not bring on the difficulty, and that there was no reasonable mode of escape left open to him without increasing his peril, and that if the deceased, Ward, assaulted the defendant and attempted to carry out the threats previously made by him, if you believe such threats were made, and that the defendant fired the fatal shot under the honest belief that there was a present, impending, or imperious necessity to strike or to shoot to save himself from death or great bodily harm, then it would be your duty to acquit the defendant, and it would be immaterial as to whether said danger was real or apparent, provided it was such as to convince a reasonable man that it was necessary for him to act in order to save himself, and provided, also, the defendant was free from fault in bringing on the difficulty." (5) "The court charges the jury that, if they believe from the evidence that at the beginning of the difficulty the defendant merely answered one verbal insult or epithet with another, then this does not deprive the defendant of the privilege of afterwards defending himself, provided he did not fight willingly. If the defendant was not the author or originator of the difficulty, he may still protect his person from assault and injury by opposing force to force so far as may be necessary, taking care that he used no more violence than is requisite to repel the attack of plaintiff."

Leslie Hall and William S. Anderson, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. [1] Appellant was indicted for murder in the first degree, and convicted of murder in the second degree. The defend-

ant moved to quash the indictment, and also filed pleas in abatement setting up that the grand jury which returned the indictment was not organized according to law in that the judge of the court who organized the grand jury, before proceeding to organize said grand jury from those jurors then in attendance upon the court, drew from the jury box the names of sufficient additional jurors necessary to complete the juries required, and that such names last drawn were placed in the hat or box together with the jurors first drawn, and from the list as thus completed and placed in the hat or box the names of the jurors to constitute the grand jury were drawn.

Section 20 of the jury law approved August 31, 1909 (Acts 1909, p. 314), provides that whenever there are not enough qualified jurors in attendance upon the court to form the juries required that the judge of the court shall draw from the jury box names of as many jurors as he may deem necessary to complete all juries then required, and that "the court shall then proceed to impanel, or complete the impaneling of the juries as provided in this act."

Section 23 of the jury law provides "that no objection to an indictment on any ground going to the formation of the grand jury which found the same can be taken to the indictment, except by plea in abatement to the indictment; and no objection can be taken to an indictment by plea in abatement except upon the ground that the grand jurors who found the indictment were not drawn by the officer designated by law to draw the same."

The cases of *Osborn v. State*, 154 Ala. 44, 45 South. 866, and *Nordan v. State*, 143 Ala. 13, 39 South. 406, cited by appellant are not in point. In those cases the illegal action consisted in adding to the number of grand jurors after the grand jury had been once legally organized, and not to the manner of drawing, summoning or impaneling the jurors to be organized as a grand jury. In *Spivey v. State* (Sup.) 56 South. 232 the jury was not drawn by the officer designated by law. *Fryer's Case*, 146 Ala. 4, 41 South. 172, and *Tucker's Case*, 152 Ala. 1, 44 South. 587, are inapplicable. The former case was where a grand jury had been organized without legal warrant or authority in law and held at a time not allowed by law. The latter case is one where the objection was that the officers designated by law did not draw the jury. The ruling of the trial court in denying the motion to quash and in sustaining the state's demurrers to the defendant's pleas in abatement is free from error. *Jordan Crandall v. State*, 56 South. 873, present term; see, also, *Thompson v. State*, 122 Ala. 12, 26 South. 141.

[2] The insistence of counsel for defendant in his brief that the indictment is void because one Christopher Columbus Rogers served on the grand jury that returned the indictment,

and was not, at any time, drawn as a grand juror, cannot be reviewed when it appears that the question is raised for the first time in this court and no objection was made or exception reserved in the court below. It has been uniformly held that such an objection, to be available, must have been raised in the lower court. Code 1907, § 6256; Acts 1909, p. 315, § 23; *Nugent v. State*, 19 Ala. 540; *Morgan v. State*, 19 Ala. 556; *Bass v. State*, 37 Ala. 469; *Harrington v. State*, 83 Ala. 9, 8 South. 425; *Tipton v. State*, 140 Ala. 89, 37 South. 231; *Hatch v. State*, 144 Ala. 51, 40 South. 113; *Harrell v. State*, 160 Ala. 91, 49 South. 805. The charges requested by the defendant are not numbered, as they should be to avoid confusion in discussing them. *Gibson v. State*, 89 Ala. 122, 8 South. 98, 18 Am. St. Rep. 96; *Ry. Co. v. Cofer*, 149 Ala. 565, 43 South. 102.

[3-6] The first charge set out in the record as requested in writing by the defendant and refused is erroneous, in that it predicates the belief of defendant that he was in danger, and what he understood to be necessary to entitle him to act in self-defense, and not what the law requires as sufficient to authorize such action. The second charge set out ignores the element of retreat. The third charge set out as refused singles out a part of the evidence and gives undue prominence to it and limits the question of freedom from fault and duty to retreat to a restricted time. The charge is not a succinct statement of legal principles, but is confusing in its tendency and involved in the statements as to defendant's duty to retreat. The fourth charge authorizes the defendant to act upon his honest belief that there was a necessity to defend himself even to the taking of the life of his assailant, without regard to whether his honest belief was such a belief as would under similar circumstances be entertained by a reasonably prudent man. The statement in the latter part of the charge that whether the danger was real or apparent makes no difference provided it was such as to convince a reasonable man that it was necessary for him to act to save himself does not relieve the charge of the vice pointed out, as this statement does not predicate the existence of a real or apparent necessity for the defendant to kill the deceased in order to save himself, but predicates merely the necessity of some action on his part to save himself.

[7] The fifth charge set out ignores entirely the element of retreat as an essential in acting in self-defense, and is unintelligible.

The charges given at the request of the state are not numbered or designated in any way, and confusion would follow their discussion without setting them out. This is unnecessary, even if incumbent on the court, as a careful examination of these charges

leads us to the conclusion that they are all correct statements of principles of law and were properly given under the evidence, although the better practice is not to ask or give numerous written charges in behalf of the state.

The record presents no error prejudicial to the defendant for review, and the case will be affirmed.

Affirmed.

CRAWFORD v. STATE.

(Court of Appeals of Alabama. Jan. 16, 1912.)

1. CRIMINAL LAW (§ 1170½*)—HARMLESS ERROR—ADMISSION OF TESTIMONY.

Any error in overruling accused's objection to a question asked a witness was harmless, where the answer was favorable to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3130; Dec. Dig. § 1170½.*]

2. WITNESSES (§ 289*)—REDIRECT EXAMINATION.

That, on cross-examination of accused's witness, the state showed that accused was previously indicted for assault with intent to murder—an independent offense—did not entitle accused to show the details of that case.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1004; Dec. Dig. § 289.*]

3. WITNESSES (§ 277*)—ACCUSED PERSONS—CROSS-EXAMINATION.

Accused having testified in his own behalf, the state could cross-examine him to test the accuracy of his statements, and to disclose his relations with his witnesses.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-984; Dec. Dig. § 277.*]

4. HOMICIDE (§ 28*)—DEFENSE—INTOXICATION.

It is no defense to a murder charge that accused was under the influence of whisky furnished by decedent.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 45, 46, 133; Dec. Dig. § 28.*]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Harwell Crawford was convicted of murder in the second degree, and he appeals. Affirmed.

Provo testified as a witness for the state that he saw the difficulty, and that both participants were drunk; that the defendant was so drunk that every time he would make a pass at deceased he would fall; and that the deceased was also drunk, but did not fall until he started to run. The solicitor then propounded the following questions: "Who has been talking to you about this case?" "Has Mr. Gray been talking to you about it?" "You have changed your testimony since you came before the grand jury, haven't you?" "And haven't some white people down there been talking to you?" To all of which he answered, "No." On the cross-examination of the defendant, the solicitor asked him if he was at the house of the deceased that night, and at what time, and who was the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

white gentleman there with you negroes, if you were there shooting craps, if the negroes were playing skin, and how the defendant got to owe him 60 cents, and what did you do there all night? Objections were interposed and overruled to all these questions.

The following charges were requested by the defendant and overruled: (1) "I charge you, gentlemen of the jury, that if, after considering all the evidence in this case, you believe from the evidence that the defendant, at the time he is said to have stabbed and killed James Jones, was so drunk that he was incapable of forming the purpose to do a voluntary act, and if you believe further from the evidence that he got drunk on whisky which was sold or furnished him by the deceased, and that the defendant killed the deceased while or just after the deceased and defendant were drinking the whisky together, and while the defendant was drunk on the same, then the deceased was at fault in bringing on the difficulty." (2) "If you find from the evidence that James Jones furnished or sold to defendant whisky which caused him to get drunk and kill James Jones, then, under all the evidence in this case, you must acquit the defendant." (3) "If you find from the evidence that James Jones sold or furnished the defendant whisky that caused him to get drunk and kill James Jones, after considering all the evidence, then the deceased was at fault in bringing on the difficulty." (4) Affirmative charge as to murder in the first degree.

William H. and J. R. Thomas, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. [1] The defendant could not have been prejudiced by the action of the court in overruling his objection to the question asked the witness Provo by the solicitor, as the answer to the question was favorable to the defendant.

[2] On the cross-examination of the defendant's witness Gray, the solicitor, without objection on the part of the defendant, elicited the fact that the defendant had formerly been indicted for assault with intent to murder. This did not entitle the defendant to go into the details of the subject of that former charge. The question asked by his counsel as to what were the facts in that case was an inquiry in reference to a matter foreign to the issues in the pending case; and the objection to it was properly sustained.

[3] The defendant having testified as a witness in his own behalf, it was permissible for the solicitor, on the cross-examination, to ask him questions calculated to test the accuracy of his statements, and to disclose his relations with others who had been examined as witnesses for him. We discover no prejudicial error in any of the rulings made on

objections to questions asked in the course of that cross-examination.

[4] We know of no warrant of law for asserting any such proposition as that the question of the criminal responsibility of the defendant in a homicide case is affected by the mere fact that at the time of the killing he was under the influence of whisky that had been sold or furnished to him by the deceased, or that that fact would entitle him to an acquittal. Plainly the defendant was not entitled to the written charges involving such propositions, whether or not those charges were otherwise objectionable.

Under the evidence, the question of the defendant's guilt of homicide was one for the jury. There was no error in the refusal of the affirmative charge requested in his behalf.

Affirmed.

SWINT v. STATE.

(Court of Appeals of Alabama. Jan. 11, 1912.)

1. COSTS (§ 322*)—CRIMINAL PROSECUTION.

One convicted of disposing of stolen property, and sentenced to hard labor for payment of costs, should be sentenced at the rate of 75 cents per day.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 322.*]

2. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

In a prosecution for disposing of mortgaged chattels, where defendant questioned a witness minutely about the mortgage, it was proper for the state, on cross-examination, to inquire when the mortgage was delivered.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 268.*]

3. CHATTEL MORTGAGES (§ 233*)—DISPOSITION OF MORTGAGED PROPERTY.

In a prosecution for disposing of mortgaged property, evidence of accused's possession of the property prior to the time of disposition is admissible.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 233.*]

4. CHATTEL MORTGAGES (§§ 118, 233*)—PROPERTY SUBJECT TO MORTGAGE.

The progeny of mortgaged animals, born after the making of the mortgage, are subject to its lien; and in a prosecution for disposing of mortgaged animals evidence of the birth of such progeny is admissible.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. §§ 118, 233.*]

5. CHATTEL MORTGAGES (§ 232*)—TRANSFER OF PROPERTY—INDICTMENT—VARIANCE.

Under Code 1907, § 7423, making it an offense for any person to sell any mortgaged personalty, where an indictment charged the disposition of a number of mortgaged animals, proof, showing an unlawful disposition of one of them, was sufficient for conviction, and did not constitute a variance.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 232.*]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Lee Swint was convicted of disposing of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

mortgaged property, and appeals. Modified and affirmed.

L. A. Sanderson, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. [1] The defendant having been convicted of disposing of mortgaged property, that part of the judgment sentencing the defendant to hard labor in payment of costs at the rate of 40 cents per day is erroneous, and should be at the rate of 75 cents per diem. *Dowling v. City of Troy*, 56 South. 118.

[2] The lower court's rulings on the evidence are free from error. The defendant had questioned the witness Gray at length and minutely about the mortgage, and the state had a right to ask when it was delivered to him as part of the transaction inquired about by defendant.

[3] Proof of the defendant's possession of the property prior to the time of the alleged offense was an essential element of the crime charged, and the questions asked eliciting such facts were proper. The cross-examination by the state of defendant's witness shows no abuse of the legitimate latitude permissible on such examinations.

[4] The progeny of mortgaged animals, born after the making of the mortgage, becomes subject to the lien created by the mortgage; and the court properly admitted evidence as to the calves born to the mortgaged cows. *Dyer v. State*, 88 Ala. 225, 7 South. 267; *Meyer Bros. v. Cook*, 85 Ala. 417, 5 South. 147; *Bush v. Henry*, 85 Ala. 605, 5 South. 321; *Gans v. Williams*, 62 Ala. 41.

[5] The general charge and the special charges requested, in writing, by defendant seem to have been asked on the theory that there was a variance or insufficient proof to support a conviction, in that the indictment alleged the disposition of five cows, one horse, one pony, and two bulls, while the proof showed that several of the animals had died; and that the evidence introduced by the state failed to show that the defendant had disposed of more than one or two of the animals described in the indictment. The statute under which the indictment is framed (Code 1907, § 7423) makes it an offense for any person to sell or convey *any* personal property upon which he has given a mortgage; and it is sufficient to authorize a conviction to prove so much of an indictment as shows that the defendant has committed a substantive offense as charged in the indictment. Proof, showing an unlawful disposition of one of the animals by the defendant, would be sufficient to show a commission of the offense charged, and would not constitute a variance. *State v. Murphy*, 6 Ala. 846; *Mooney v. State*, 8 Ala. 328; *McElhaney v. State*, 24 Ala. 71; *Porter & Co. v. State*, 58

Ala. 66; *Bates v. State*, 152 Ala. 77, 44 South. 695.

The judgment sentencing the defendant to hard labor at the rate of 40 cents per diem to pay costs of the prosecution will be here corrected, making the rate 75 cents per diem, and the judgment as thus corrected is affirmed.

Corrected and affirmed.

LEE v. STATE.

(Court of Appeals of Alabama. Jan. 9, 1912.)

1. HOMICIDE (§ 300*)—ASSAULT WITH INTENT TO KILL—MISLEADING INSTRUCTIONS.

A requested charge, that if accused, on trial for assault with intent to murder, was free from fault in bringing on the difficulty, and honestly believed that his life was in imminent peril, and that it was necessary for him "to act immediately" to save his life, he must be acquitted, was properly refused, because the quoted words might mean something other than to shoot prosecutor, and because, if the quoted words negated the idea that accused could avoid the combat by retreat, the charge did not declare the law with sufficient clearness.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

2. CRIMINAL LAW (§ 830*)—INSTRUCTIONS—MEANINGLESS CHARGE.

A requested charge, that before the jury can convict accused they must be satisfied that the proof is "inconsistent" with accused's guilt, and "inconsistent" with every other rational conclusion, is properly refused, because the word "inconsistent," in place of "consistent," renders the charge meaningless.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2012; Dec. Dig. § 830.*]

3. HOMICIDE (§ 300*)—ASSAULT WITH INTENT TO MURDER—INSTRUCTIONS.

A requested charge on trial for assault with intent to murder, that if accused, prior to the difficulty, talked with a witness, and asked him to see prosecutor and have him not bother accused, and the witness saw prosecutor and asked him not to give accused any trouble, and the prosecutor replied, "Damn him," then that fact must be weighed in determining who was the aggressor, was bad, and properly refused.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 300.*]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Fred Lee was convicted of assault with a weapon, and he appeals. Affirmed.

The following charges were refused to the defendant: (1) "The court charges the jury that before they can convict the defendant they must be satisfied to a moral certainty, not only that the proof is inconsistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion; and unless the jury is so convinced by the evidence of the defendant's guilt that they would each venture to act upon that decision in matters of the highest concern and importance to his own interest, then they must acquit the defendant." (2) "The court

charges the jury that if, from all the evidence, they find that the defendant did not bring on the difficulty, that he was leaving Mr. Holmes' store in an orderly and peaceful manner, and that Tom Simmons spoke to him in an insulting way, and advanced towards the defendant in such a manner as to indicate to a reasonable mind that his purpose was to do the defendant grievous bodily harm, or to kill him, then the defendant was authorized to anticipate Tom Simmons and shoot him." (13) "The court charges the jury that the law is that when a person is free from fault in bringing on the difficulty, and that he is being attacked by a man of dangerous character, then he is not required to wait until the weapon is presented, ready for deadly use, but to act on the reasonable appearance of same, and fire to kill, if in his mind the danger is real." (14) "The court charges the jury that if they believe from all the evidence that Tom Simmons had made previous threats towards the defendant, and that the defendant was aware of such threats, and that Tom Simmons had the reputation of being a dangerous and bloodthirsty man, and that Tom Simmons moved towards the defendant in a hostile manner, and that the defendant did not provoke or bring on the difficulty, then it was the duty of the defendant to fire upon Tom Simmons." (15) "If the jury believe from all the evidence in this case that the defendant and Tom Simmons were in close proximity to each other at the time of the difficulty, and that the defendant did not bring on the difficulty, and that Tom Simmons had the reputation of being a dangerous and turbulent and violent man, and that he assumed the hostile attitude towards the defendant, and that the defendant did honestly believe he was about to suffer grievous bodily harm at the hands of Tom Simmons, then the defendant had the right to shoot, and should be acquitted." (16) "The court charges the jury that if from all the evidence they find that the defendant is free from fault in bringing on the difficulty, and that he honestly and reasonably believed that his life was in imminent peril, and that it was necessary for him to act immediately to save his own life or to prevent grievous bodily harm, then the defendant should be acquitted." (17) "The court charges the jury that if they find from all the evidence that the defendant had prior to the difficulty had a talk with the witness —, and asked him to see Tom Simmons, and have him not to bother or to do him any harm, and that the said witness did see Tom Simmons, and asked him not to give the defendant any trouble, and that Tom Simmons replied by saying, 'Damn him,' then this fact must be weighed by you, in determining who was the aggressor."

H. B. Fuller, for appellant. R. C. Brickell, Atty. Gen., for the State.

DE GRAFFENRIED, J. The defendant was indicted for assault with intent to murder. He was tried by a jury, found guilty of assault with a deadly weapon, was sentenced to hard labor for Montgomery county, and appeals.

The only questions presented to us for consideration grow out of the refusal of the trial court to give certain charges which the defendant, in writing, requested it to give to the jury.

[1] 1. In charge 16 the defendant requested the court to charge the jury, in substance, that if he was free from fault in bringing on the difficulty, and honestly and reasonably believed that his life was in imminent peril, and that it was necessary for him to act immediately to save his own life, or to prevent himself from suffering great bodily harm, then the jury should acquit him. It may be that "to act immediately" meant "to get out of his assailant's way immediately," or "to retreat immediately," or to do something, other than to shoot his adversary. The charge was patently bad. The words "to act immediately," as used in the above charge, if intended to negative the idea that the circumstances were such that the defendant could not have avoided the combat by retreat, without increasing his peril, certainly do not do so with sufficient clearness.

[2] 2. Charge 11 was evidently copied from some charge which had been previously passed upon by the Supreme Court, but by some error, clerical or otherwise, the words "consistent with the defendant's guilt" were written in the charge, as requested, "inconsistent with the defendant's guilt," which rendered the charge meaningless, and the court properly refused it.

3. Charges 12, 13, 14, and 15 ignore the doctrine of retreat, and were properly refused.

[3] 4. Charge 17 was patently bad.

There is no error in the record, and the judgment of the court below is affirmed.

Affirmed.

WESTERN RY. OF ALABAMA v. McPHERSON.

(Court of Appeals of Alabama. Jan. 11, 1912.)

1. PLEADING (§ 248*)—AMENDMENTS—DEPARTURE.

In an action against a railroad company for negligently killing a cow, an amendment to the complaint, which only varied the description of the transaction originally complained of, was not a departure; the same defenses being available against the amended complaint as the original.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. RAILROADS (§ 439*)—INJURIES TO ANIMALS ON TRACKS—ACTIONS—COMPLAINT.

A complaint, alleging that the employé of a railroad company having charge of its engine, and while running the same and acting in the scope of his authority, did so recklessly, carelessly, and negligently operate it as to strike and injure plaintiff's cow, sufficiently alleged the negligence of the engineer and stated a cause of action.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1551-1568; Dec. Dig. § 439.*]

3. RAILROADS (§ 447*)—INJURIES TO ANIMALS ON TRACKS—BURDEN OF PROOF—INSTRUCTIONS.

In an action against a railroad company for negligently killing a cow, a requested charge that, to cast on defendant the burden of disproving the negligence charged, the plaintiff must not only show the infliction of injury, but that it occurred at a public road crossing, the crossing of the railroad, the regular station, or stopping place in a village or city, was properly refused; for under the direct provisions of Code 1907, §§ 5474, 5476, a railroad company injuring an animal at the crossing of another railroad has the burden of proving the absence of negligence, and this instruction did not show that such burden was on the railroad.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. 447.*]

4. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action against a railroad company for killing a cow, a charge upon the hypothesis of the failure of the engineer to see the cow while on the track was properly refused; the evidence as shown by the bill of exceptions not raising any such hypothesis.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

Appeal from Circuit Court, Chambers County; S. L. Brewer, Judge.

Action by N. B. McPherson against the Western Railway of Alabama for damages to a cow. Judgment for plaintiff and defendant appeals. Affirmed.

Count 1 of the complaint as originally filed is as follows: "Plaintiff claims of the defendant, which is a corporation organized under the laws of Alabama, and doing business in Chambers county, in said state, the sum of \$50 as damages, for that heretofore, on, to wit, on and prior to January 1, 1902, defendant was engaged in the operation by steam of a railway between the cities of West Point, Ga., and Montgomery, Ala., and that its engineer, to wit, W. B. Rast, who was in the employ of defendant, and in charge of their engine, *did not keep a proper lookout, and did not ring the bell or blow the whistle, or did so recklessly, rapidly, carelessly, and negligently operate its engine as to knock from the defendant's track on or about January 2, 1903, within or near the corporate limits of Lanett, Ala., in said county, within one-fourth of a mile of a public road crossing, one milk cow, belonging to the plaintiff, and injured said cow to the extent of the value of \$50. Wherefore plaintiff sues. That defendant failed to notify plaintiff within 24 hours after said cow was struck by its engine, and failed*

to notify the nearest justice of the peace; but that one A. T. Hobbs, who was in the employ of the plaintiff, came along next day after said cow was struck, with his hands, all of whom were in the employ of defendant, and in charge of this part of defendant's track, and without plaintiff's knowledge or consent did kill, then and there, with a large hammer, said cow, without saving her hide, which was worth about \$2." The amendment to the complaint consisted in striking out the italicized words. The second count sufficiently appears from the opinion.

The charge set out in the third assignment of error is as follows: "To cast burden on defendant of disproving negligence charged in the complaint, the plaintiff must have shown, not only that the defendant inflicted the injury, but that it occurred at or near a public road crossing, the crossing of the railroad, the regular station or stopping place, or in a village, town, or city." The charge set out in the fourth assignment is as follows: "If the jury believe from the evidence that the engineer of the defendant was at his post, and in the discharge of his duty, and was keeping a proper lookout for animals on or in close proximity to the track, and that the train was properly equipped, and that he was exercising that degree of diligence which very prudent persons observe in the conduct of their own business, then simply because he failed to see the cow while it was on the right of way does not make the defendant liable for damages for the accident."

George P. Harrison, El. M. Oliver, and R. E. Stelner, for appellant. Barnes & Denson, for appellee.

WALKER, P. J. [1] There is nothing in the averments of the amended first count of the complaint, which were descriptive of the transaction complained of, to indicate or suggest that they did anything more than vary the description of the transaction originally counted on. That amended count was not subject to any objection which might have been available to the defendant on that account if it had constituted a departure from the original complaint. *Kansas City, Memphis & Birmingham R. Co. v. Cobb*, 102 Ala. 356, 14 South. 763; *Louisville & Nashville R. Co. v. Woods*, 105 Ala. 561, 17 South. 41.

[2] That count of the complaint, in alleging that the employé of the defendant who had charge of its engine, while running said engine and acting within the scope of his authority, did "so recklessly, carelessly, and negligently operate its said engine as to strike and knock from defendant's track" the plaintiff's cow, and "injured said cow to the extent of \$50," sufficiently showed that the alleged negligence of the engineer in the operation of the engine caused or contributed to the injury complained of. *Western Ry. Co.*

v. Lazarus, 88 Ala. 453, 6 South. 877; Western Ry. of Ala. v. McPherson, 146 Ala. 427, 40 South. 934; Curry v. Southern Ry. Co., 148 Ala. 57, 42 South. 447. The court was not in error in overruling the demurrer to the complaint as amended.

[3] In the charge referred to in the third assignment of error, the defendant undertook to enumerate the places at which the infliction of damage to person or property by a railroad company casts upon it the burden of disproving negligence, and asserted as a proposition of law that, to cast on the defendant the burden of disproving the negligence charged in the complaint, the plaintiff must have shown, not only that the defendant inflicted the injury, but that it occurred at one of the places mentioned in the charge. If the injury complained of occurred where "the tracks of two railroads cross each other at grade," the statute expressly casts upon a defendant railroad company, which is sought to be charged with liability for injury to person or property shown to have been inflicted at such a place, the burden of proving a compliance with its requirements applicable to that situation. Code 1907, §§ 5474, 5476. Such a place was not included in the enumeration made in the charge in question. In this respect it omitted a material feature of the charge on the same subject, which was approved on a former appeal in this case. Western Ry. Co. v. McPherson, 146 Ala. 427, 40 South. 934. The words "the crossing of a railroad," in the connection in which they are found in the charge now under review, immediately following, as they do, the words, "at or near a public road crossing," suggest that the only purpose of their use was to qualify the last-quoted expression, so as to make the expression as a whole describe only a crossing of a railroad by a public road, with the result that the charge as a whole is to be understood as omitting any mention of a crossing of two railroads. Certainly the language of that charge was not such as to inform the jury that the occurrence of an injury at a place where "the tracks of two railroads cross each other at grade" casts on the railroad company inflicting the injury the burden of proving anything in order to relieve itself of liability because of such injury. Under the charge as requested, though the plaintiff proved that the injury complained of was inflicted by the defendant's engine at a place where its track crossed that of another railroad at grade, that proof would not cast on the defendant the burden of disproving the negligence involved in a disregard of the precaution which the statute requires to be observed at such a place. A charge involving such a proposition cannot be reconciled with the statutory rule as to the burden of proof applicable in such a case. Code, § 5476. Whether it was abstract or not, the refusal of that charge was justifiable be-

cause it asserted, or necessarily involved, a proposition which is not the law.

[4] The charge referred to in the fourth assignment of error hypothesized the failure of the engineer to see the cow while it was on the right of way. The bill of exceptions, which, as to most of the evidence, merely stated its tendencies, does not show that there was any evidence tending to show that such was the fact. This charge was properly refused because it involved the hypothesis of the existence of a state of fact which, so far as is indicated or suggested by the bill of exceptions, there was no evidence tending to prove.

Affirmed.

PETERS v. NOLEN.

(Court of Appeals of Alabama. Jan. 9, 1912.
Rehearing Denied Jan. 30, 1912.)

1. APPEAL AND ERROR (§ 797*)—REQUISITES FOR TRANSFER—TRANSCRIPT.

Under Code 1907, p. 1517, rule 41, which provides that a court on appeal may dismiss for failure to file the transcript by noon of the first day of the first week during which the case is subject to call upon motion of the appellee made not later than the next Thursday, where the transcript was filed within the term to which the appeal was returnable, a motion not made within the time limited must be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3149-3154; Dec. Dig. § 797.*]

2. APPEAL AND ERROR (§ 548*)—RESERVATION OF GROUNDS—BILL OF EXCEPTION.

A ruling on an instruction cannot be reviewed on appeal where not shown by a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2440; Dec. Dig. § 548.*]

3. JUDGMENT (§ 256*)—CONFORMITY TO VERDICT.

Under Code 1907, § 3789, which provides that a defendant in a suit on a mortgage may require the ascertainment of the sum due on the mortgage, and for the rendition of a judgment on such finding, where a complaint contained but two counts, one in detinue and the other claiming amounts alleged to be due under a written instrument under seal, the nature of which was not alleged, though the verdict, in addition to a finding that the plaintiff was entitled to the property, further found that there was a sum due "on the mortgage," it will not support a judgment for such sum.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.*]

4. APPEAL AND ERROR (§ 733*)—RESERVATION OF GROUNDS—ASSIGNMENT OF ERROR.

The objection that a judgment in detinue was based on a verdict which did not assess the value of one of the items of personal property which was sued for will not be considered where the single assignment of error to the judgment suggests only a different specific objection thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3025-3027; Dec. Dig. § 733.*]

Appeal from Circuit Court, Tallapoosa County; S. L. Brewer, Judge.

Action by G. P. Nolen against E. M. Peters. From a judgment for plaintiff, defendant appeals. On motion to dismiss appeal. Motion denied, and judgment of circuit court affirmed.

The motion was entered November 21, 1911, and is as follows: "The appellee moves the court to dismiss the appeal in this case on the following grounds: The judgment appealed from was rendered August 11, 1910, and the appeal was taken March 10, 1911, to the term of the court then in session, and the record was not filed until April 27, 1911, after the last case of the Fifth division at the term to which the appeal was taken."

George A. Sorrell and M. Peters, for appellant. Riddle, Ellis, Riddle & Pruett, for appellee.

WALKER, P. J. [1] The transcript having been filed during the term to which the appeal was returnable, and the motion to dismiss the appeal because of the failure to file the transcript within the time prescribed by the rule of practice on the subject (rule 41, Code, p. 1517) not having been made within the time allowed by that rule, that motion must be overruled. *Street v. Street*, 113 Ala. 333, 21 South. 138.

[2] The record contains no bill of exceptions. The giving of a written charge which is set out in the record is assigned as error. Rulings on charges cannot be reviewed on appeal where they are not shown by a bill of exceptions. *Milner Coal & Railroad Co. v. Wiggins*, 143 Ala. 132, 38 South. 1010; *Dannelly v. State*, 130 Ala. 132, 30 South. 452.

[3] The complaint, as it was amended, contained two counts, one of them being in detinue for "one black horse about twelve years old," and other personal property, and the other count claiming amounts alleged to be due "from the defendant by a written instrument under seal," the nature of which was not alleged. So far as disclosed by the record, at the time of the trial the property sued for was still in the possession of the sheriff under the writ of seizure issued on the institution of the suit, neither of the parties having given a bond for a delivery of the property, as authorized by the statute. Code, § 3780. The verdict of the jury was as follows: "We, the jury, find for the plttf., and find the value of the property sued for as follows: One lot of corn, value \$75.00—one lot of fodder, \$10.00—30 bu. cotton seed, \$6.00—one cow and her calf, \$15.00—25 gals. syrup, \$10.00—150 pounds of seed cotton, 4.50—one mule, \$75.00. And we find \$117.06 due on the mortgage." This verdict enumerated all the property sued for except the one black horse, which was not mentioned. The judgment rendered on this verdict was that "the plaintiff have and recover of the defendant the

following property or its proven value"—naming the same items of property with their respective values as they were set out in the verdict—"and the further sum of \$117.06 on mortgage, besides all the costs in this behalf expended, for all of which let the proper writ issue." The only assignment of error directed against this judgment is the following: "(1) The court erred in entering a judgment against the defendant for the proven value of the property and the further sum of \$117.06." This assignment of error must be sustained. The part of the judgment which awarded to the plaintiff the sum of \$117.06 was not supported by the verdict. The verdict did not contain a finding in favor of the plaintiff for that sum. Its finding in that regard was merely that there was "\$117.06 due on the mortgage." In view of what the record discloses and fails to disclose, that part of the verdict cannot be given the effect of necessitating or authorizing the rendition of such a judgment as is provided for by section 3789 of the Code when a suit is by a mortgagee or his assignee against the mortgagor or one holding under him, and the defendant upon suggestion requires the jury to ascertain the amount of the mortgage debt, as the record in this case nowhere shows that this is such a suit, and contains no suggestion by the defendant that the jury be required to ascertain the amount of any mortgage debt or the unpaid balance of the purchase price of any article sold. The result is that the part of the verdict last mentioned can neither support a judgment in favor of the plaintiff for the recovery of money nor entitle the defendant to the kind of judgment which is prescribed in the contingencies provided for by the section of the Code just referred to. So far as the defendant was prejudiced by the rendition of that unauthorized part of the judgment, he will be fully protected by a correction of the judgment here by striking from it the clause awarding to the plaintiff the sum of \$117.06. The verdict supports the judgment as thus corrected.

[4] The criticism by the counsel for the appellant of the judgment appealed from because it was based upon a verdict which did not assess the value of one of the items of personal property which was sued for, namely, the "one black horse," which was not included in the judgment rendered in favor of the plaintiff, need not be considered, as the feature of the judgment which is the subject of this criticism is not brought into question by the single assignment of error in reference to the judgment which suggests only another and different specific objection to it.

The correction above indicated will be made here, and the judgment as so corrected is affirmed, the costs of the appeal to be taxed against the appellee.

Corrected and affirmed.

EDWARDS v. MASSINGILL.

(Court of Appeals of Alabama. Jan. 9, 1912.)

1. DAMAGES (§ 91*)—PUNITIVE DAMAGES—WANTON OR MALICIOUS CONDUCT—EVIDENCE.

That one personally started, or directed his employes to start, a fire for a legitimate purpose on land under his control, was not, in itself, sufficient to justify punitive damages for the burning of the property of another caused by the fire spreading, and where there was no intent to inflict injury, nor any wanton or malicious conduct amounting to a reckless indifference to consequences, punitive damages could not be awarded.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 193-201; Dec. Dig. § 91.*]

2. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where punitive damages were not recoverable, and the court on appeal from the judgment on the verdict, rendered under instructions authorizing punitive and compensatory damages, could not say whether punitive damages were included, the error in the instructions was reversible.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4230; Dec. Dig. § 1068.*]

3. EVIDENCE (§ 474*)—OPINION EVIDENCE—ADMISSIBILITY.

A farmer who had had considerable experience with fences, but who had not seen a particular fence for two or three years prior to its destruction by fire, was not competent to testify whether the fence was sufficient to turn cattle.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.*]

4. NEGLIGENCE (§ 21*)—FIRES—LIABILITY.

One who lawfully and prudently kindles a fire on his own premises for a legitimate purpose for his own use, is not liable for the destruction of his neighbor's property by the fire in the absence of negligence in setting or managing the fire but one who sets out a fire is responsible for injury due to his failure to use reasonable care in kindling the fire and to keep it from spreading to the lands of another.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 28-30; Dec. Dig. § 21.*]

5. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—NECESSITY.

A party deeming a charge misleading, though applicable to the issues, must request an explanatory charge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

6. EVIDENCE (§ 471*)—CONCLUSION OF WITNESSES.

The testimony of a party suing for the destruction of his property by fire set by the adverse party, that the latter acknowledged that his fire destroyed the property, is inadmissible as a conclusion, the proper way being to state the conversation so that the jury may draw the conclusion.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*
Witnesses, Cent. Dig. §§ 833-836.]

Appeal from Circuit Court, Escambia County; A. E. Gamble, Judge.

Action by C. W. Massingill against J. L. Edwards for setting out a fire and destroying a fence. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The first count is for punitive damages. The other counts declare on simple negligence for communicating fire to certain property, some of which placed the negligence upon the defendant, and others upon the negligence of servants or employes of the defendant acting within the line and scope of their employment.

Jernigan was introduced as a witness for the defendant, and testified in effect that he had been a farmer for 50 years, and had had considerable experience with fences, both in the construction and moving thereof; that he had not seen the fence in question for a year or more, and that he had never seen the horse stalls to notice them; that the fence seemed to be old and rotten. Thereupon the counsel for defense asked the following question: "Based on your experience, and as a farmer, and the experience you have had, was this fence sufficient to turn cattle out of their farm—to keep cattle out?" The court sustained plaintiff's objection.

Charge 1, requested by appellee, is as follows: "I charge you, gentlemen, that the defendant, Edwards, in using fire upon the premises, was compelled at his peril to keep it there; and if the defendant or his servants, as alleged in the complaint, were guilty of negligence, in either setting out the fire that destroyed Massingill's fence, or in negligently permitting it to spread to said fence so destroyed, then you will find for the plaintiff."

Leigh & Leigh and James M. Davison, for appellant. G. W. L. Smith, for appellee.

PELHAM, J. The two separate suits brought in the justice of the peace court by appellee were by agreement consolidated and tried as one case on one complaint in the circuit court, where judgment was rendered against appellant, from which this appeal is prosecuted. The consolidated complaint filed in the circuit court contained five counts, and the case was tried on pleas of the general issue to each of the counts. The first count of the complaint claims punitive damages, and in this count it is alleged that defendant willfully set fire to and destroyed 572 panels of the plaintiff's rail fence. The evidence shows that the appellant was in possession of the property on which the fire was started, or "set out," and was engaged in running a turpentine business for the purpose of getting crude turpentine, and that the fire was set out in this turpentine orchard for the purpose of burning off the woods to prevent the turpentine orchard from being injured by subsequent fires, as was usual and customary in connection with the work in which appellant was engaged. The lease under which the turpentine operations were carried on was made to C. W. Edwards, a brother of the appellant, and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

appellant seems to have taken over the business without a written transfer of the lease, but whether appellant was in possession and conducting the business in his own right as transferee of his brother, or by permission of his brother, makes no difference under the issues involved; as he was in the rightful possession and working the trees for turpentine purposes, and his right to conduct the operations on the land was not a matter of dispute on the trial. The fire thus started on the premises under control of appellant and of which he was in possession under a "turpentine lease" either as the transferee or by permission of his brother as the owner of the lease, spread to and burned over on the adjoining premises of appellee and destroyed some of his property, consisting of a part of his fence, stalls, etc. The appellant, it seems, intrusted the burning of the woods to his employes, and the evidence is in conflict as to whether the appellant, or his employes, were guilty, under the circumstances, of negligence, in the first instance, in setting the fire out; and, secondly, in not keeping the fire confined to appellant's premises, and in allowing it to spread to the adjoining land and burn and damage appellee's property.

[1] There is, however, no evidence contained in the bill of exceptions tending to show that appellant willfully set fire to and burned the appellee's fence as alleged in the first count of the complaint. This count of the complaint is in trespass, and there was no evidence to support it, or to authorize the submission of the recovery of punitive damages to the jury under its averments. The fact alone that appellant gave orders to set out the fire for legitimate and proper purposes on land under his control, or that the fire was personally started by him under such circumstances is not sufficient in itself, without some element of gross negligence attending the act, to entitle the appellee to recover punitive damages, or smart money. The evidence shows no design, purpose, or intent on the part of appellant or his employes to inflict the injury or loss on appellee, nor any wanton or malicious conduct on the part of any of them amounting to a reckless indifference to consequences such as would make the appellant liable to respond in punitive damages. The setting of the fire and the failure to confine it to appellant's own premises was characterized by no act, nor was it done under circumstances such as would amount to more than simple negligence, so far as shown by the evidence set out in the bill of exceptions; and certainly did not constitute a trespass as averred in the first count of the complaint.

[2] The value of the damage suffered varied under the estimates given by different witnesses from six or eight dollars to an amount in excess of the sum claimed in the complaint, and, the verdict being for fifty

dollars, we are unable to say whether or not a recovery was had for punitive or exemplary damages under the first count of the consolidated complaint, and the court committed error that must work a reversal of the case in refusing the general charge requested in writing by appellant on the first count of the complaint. *B'ham Water Wks. Co. v. Wilson*, 56 South. 760, present term; *Snedecor v. Pope*, 143 Ala. 275, 39 South. 318; *B. R. L. & P. Co. v. Brown*, 150 Ala. 327, 43 South. 342; *Peters v. So. Ry. Co.*, 135 Ala. 533, 33 South. 332; *B. R. L. & P. Co. v. Franscomb*, 124 Ala. 621, 27 South. 508; *B. R. L. & P. Co. v. Bowers*, 110 Ala. 323, 20 South. 345.

[3] There was sufficient evidence to submit to the jury the question of appellant's liability under each of the other four counts of the complaint; but, as the case must be reversed for the error pointed out, it is not necessary to give extended discussion to the other assignments of error.

The question asked the witness Jernigan was leading and did not specify the time; the witness had testified he had not seen the place for two or three years, and the opinion sought to be elicited was shown to be based on information too remote, uncertain, and indefinite.

[4, 5] There was no error in giving charge No. 1 requested by appellee. While it is true that where one lawfully and prudently kindles a fire on his own premises for a legitimate purpose and with a good motive to serve his business or domestic use, in the absence of negligence in its setting or management, he is not liable to his neighbor for damage that may be occasioned from the fire, yet it is also true that a person who sets out a fire is responsible for injury or damage due to failure on his part to use prudence and reasonable care and caution in kindling the fire and keeping it from spreading to the lands of another. The charge limits the "peril" under which the appellant was compelled to keep the fire on his own premises to the negligence averred in the complaint, on which the appellant had taken issue. If the appellant deemed the charge misleading in this particular, it was his duty to have asked an explanatory charge. *Hammond v. State*, 147 Ala. 79, 41 South. 761; *Vandiver v. Walker*, 143 Ala. 411, 39 South. 136; *Daniel v. Bradford*, 132 Ala. 262, 31 South. 455; *Evans v. State*, 120 Ala. 269, 25 South. 175; *Abraham & Bro. v. Nunn*, 42 Ala. 51.

[6] The evidence in many particulars was in conflict as to appellant's connection with the fire, and the appellee should not have been allowed to testify that appellant "acknowledged that his fire burned the fence." The statement was a conclusion or impression made on the mind of the witness from what was said, and he should have been required to state the conversation and allow

the jury to draw the conclusion, unaided by the conclusion or inference drawn by the witness. *Knight v. State*, 160 Ala. 58, 49 South. 764; *A. B. & A. Ry. Co. v. Brown*, 158 Ala. 607, 48 South. 73; *City of Anniston v. Ivey*, 151 Ala. 392, 44 South. 48; *B. R. L. & P. Co. v. Randle*, 149 Ala. 539, 43 South. 355; *W. U. Tel. Co. v. Merrill*, 144 Ala. 618, 39 South. 121, 113 Am. St. Rep. 66.

For the errors pointed out and discussed above, the case must be reversed.

Reversed and remanded.

STANFIELD et al. v. STATE.

(Court of Appeals of Alabama. Jan. 18, 1912.)

1. CRIMINAL LAW (§ 575*)—TIME FOR TRIAL.

Code 1907, § 3248, which provides that, where a term of court is for three weeks, the criminal docket shall be taken up on the third Monday of the term, merely means that the criminal docket shall be taken up and criminal cases given preference over civil business during that week, and not that the court is without authority to try criminal causes during a prior week of the term, so that a trial of a prosecution for assault with intent to murder during the second week of the term is not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 575.*]

2. CRIMINAL LAW (§ 991*)—JUDGMENT.

Under Code 1907, § 7630, which provides that when an offense may be punished both by fine and imprisonment, or hard labor, the jury need not impose a fine, but may find the accused guilty and leave the imposition of his punishment to the court, and section 6306, which provides that a person convicted of an assault or an assault and battery must be fined not more than \$500, and may also be imprisoned or sentenced to hard labor for not more than six months, a verdict, which simply found certain persons guilty of assault and battery, was sufficient to authorize a sentence to hard labor for six months and an additional term to cover the costs of the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 991.*]

3. CRIMINAL LAW (§ 995*)—JUDGMENT.

Although a judgment in a prosecution for assault with intent to murder does not affirmatively show that defendants failed to personally pay costs or confess judgment for the sum, where the entry assessing such costs recites that the defendant, being asked if he had anything to say why sentence should not be pronounced, said nothing, then recites, "It is further considered by the court," followed by a judgment of sentence in lieu of the costs having been paid or secured, it implies a determination that the costs were not paid or secured, and is sufficient.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 995.*]

4. HOMICIDE (§ 191*)—EVIDENCE.

In a prosecution for assault with intent to murder, a defendant may not go into the details of a former difficulty with the assaulted person, so that testimony about the assaulted party having a pistol in his hand on an occasion when he made threats, at a time prior to and disconnected with the assault for which defendant is being prosecuted, is inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 414; Dec. Dig. § 191.*]

5. WITNESSES (§ 414*)—CORROBORATION.

Such testimony is inadmissible to corroborate the testimony of the same defendant as to the assaulted party having a pistol on different occasions than the assault in question, since a witness cannot corroborate his own testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1287-1288; Dec. Dig. § 414.*]

6. WITNESSES (§ 387*)—TRIAL—CROSS-EXAMINATION—EVIDENCE ON PRELIMINARY HEARING.

Under Code 1907, § 7600, which provides that the evidence of witnesses examined in preliminary proceedings must be reduced to writing by the magistrate or under his direction and signed by the witnesses, a witness, who was a defendant in a prosecution for assault with intent to murder, may properly be asked if he did not make certain statements on a preliminary hearing, though the evidence therein was not produced, where it was not sought to contradict the witness or show by secondary evidence whether he did or did not make the statement.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1228-1232; Dec. Dig. § 387.*]

7. CRIMINAL LAW (§ 720*)—TRIAL—ARGUMENT.

Where, in a prosecution for assault with intent to murder, a defendant, when asked on cross-examination whether he made a certain statement in his preliminary examination, could not remember whether he had made such statement, his failure to remember was a circumstance not improper to be referred to by state's counsel in argument as an independent matter, regardless of whether the statement had or had not been made.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 720.*]

8. WITNESSES (§ 387*)—EVIDENCE—STATEMENTS ON PRELIMINARY EXAMINATION.

Where, in a prosecution for assault with intent to murder, state's counsel stated in open court that the evidence taken in a preliminary examination required to be preserved by Code 1907, § 7600, and to be delivered to the clerk or state's counsel by section 7601, had not been seen by him, and that to his knowledge such evidence had not been reduced to writing, and such statement was not challenged, it is sufficient to overcome the presumption of the reduction of the evidence to writing, and to authorize the cross-examination of a defendant as to whether he made a certain statement on such examination.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 387.*]

9. WITNESSES (§ 274*)—CROSS-EXAMINATION—DISCRETION.

The extent of cross-examination in a criminal prosecution is discretionary with the court, and where a witness, in a prosecution for assault with intent to murder, testified to the good character of the party assaulted for peace and quiet, permitting cross-examination as to the knowledge of the witness of facts supposed to have transpired in the life of the assaulted party to test the extent and accuracy of his information was no abuse of discretion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 965-966; Dec. Dig. § 274.*]

10. COSTS (§ 322*)—CRIMINAL PROSECUTION—SENTENCE.

In a criminal prosecution, a judgment sentencing the defendants to hard labor in default of the payment of costs at 40 cents per day is erroneous, and should be at the rate of 75 cents per day.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 322.*]

Appeal from Circuit Court, Tallapoosa County; A. E. Gamble, Judge.

John Stanfield and Ab Stanfield were convicted of assault and battery, and appeal. Judgment corrected and affirmed.

T. L. Bulger, George A. Sorrell, and N. D. Denson, for appellants. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. The defendants were jointly indicted and tried for an assault with intent to murder, and the jury returned a verdict finding the defendants guilty of an assault and battery, leaving the punishment to be fixed by the court. The court sentenced each of the defendants to hard labor for the county for six months, and an additional term to cover the costs of the prosecution at the rate of 40 cents per day.

[1] The term of the circuit court at which the defendants were tried was authorized to continue for three weeks (Code, § 3235), and the record shows the trial to have been had during the second week. The defendants made no objection to being tried during the second week of the term, but counsel urge in their brief that the court committed reversible error in putting the defendants on trial during the second week of a term of court authorized to continue three weeks, because section 3248 of the Code provides, when the term of the court is for three weeks, the criminal docket shall be taken up on the third Monday of the term. The statute means only that the criminal docket shall be taken up, and criminal cases given preference over civil business during the week stipulated, and not that the court is without authority or warrant in law to try criminal cases during a prior week of the term. The identical question was raised in *Goley v. State*, 87 Ala. 57, 6 South. 287, and decided adversely to the contention made by defendant, in his brief. This ruling in *Goley's Case* has been cited approvingly and affirmed in *Hall's Case*, 130 Ala. 45, 30 South. 422, and *Griffin's Case*, 165 Ala. 29, 50 South. 962.

[2] It is also insisted by appellants that, the jury having assessed no fine, the court was without authority to impose a punishment on the defendants based on the jury's verdict finding the defendants guilty of an assault and battery and leaving the punishment to the court. Section 7630 of the Code provides: "When an offense may be punished, in addition to a fine, by imprisonment or hard labor for the county, the jury shall not be required to impose a fine; but, if in their judgment the defendant should only be punished in some other mode, may, in such case, only find him guilty and leave the imposition of the punishment to the court." The offense of which the defendants were convicted is one that may be punished, in addition to a fine, by imprisonment or hard labor for the county. Code, § 6806. The

verdict was sufficient to support the judgment of the court imposing a punishment of hard labor within the limitations provided. *Golson v. State*, 86 Ala. 601, 5 South. 799.

[3] It is the further contention of appellants in brief filed by counsel that the judgment does not affirmatively show that defendants failed to presently pay the costs or confess judgment for the same, and that the sentence therefore rendered against the defendants in lieu of their payment or securing the costs is erroneous. The judgment entry as to each defendant recites that the defendant, being asked by the court if he had anything to say why sentence should not be pronounced upon him, said nothing, and the judgment then recites, "It is therefore considered by the court, and it is the judgment and sentence of the court," etc., that the defendant perform hard labor for the county for six months as punishment for the offense, and an additional term to pay the costs. The words, "It is therefore considered by the court," when followed by the proper statement in a judgment, have often been held to be a determination of the defendant's guilt and a sufficient judgment of conviction. *Shirley v. State*, 144 Ala. 35, 40 South. 269; *Talbert v. State*, 140 Ala. 98, 37 South. 78; *Roberson v. State*, 123 Ala. 55, 26 South. 645; *Driggers v. State*, 123 Ala. 46, 26 South. 512; *Wilkinson v. State*, 106 Ala. 23, 17 South. 458; *Gray v. State*, 55 Ala. 86. If these words are a sufficient determination of guilt, certainly they are a sufficient determination, in the connection in which they are used, that the costs were not presently paid or secured. As said by Denson, J., in rendering the opinion of the court in *Shirley v. State*, supra: "The record fails to show a formal adjudication of the defendant's guilt upon the verdict rendered by the jury. But the minute entry shows a judgment of sentence by the court in accordance with the verdict. It has been held by this court that this sufficiently implies the judgment of guilt and is a judgment of conviction which will support an appeal." And in this case the record fails to show a formal adjudication that the costs were not presently paid or secured by a judgment of the court, but the minute entry shows a judgment of sentence by the court in lieu of the costs having been paid or secured, and it will be held, following the authorities cited, that this sufficiently implies finding a judgment that the costs were not paid or secured.

[4] The question asked one of the defendants when being examined as a witness about the assaulted party, Drake, having a pistol in his hand on an occasion of making threats at a time prior to and disconnected with the difficulty in question, falls within the rule prohibiting a party going into the details of a former difficulty. *Gordon v. State*, 140 Ala. 29, 36 South. 1009; *Harkness v. State*, 129 Ala. 71, 30 South. 73; *Stitt v. State*, 91 Ala.

10, S South. 669, 24 Am. St. Rep. 853; Rutledge v. State, 88 Ala. 85, 7 South. 335; Lawrence v. State, 84 Ala. 424, 5 South. 33; McAnally v. State, 74 Ala. 9; Gray v. State, 63 Ala. 66.

[8] The proposition advanced by counsel in brief, that the testimony of the defendant Stanfield as to the assaulted party having a pistol on different occasions than the assault in question was admissible as corroborative of the defendant's prior testimony, is not tenable. A witness cannot corroborate his own testimony. McKelton v. State, 86 Ala. 594, 6 South. 301; Green v. State, 96 Ala. 29, 11 South. 478; James v. State, 115 Ala. 83, 22 South. 565.

[6] There was no error prejudicial to defendants committed by the court in permitting the state's counsel to ask one of the defendants on cross-examination, against objection because the evidence required by the statute (Code, § 7600) to be reduced to writing was not produced, if he did not make certain statements on the preliminary hearing. The witness answered that he did not remember whether he made the statement asked about or not, and the investigation and inquiry ended there. It was not sought to contradict him and show by secondary evidence whether he did or did not make the statement.

[7] The question could have been asked to test the recollection of the witness, and the fact that the witness could not recollect whether he had made such statement was a circumstance not improper to be referred to by state's counsel in argument as an independent matter, irrespective of whether the statement had or had not been made. No attempt was made to impeach the witness by the introduction of secondary evidence showing conflicting statements to have been made, and the objections taken cannot raise that inquiry.

[8] Besides, it was held, in Harris' Case, 73 Ala. 495, and Matthews' Case, 96 Ala. 62, 11 South. 203, that, if the testimony is not reduced to writing, the testimony may be proven by any witness who heard it, and, while the presumption is that the officer did his duty and reduced the evidence to writing, the statute (Code, § 7601) requires that he must deliver it to the clerk or state's counsel, and the counsel for the state made the statement in open court, at the time objection was interposed, that he had not seen such evidence, and that the evidence had not, to his knowledge, been reduced to writing. This statement that the evidence was not available to the state was not challenged and might be deemed a sufficient showing to overcome the primary presumption of the officer's having reduced the evidence to writing.

[9] The witness Taylor, having testified on direct examination to the good character of Marvin Drake, the party assaulted, for peace

and quiet, was cross-examined at length on his knowledge of a great many facts supposed to have transpired in the life of the assaulted party to test the extent and accuracy of the witness' information. Some of the questions to which objections were sustained are shown to have been subsequently answered, others seek to go into the details of former difficulties between the defendants and the party assaulted, and a careful examination shows no well taken objection to the refusal of any proper question seeking legal evidence pertinent to the issue. While it is permissible, on the cross-examination of a witness who has testified to the good character of a party for peace and quiet, to interrogate him with reference to what he has heard of specified acts of violence committed by the party, the extent and range of such examination is largely within the discretion of the court, and no abuse of discretion is shown as to the cross-examination of the witness Taylor by the defendants. Clay v. Sullivan, 156 Ala. 392, 47 South. 153; Dilburn, Adm'r, v. L. & N. R. Co., 156 Ala. 228, 47 South. 210; Smiley v. Hooper, 147 Ala. 646, 41 South. 660; Rhodes v. Weeden & Dent, 108 Ala. 252, 19 South. 318; Tobias v. Treist & Co., 103 Ala. 664, 15 South. 914; Noblin v. State, 100 Ala. 13, 14 South. 767.

We have examined all the rulings on the evidence, and other questions raised by the record, and find no reversible error available to defendants.

[10] The judgment sentencing the defendants to hard labor for the county in default of the payment of costs at 40 cents per day is erroneous, and should be at the rate of 75 cents per day, and the judgment will be here corrected in that particular, and as thus corrected will be affirmed. Dowling v. City of Troy, 56 South. 118; Bradley v. State, 69 Ala. 318; Miller v. State, 77 Ala. 41; Vaughan v. State, 83 Ala. 55, 3 South. 530; Johnson v. State, 94 Ala. 35, 10 South. 667.

Corrected and affirmed.

BIRMINGHAM RY., LIGHT & POWER CO. v. DEMMINS.

(Court of Appeals of Alabama. Dec. 9, 1911.
Rehearing Denied Jan. 30, 1912.)

1. NEGLIGENCE (§ 100*)—WANTONNESS—CONTRIBUTORY NEGLIGENCE.

Contributory negligence is no defense to an action for wanton negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 85; Dec. Dig. § 100.*]

2. PLEADING (§ 204*)—ALTERNATIVE PLEAS—SUFFICIENCY.

If either averment of an alternative plea is demurrable, demurrer to the whole plea is properly sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486-490; Dec. Dig. § 204.*]

8. STREET RAILROADS (§ 110*)—NEGLIGENCE—PLEADING.

In an action against a street railroad company for a collision between its car and a hack owned by plaintiff, pleas, that a certain person was with plaintiff's consent in charge of the hack and was guilty of negligence contributing to the accident, were insufficient to show that such person was in charge of the hack as bailee.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 110.*]

4. STREET RAILROADS (§ 110*)—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE—PLEADING—SUFFICIENCY.

In an action against a street railroad company for a collision between its car and plaintiff's hack which was being driven by another, a plea that the driver negligently drove upon or dangerously near the track without first looking or listening for a car, and that the car was going so fast that it was impossible to stop before it struck the hack, was demurrable for failing to show that the proximity of the car when the driver drove upon or near the track made the driver's act negligent.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 110.*]

5. WITNESSES (§ 248*)—EXAMINATION—RESPONSIVENESS OF ANSWERS.

Where witness was asked how another appeared after an accident, an answer, that he said he had been asleep, was properly stricken as being nonresponsive.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.*]

6. APPEAL AND ERROR (§ 206*)—REVIEW—EXCLUSION OF TESTIMONY.

In an action for a collision between a street car and a vehicle, exclusion of a question asked a witness as to what the driver of a vehicle said immediately after the accident is not reviewable, where the trial court was not advised what was expected to be proved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1283-1289; Dec. Dig. § 206.*]

7. WITNESSES (§ 388*)—IMPEACHMENT—PREDICATE—NECESSITY.

Testimony offered to contradict a witness, not a party to the action, is properly excluded, where no predicate is laid for his impeachment.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1242; Dec. Dig. § 388.*]

8. NEGLIGENCE (§ 117*)—CONTRIBUTORY NEGLIGENCE—PLEADING.

Contributory negligence must be pleaded.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 196-197; Dec. Dig. § 117.*]

9. APPEAL AND ERROR (§ 260*)—EXCEPTIONS—NECESSITY.

Exclusion of evidence is not reviewable in the absence of exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1503-1515; Dec. Dig. § 260.*]

10. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Exclusion of relevant evidence is not reversible error if the record shows that appellant was not prejudiced thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

11. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action against a street railway company for collision between its car and a vehicle, it was not prejudicial to exclude testimony

that, up to the time when the car came within a few feet of the vehicle, there would have been no collision if the driver had maintained his course, where the company was permitted to show that the car extended beyond the rails 2½ feet and that the vehicle was at least 3½ feet from the track when the driver turned toward the track.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200-4206; Dec. Dig. § 1058.*]

12. STREET RAILROADS (§ 85*)—RIGHTS AGAINST VEHICLES.

One driving a vehicle on street railway tracks is not a trespasser, and, where the street is too narrow for a vehicle and a car to pass at the same time, they have equal rights, and the driver and the motorman are equally bound to avoid injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 193, 195; Dec. Dig. § 85.*]

13. STREET RAILROADS (§ 90*)—VEHICLES ON TRACK—MOTORMAN'S DUTY.

If defendant street railway company's motorman saw plaintiff's vehicle on or dangerously near the track going in the same direction as the car, and if on account of the vehicle being a closed hack and through rain the driver did not appear to be aware of the car's approach, or if he was driving in disregard thereof, the motorman was bound at once to place the car under his control, so that he could stop immediately if necessary.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. § 90.*]

14. STREET RAILROADS (§ 117*)—COLLISION WITH VEHICLE—NEGLIGENCE—QUESTION FOR JURY.

In an action against a street railway company for collision with a vehicle, whether, under all the circumstances, a car was run by its motorman at an excessive speed, was a question for the jury and not for the court.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 117.*]

15. TRIAL (§ 251*)—INSTRUCTIONS—CONFORMITY TO ISSUES.

Instructions on contributory negligence are properly refused where there is no plea of that defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

16. STREET RAILROADS (§ 117*)—NEGLIGENCE—JURY QUESTION.

In an action against a street railway company for a collision with a vehicle, evidence held insufficient to show, as a matter of law, that the motorman had the right to assume that the driver would not drive near enough to the track to cause a collision.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 117.*]

17. TRIAL (§ 260*)—INSTRUCTIONS—MATTER COVERED.

An instruction covered by one given is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

18. STREET RAILROADS (§ 112*)—COLLISION WITH VEHICLES—NEGLIGENCE—BURDEN OF PROOF.

Under the express terms of Code 1907, § 5476, the burden is on a street railway company, in an action against it for a collision with a vehicle, to show that the company was not negligent.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 227, 228; Dec. Dig. § 112.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

19. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—SUBMISSION OF ISSUES.

Any error in authorizing recovery for punitive damages was harmless, where the jury allowed actual damages only.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.*]

20. TRIAL (§ 224*)—INSTRUCTIONS—DEFECTS—REMEDY.

When the oral charge of a court contains an elliptical expression or a sentence which might mislead the jury, the true remedy is to ask a written explanatory charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 516; Dec. Dig. § 224.*]

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

Action by Tom Demmins against the Birmingham Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The following are the pleas discussed in the opinion: (7) "For further answer to plaintiff's complaint as amended, and each count thereof, separately and severally, the defendant says that, at the time said car ran upon or against the vehicle mentioned in the complaint in said cause, one Robert Johnson was by and with the consent of the plaintiff in charge and control of said horse, vehicle, and harness mentioned in the complaint, and said Robert Johnson was himself guilty of negligence which proximately contributed to the damage alleged in the complaint, which contributory negligence consisted in this: Said Robert Johnson negligently caused or allowed said vehicle, harness, and horse to go upon, across, or dangerously near said defendant's railroad track, and in dangerous proximity to said car, which was then and there being operated on said track, without first looking and listening for said car, then and there approaching on said track, and in dangerous proximity to him." (8) Same as 7, down to and including the words "consisted in this," and adds: "Said person, having looked and seen said car approaching in dangerous proximity to him, nevertheless thereafter negligently caused or allowed said horse, when attached to said vehicle by means of said harness, to go upon or dangerously near said track, in front of said car, after having seen that said car was fast approaching said vehicle." (9) Same as 7, down to and including the words "consisted in this," and adds: "Said person, having been warned of the near approach of said car, nevertheless thereafter allowed said horse, which was attached to said vehicle by said harness, to go upon or dangerously near the said track, in dangerous proximity to said approaching car; said Johnson having charge and control of said vehicle by and with the consent of defendant." (10) Same as 7, down to and including the words "consisted in this," and adds: "Said Johnson,

while acting in the line and scope of his employment, negligently caused said horse, while attached to said vehicle by means of said harness, to go upon, across, or dangerously near the said railroad track, without first looking or listening for said car, which was then and there approaching the said place where said Johnson so caused said horse to go upon, across, or dangerously near said track, at such a rate that it was impossible to stop said car before it struck said vehicle."

The demurrers were: "The plea states contributory negligence in the alternative; that plaintiff is not sufficiently shown to be responsible for the alleged contributory negligence; that it does not sufficiently appear that there was any contributory negligence which proximately contributed to the injuries suffered by the plaintiff; that the second count was for wantonness; that the facts averred are not sufficient to amount to negligence as a matter of law; that the pleas are conclusions of the pleader, are not sufficiently specific, and raise an immaterial issue."

The following charges were given at the request of the plaintiff: (1) "If a car operated by a street car company upon a public street in Birmingham strikes and injures the property of another, there is a prima facie presumption that the street car company operating the car was guilty of negligence in so injuring the property of another, and the burden of proof is upon the street car company in that event to acquit itself of negligence." (2) "There is no issue of contributory negligence in this case, and whether Robert Johnson, the driver, was guilty of contributory negligence or not, if the jury are reasonably satisfied from the evidence that plaintiff's complaint, or either count thereof, is true, the court charges the jury that the jury must find for the defendant." (3) "If the jury are reasonably satisfied from the evidence that either count of plaintiff's complaint is true, then the jury must find for the plaintiff, whether the driver of the hack was guilty of contributory negligence or not."

The following charges were refused to the defendant: (5) General affirmative charge. (6) "If you believe the evidence in this case, you cannot award plaintiff anything for damages." (10) "The mere fact that a vehicle in charge of the person is injured on a public street in an incorporated city, by being struck by a street car on such street, does not raise a presumption that such injury was proximately caused by the negligence of those operating the car." (12) "The mere fact that a vehicle is struck by a street car on a public street in the city of Birmingham does not raise a presumption that it was struck by reason of the negligence of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

person or persons in charge of the car." (14) "The burden of proof in this case is on the plaintiff to reasonably satisfy you by evidence that the injuries inflicted on his property were proximately caused by the negligence of the conductor and motorman in charge of the car which struck said vehicle, or by the negligence of one of them."

(15) "If you are reasonably satisfied from all the evidence in this case that the motorman in charge of the car that struck plaintiff's vehicle was keeping a diligent lookout for obstructions on the track in front of said car, and that said vehicle and horse came upon said track suddenly, and that said motorman, immediately after seeing them make the first move that indicated that they would go upon said track, used all the means at his command and did everything in his power to stop said car, until it was stopped, you must find for the defendant."

(16) "If you are reasonably satisfied from all the evidence in this case that the motorman in charge of the car that struck plaintiff's vehicle was keeping a diligent lookout for obstructions on the track in front of said car, and that said vehicle and horse came upon said track suddenly, and that said motorman, immediately after seeing them make the first move that indicated that they would go upon said track, used all the means at his command and did everything in his power to stop said car, until it was stopped, you must find for the defendant."

(18) "If you are reasonably satisfied from the evidence in this case that, when the car that struck plaintiff's vehicle turned into Avenue B, plaintiff's horse and vehicle were in such a position as would have permitted the car to have passed them without coming in contact with either the horse or vehicle, and were going along said Avenue B towards Seventh street, and that there was nothing to indicate to the motorman in charge of said car that the position of said vehicle and horse would be changed, so as to cause said car to come in contact with said vehicle and horse, then the motorman had the right as a matter of law to assume that the position of said vehicle and horse would not be changed before said car would pass them." (19) "If you are reasonably satisfied from all the evidence in this case that, when the car that struck plaintiff's vehicle turned into Avenue B, plaintiff's horse and vehicle were going along Avenue B towards Seventh street at such a distance from the track on which said car was being run as would have permitted said car to have passed them without coming in contact with any of plaintiff's property, and that there was nothing to indicate to the motorman in charge of said car that said horse and vehicle would go any closer to said track before they were passed by said car, then the motorman had the right as a matter of law to assume that said vehicle and horse would not go upon or sufficiently

near said track to prevent said car from passing them without coming in contact with either of them; and if you are further reasonably satisfied from the evidence that the said motorman was keeping a diligent lookout for obstructions on or near said track, and that, when he saw the first movement of said vehicle and horse indicating or tending to indicate to him that they would go upon or in the direction of said track, he immediately used all the means possible in an effort to stop said car, and did everything in his power to stop the same, until it was stopped, you must find for the defendant."

Tillman, Bradley & Morrow and John S. Stone, for appellant. Harsh, Beddow & Fitts, for appellee.

DE GRAFFENRIED, J. This suit was brought by appellee against the appellant for damages which he alleges in his complaint he sustained by reason of the negligence of the appellant's servants while acting in the line of their employment in the management of an electric car. There were two counts to the complaint, one alleging that the damages were caused by the negligence, and the other by the wantonness, of appellant's servants or agents. The appellee's theory was that, while a hackman in his employ was driving one of his closed hacks along one of the streets of the city of Birmingham and, at the time of the injury, was driving upon the track of appellant, one of appellant's electric cars, traveling behind the hack and upon the same track and in the same direction and at a greater rate of speed, through the negligence of the motorman and conductor of the car, or one of them, ran into the hack and caused the damage complained of; that it was raining at the time; and that the driver, being in a closed hack, knew nothing of the approach of the car, and that, if he did know of its approach and was himself negligent in being on the track, nevertheless, that such *negligent act* was a mere *condition* upon which, after the discovery of the situation by the said servants of appellant or one of them, the subsequent negligence of the said servants or one of them in permitting the car to run into appellee's hack operated as the efficient, proximate cause of the injury. The appellee's theory was, also, that the car was permitted to run into and injure appellee's property through an act of wantonness on the part of said servants or one of them.

Appellant's theory was that the hack and the car were traveling in the same direction as above stated, but that, when the servants of appellant first came in sight of the hack, it was not on the track of appellant, but on one side of it and sufficiently *far* from the track for the car to have passed it without injury; that appellant's servants sounded the gong and blew the whistle to apprise the hackman of the approach of the car, which was then traveling at such a rate of speed as was reasonable and warranted by the sur-

rounding circumstances; but that, either because the hackman was asleep or drunk, or for some other reason which was unknown and could not have been known or reasonably anticipated by appellant's servants, the hackman, just before the car reached him, drove upon the track; that when this occurred appellant's servants did all that could possibly be done to stop the car and avoid the injury; but that the car could not be stopped in so short a space; and that the injury was the inevitable result of said negligent act of appellee's hackman and was in no way due to the negligence of appellant's servants.

1. There were a number of special pleas to the complaint, demurrers to all of which were sustained, and the case was tried upon the general issue. The action of the trial court in sustaining the demurrers to each of the special pleas is here assigned, separately, as error. The pleas were skillfully drawn, and we cannot indulge the presumption that the defects existing in any of them were due to the inadvertence of counsel. While it may appear that their defects were strictly technical, they were, as we have said, drawn by some one eminently versed in all the requirements of the art of pleading, and a slight defect in a work of art is frequently more glaring and more disastrous in its results upon the particular work than a gross imperfection in some production of a clumsy amateur. In other words, each special plea was evidently advisedly filed in the case for the purpose of presenting the question as to whether its alleged defects destroyed its efficacy as a perfect plea in bar to the right of the appellee to recover the damages alleged to have been sustained by him in the manner stated in the complaint.

[1-3] Each plea is an alleged plea of contributory negligence, and none of them is available, on demurrer, as a plea to the second count, which charges wantonness. Were any of the pleas available on demurrer as an answer to the first count in which only simple negligence is alleged?

Each plea alleges either that the hackman "negligently went upon or dangerously near said track," or that he "negligently went upon, across, or dangerously near" said track. As the defense is made by each plea in the alternative, if, as to either of its alternative averments, it was subject to the demurrer, the demurrer to the whole plea was properly sustained. The appellant has waived its first, second, third, and fourth assignments of error and presents no argument in support of its assignment of error as to plea 6, and we will consider the questions only as to the sufficiency of pleas 7, 8, 9, and 10.

The seventh, eighth, and ninth pleas seek to raise the question as to whether, when property which is in the hands of a bailee is injured through the negligence of another, the negligence of the bailee proximately contributing to the injury, the bailor can recov-

er the damages growing out of such injury. The most intelligent discussion that we have been able to find upon this subject is to be found in the case of *Illinois Cent. R. Co. v. Sims*, 77 Miss. 325, 27 South. 527, 49 L. R. A. 322. In that case the court held that where property is in the possession of a bailee and, *while being used in accordance with the terms of the bailment*, is injured by a third party, and the bailee's negligence contributes to the injury, his negligence is imputable to the bailor.

We refer to the above case, not for the purpose of indicating our views as to whether the decision in that case is or is not a proper statement of the law, but for the purpose of pointing out the fact that neither of the pleas under discussion is brought within the terms of the rule which appellant invokes. In neither of the pleas is it averred that the hack was being used by its driver in accordance with the terms of the bailment, and the demurrer to each of said pleas was therefore properly sustained on that ground. While plea 7 avers that Robert Johnson was, with the knowledge and consent of appellee, in charge and control of said hack and horse, it may be, so far as the allegations of the plea are concerned, that Robert Johnson was a liveryman, and as such was in charge and control of the horse and hack to keep them for appellee, without authority to drive them upon the streets of Birmingham. Pleas 8 and 9 do not aver that appellee knew that Johnson was in possession or control of the horse and hack, and, so far as the allegations of those pleas are concerned, it may be that Johnson had stolen the horse and hack from appellee.

[4] Plea 10 was subject to demurrer because it fails to show that the *proximity* of the car to the hack when its driver, without looking or listening, drove "across, upon, or dangerously near the track," rendered the act of the hack driver, in so doing, negligence. The plea says that the car was then and there approaching the place at such a rate that it was impossible to stop said car before it struck said vehicle. It may be, from aught that appears in the plea, that the car was 200 yards from the hack when it turned "dangerously near, upon, or across the track," and that the car was then running at the rate of 50 miles an hour around a curve, and that it could have been neither seen nor heard by the driver if he had "looked and listened." While the plea says that Johnson "negligently caused said horse while attached to said vehicle to go upon, across, or dangerously near the defendant's track without looking or listening for said car, which was then and there approaching said place," it may be, so far as the allegations of the plea are concerned, that, if the driver had looked and listened, he would have neither seen nor heard anything indicating that he did not have ample time to cross before appellant's car reached him, and that the entire danger

was due solely to the high and excessive rate of speed of a car of which the driver could not, by listening and looking, have informed himself. In other words, the plea fails to show with sufficient certainty such a condition as rendered it a duty of the driver not to go near, upon, or across said track at the time mentioned in the plea if he had looked or listened. "A driver has the right to cross a street railroad track, although he may see a car in the distance, if he may reasonably suppose he can cross before it reaches him." *B. R., L. & P. Co. v. McLain*, 162 Ala. 658, 50 South. 149.

[5-8] 2. During the progress of the trial, a witness was asked as to how the hackman appeared immediately after the accident. Answering the question, the witness answered, "He got out and looked like he had been asleep or something, and said he had been asleep." The latter part of the answer was, upon motion, properly excluded from the jury because it was not responsive to the question. Thereupon the same witness was asked what the hackman said immediately after the accident. The court refused to allow the witness, on objection of appellee, to answer the question, and appellant reserved an exception. As appellant failed to inform the court *what* he expected to prove the hackman said, the court was unable to say whether the testimony thus sought to be elicited was or was not relevant. The trial court, therefore, will not be put in error for such refusal. It may be that the intention was to offer testimony to the effect that the hackman said he was asleep when the accident occurred; but it is possible that the testimony would have shown that he said *more* than that, and the appellant should have informed the court exactly what he did expect to prove, so that the trial court could have, before the witness answered the question, determined whether such testimony was relevant or material. The practice of admitting irrelevant evidence and afterwards excluding it from the jury has been frequently condemned by the courts, as it often tends to prejudice the jury against the party against whom it is offered. *Green v. State*, 96 Ala. 32, 11 South. 478; *Griffin v. State*, 90 Ala. 600, 8 South. 670. It is argued by counsel for appellant that, if proof that the hackman said that he was asleep when the hack was struck had been allowed to go to the jury, such testimony would have tended to contradict his testimony as to what he was doing from the time he turned into the avenue where the injury occurred until the time of the collision. It is a sufficient reply for us to say that the hackman was not a party to this suit, and that appellant, when he was examined, laid no predicate for his contradiction or impeachment by asking him if he did not say, immediately after the collision, that he was asleep; and that the only possible theory under which such testimony could be admissible, in the absence of such predicate, was that it was a part of the *res gestae*. As

there was no plea of contributory negligence, we cannot see that the fact that the negligence of the hackman may or may not have contributed to the injury was available to appellant.

[9] In this connection we dispose of the eighteenth assignment of error by stating that it presents nothing for our consideration because no exception was reserved, in the court below, to the exclusion by the court, on motion of appellee of the evidence referred to in said assignment of error.

[10, 11] 3. Some exceptions were reserved upon the trial for our consideration, going to the action of the trial court in refusing to allow the appellant to prove that when the car came in sight of the hack, and up to the time it came up to within a few feet of the hack, "the car would have missed him if he had kept going the way he was." It is a familiar rule that, where the record plainly shows that no error was done the party complaining by the exclusion of certain evidence, the action of the trial court, in excluding such testimony, even if relevant, will not operate to work a reversal of the case. The testimony of the appellant tended to show that the car extended beyond the rails on each side—"the overhang of the car"—for a distance of $2\frac{1}{2}$ feet, and that the hack was, at the time it is claimed to have turned in the direction of the track, a distance of at least $3\frac{1}{4}$ feet from the track. If this was true, the car, but for the fact that the hack changed its direction, would have missed the cab by *one* foot. As the court permitted *this* evidence to go before the jury, we cannot see how appellant was prejudiced by the court's refusal to allow the witness to place the evidence in a different form and say the "car would have missed him if he had kept going in the direction he was."

In addition to the above, one of the witnesses for appellant—the motorman—testified (and *that* evidence remained with the jury): "The cab was not in the path of the car at that time. The horse turned right in front of the car just before I got to it." In the case of *Birmingham R., L. & P. Co. v. Randle*, 149 Ala. 544, 43 South. 355, *after* the witness had stated the distance, in feet, the deceased was from the track when he first saw him near the track, it was held that it was *competent* for the witness to state that "the car would not have struck him in passing him at that distance from the track," and we think that a careful analysis of the reasoning of the court in that case will convince the most skeptical that the action of the trial court made the basis of this assignment of error does not constitute reversible error.

[12] 4. Under the appellee's evidence, if it was believed by the jury, his hack was on the track of the appellant when its car came in sight of the hack in a business section of the city of Birmingham where the street on the side on which it was traveling was so narrow that hacks and other vehicles out of neces-

sity used, in passing up and down the street, the track of appellant, and that appellant's servants in charge of the car, seeing the driver's position, and knowing that it was raining and that the driver was in a closed hack and was driving in the same direction as that in which the car was traveling, were disregarding of their duties in the premises and needlessly so ran the car at such a rate of speed as to run into the hack and cause the injury complained of. A person who drives a hack on the tracks of a street railway for a legitimate purpose is not a trespasser. The rights of the public require that the cars of a street railway shall not be unreasonably delayed because of the conduct of others in the use of the streets, but the law does not confer upon the motorman of a street car the right to enforce his right of passage through a street by running his car over a person making even a negligent use of the right of way. *Nellis on Street Railways* (2d Ed.) vol. 2, §§ 388, 389.

Where the street is too narrow for a vehicle and a street car to pass through it at the same time, it is evident that a driver of a vehicle and an operator of a street car have equal rights of passage, and upon each the law devolves the same duty as to the avoidance of injury. *B. R., L. & P. Co. v. Oldham*, 141 Ala. 195, 37 South. 452, 3 Ann. Cas. 333.

[13] Where a car is traveling down a street which is wide enough for vehicles to pass the car without injury, and the motorman or other person in control of the car sees a vehicle upon or dangerously near the track, the car must be operated at such a rate of speed that, if the vehicle remains upon or dangerously near the track, the car may, by the application of proper appliances, be stopped in time to prevent injury if that becomes necessary to avert injury. *Rosen's Case*, 159 Ala. 195, 48 South. 798, 133 Am. St. Rep. 32.

The above is stated subject to the qualification that a motorman is not necessarily obliged to stop his car when he sees a vehicle ahead of him on or in dangerous proximity to the track, but he is required to keep his car under proper control and running at such a rate of speed, when he does see a vehicle upon or dangerously near the track, that, if he ascertains that the driver is *ignorant or heedless* of his approach, he may have sufficient time within which to stop the car and prevent a collision. *Schneider v. Mobile L. & R. R. Co.*, 146 Ala. 344, 40 South. 761. The rights of a street railway company to the use of a street, subject to the limitation that its cars can only run upon its track, are the same as the drivers of any other vehicle, and, when a car is overtaking a vehicle on or dangerously near its track, a proper regard for the rights of others requires that the car be reduced to such control that it may be immediately brought to a standstill if necessary. *Consolidation Traction Co. v. Haight*, 59 N. J. Law, 577, 37 Atl. 135.

As we have above said, if a motorman, in charge of a car, sees a vehicle on the track or dangerously near it, and that the driver is either ignorant of the approach of the car or driving without regard to it, it is the duty of the motorman to so regulate the speed of his car as to be able to immediately stop it, and to actually stop it, in time to prevent injury, if that becomes necessary, and, if he fails to do so and damage results by reason thereof, the railway company is liable therefor. In such a case, if the vehicle is on or dangerously near the track through the negligence of the driver, such negligence is a *remote*, not proximate, cause of the injury; it is but the condition upon which the subsequent negligent act of the motorman or other person in charge of the car operated as the direct, efficient, proximate cause of the injury. "We have often held that if the plaintiff's peril was discovered in time to avoid the injury by the exercise of due care on the part of the defendant, and the injury was the result of its failure to perform its duty in this respect, plaintiff would be entitled to recover, although he may have been guilty of culpable negligence in the first instance." *L. & N. R. Co. v. Webb*, 97 Ala. 308, 12 South. 374; *L. & N. R. Co. v. Hurt*, 101 Ala. 34, 13 South. 130; 7 A. & E. Ency. Law, p. 382, § 3.

It is therefore manifest that if the motorman in charge of appellant's car saw appellee's hack on or dangerously near the track and going in the same direction as the car, that it was a closed hack, and that it was raining at the time, and there was nothing to indicate that the driver of the vehicle was aware of the approach of the car, or if it appeared that he was driving regardless of the fact that the car was approaching, it was the duty of such motorman to have at once reduced the speed of his car and to have placed it under such control that he could at once stop if necessary. And if the street in which the hack was being driven was too narrow for the car to have passed the hack in safety, then it was the absolute, imperative duty of the motorman, when he discovered the hack in the street, whether the hackman was aware or mindful of the approach of the car or not, to have at once so placed his car under control and to have so reduced its speed as to have prevented the collision.

[14] 5. There was evidence tending to show that at the time of the injury the car was running at the rate of from six to eight miles an hour. While the evidence is in conflict as to whether the car could have passed the hack in safety but for the fact that the horse turned across the track just before the collision, all of the evidence showed that, if the hack was not on the track, it was in close proximity to it, and that the space for vehicles between the track and the curbing of the sidewalk was narrow. Whether, under all the circumstances surrounding the parties, the car was run by its motorman at

an excessive rate of speed, was not a question of law for the court, but a question of fact for the jury. What would amount to a reasonable rate of speed in one place or under certain conditions might, 'in another place or under other conditions, amount to an excessive and dangerous rate of speed. *Nellis on Street Railways*, vol. 2, § 347.

[15] There was no plea of contributory negligence in the case, and it is evident, therefore, that the trial court committed no error in giving the last two charges which the appellee requested it in writing to give to the jury, and that it was free from error in refusing to give to the jury charges 5, 6, 15, and 16.

[16] 6. While there was evidence in the case from which the jury could have inferred that the hack could have been passed by the car without a collision if the horse had not been turned across the track, nevertheless there was evidence from which the jury also had the right to infer that the hack was in *dangerous* proximity to the track from the time the car came in sight of it until the collision occurred; that its driver was proceeding without regard to the approach of the car; and, from the circumstances, that the motorman knew or could reasonably have discovered that he was heedless of its approach. In fact, there was evidence that the hack was so close to the side of the track that the car would not have missed it more than 12 inches if the horse had not, as appellant's evidence tended to show, turned across the track. We cannot, therefore, hold that, under the circumstances of this case, it can be affirmed as matter of law that the motorman had the right to presume, and to regulate his conduct upon that presumption, that the position of the vehicle and horse would not be changed after he came in sight of it so as to cause said car to come in contact with said vehicle and horse. "The operative is forbidden to rely upon the assumption that apparently adult persons or property, such as horses and vehicles in control of persons apparently adult, will leave, in time to avert injury, the track or in dangerous proximity to it, when the circumstances reasonably indicate that the party imperiled, or likely to become so, is unconscious thereof." *Rosen's Case*, *supra*.

It is therefore our opinion that the trial court properly refused to give to the jury charges 18 and 19, which the appellant in writing asked the court to give to the jury.

[17] And, in this connection, we may add that the court properly refused to give to the jury charge 13, which appellant in writing requested it to give to the jury. It had already, at the request of the appellant, given to the jury written charge 9, which was similar in all respects to said charge 13.

[18] 7. Section 5476 of the Code, so far as the burden of proof is concerned, applies to street railways, and where any person or stock is killed or injured, or other property damaged or destroyed by a street car of a street railway, the burden of proof, by virtue of said section, is upon the street railway company to show that there was no negligence on the part of the company or its agents. *Selma Street & Suburban Ry. Co. v. M. E. Martin*, 56 South. 601.

It follows that the court properly gave to the jury charge 1 requested in writing by appellee, and properly refused charges 10, 12, and 14, which the appellant requested it to give to the jury in its behalf.

[19] 8. The question as to whether, under the facts of this case, the court erred in submitting the question as to whether there could be a recovery for punitive damages, is immaterial. It is obvious that, under the evidence as to the amount of the injury, the jury, by their verdict, only allowed appellee the damages actually sustained by him. *City of Eufaula v. Simmons*, 86 Ala. 515, 6 South. 47.

[20] 9. When the oral charge of a court contains an elliptical expression or a sentence which might mislead the jury, the true remedy of a party aggrieved thereby is to ask a written explanatory charge. *B. R., L. & P. Co. v. Murphy*, 56 South. 817.

We think that we have indicated, in what we have above said, that in our opinion the oral charge of the court, if subject to criticism, was subject to criticism only because it may have possessed a misleading tendency, and that this judgment should not be reversed on that account. 2 *Mayfield's Dig.* p. 573, § 214.

We have, in the above opinion discussed all of the matters insisted upon in the briefs of appellant's counsel in which there appears any merit, and, as we are of opinion that no error was committed by the court on the trial of this case which was in any way prejudicial to the rights of appellant, we are therefore of the opinion that the judgment of the court below should be affirmed.

Affirmed.

CAMPBELL v. STATE.

(Court of Appeals of Alabama. Jan. 16, 1912.)

LARCENY (§ 32*)—INDICTMENT—RECOVERY OF OWNERSHIP OF PROPERTY—"POSSESSION."

The paymaster of a railroad company, intending to pay the foreman of a gang and the members thereof, counted out the wages due the foreman and placed the money on the counter, and, while the foreman signed the pay roll, the money was stolen by accused, who a few moments later was found by the foreman and the money taken from him, and returned to the paymaster, who again counted it and paid it to the foreman. *Held*, that an indictment for the larceny of the money properly alleged that it was the property of the foreman, since "possession" means the owning or having a thing in one's power, and may be actual or constructive.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 81-92; Dec. Dig. § 32.* Indictment and Information, Cent. Dig. §§ 277, 281, 282.

For other definitions, see Words and Phrases, vol. 6, pp. 5464-5470; vol. 8, pp. 7757, 7758.]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Anderson Campbell was convicted of larceny, and he appeals. Affirmed.

C. H. Roquemore and Ed T. Graham, for appellant. R. C. Brickell, Atty. Gen., and William L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. H. E. Patrick, it appears from the evidence, was the foreman of a gang of laborers in the employ of the Louisville & Nashville Railroad Company. On pay day he went to the pay car of said company for the purpose of drawing his own pay and also the pay due to the laborers belonging to his gang. The defendant was a member of the gang, and the railroad company owed him something over \$5, and he, along with the other members of the gang, accompanied Patrick to the car. It appears to have been the custom of the railroad company, from data furnished to it before each pay day, to have already prepared and in readiness on each pay day, for each gang of laborers, a list or pay roll, showing the name of the foreman and of each member of the gang, with the amount due each man set out opposite to his name, and the money was paid to each man to whom it was due in the following way: A clerk would call the name of each man as his name appeared on the pay roll, another clerk standing by would identify the payment to each man as it was made by the paymaster, and the section foreman would stand by and identify the members of his gang as their names were called. The name of the foreman of the gang was always the first name on the pay roll, and he was always the first man to receive his pay.

On the day in question the above custom was pursued, and when Patrick's name was

called the money due him, \$78, was counted out on the counter. Patrick, about the time the money was placed on the counter, turned to sign the pay roll, and the paymaster turned his head away, and when Patrick turned around after signing the pay roll the money was gone. The defendant had taken the money from the counter and had disappeared. A few moments afterwards he was found by Patrick and the money taken from him. Patrick took the money and the defendant back to the paymaster. The money was again counted by the paymaster and then handed over or paid to Patrick.

The defendant was indicted for the larceny of the money, and in the indictment it is alleged that the money was the property of Patrick, and the defendant claims that there was a fatal variance between the allegations and the proof, in that the evidence showed that both the title and the possession of the money were in the Louisville & Nashville Railroad Company. It is contended by the defendant that as Patrick had not, in fact, placed his hands upon the money or finished his signature to the pay roll when the money was taken from the counter, therefore neither the title to nor the possession of the money had passed from the railroad company to Patrick.

When the paymaster segregated the \$78 from the rest of the money of the railroad company, he did it for the benefit of Patrick, and, but for the fact that the defendant took the money from the counter, in all human probability it would never have gone back into the paymaster's hand. It was carried back to the paymaster when recovered from the defendant in order that he might properly identify it and see that it was all of the money, and when that was done it was delivered to its real owner, the man for whom it had been counted out and placed on the counter in the first instance—Patrick. When the money was placed on the counter by the paymaster, it was placed there for Patrick and as money belonging to Patrick for the wages due him. It was, in fact, a delivery of the money to Patrick, and the mere fact that Patrick had not put his hands upon the money when the defendant took it and may not, in fact, have known that the paymaster had placed it there for him, cannot avail the defendant. It placed the money under Patrick's rightful dominion, and the defendant violated that dominion when he, without the knowledge or consent of Patrick, took it away.

"Possession" means, simply, the owning or having a thing in one's power; it may be actual, or it may be constructive. "Actual possession" of a chattel exists when the thing is in the actual, manual custody of the party; "constructive possession" is that which exists in contemplation of law without actual custody. *Brown v. Volkening*, 64 N. Y. 76;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Foust v. Territory of Oklahoma, 8 Okl. 543, 58 Pac. 728.

The parts of the oral charge of the court to which the defendant reserved exceptions were in accordance with the above views. There is no error in the record, and the judgment of the court below is affirmed.

Affirmed.

SCOTT v. STATE.

(Court of Appeals of Alabama. Jan. 11, 1912.
Rehearing Denied Jan. 30, 1912.)

1. INTOXICATING LIQUORS (§ 215*)—PROSECUTION—INDICTMENT—SUFFICIENCY.

Under Acts Sp. Sess. 1909, p. 63, entitled "An act to further suppress the evils of intemperance," and providing that an indictment for selling, offering for sale, keeping for sale, or otherwise disposing of intoxicating liquors is sufficient, if charging that defendant kept, sold, or disposed of the liquors contrary to law, an indictment in accordance with Code 1907, § 7353, charging the sale of intoxicating liquors without a license or contrary to local regulations, is sufficient; the averment as to license being rejected as surplusage because, under the act of 1909, all sales of intoxicating liquor were inhibited.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 215.*]

2. INDICTMENT AND INFORMATION (§ 87*)—SUFFICIENCY—MISDEMEANORS.

Where the statute denouncing a misdemeanor has been in effect more than 12 months, an indictment is not subject to demurrer for failure to aver the commission of the act since the passage of the law.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 244-255; Dec. Dig. § 87.*]

3. CRIMINAL LAW (§§ 586, 1151*)—CONTINUANCE—DISCRETION OF TRIAL COURT.

The granting or refusing of a continuance rests in the sound discretion of the trial court, which cannot be reviewed, save in the case of a palpable abuse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 3045-3049; Dec. Dig. §§ 586, 1151.*]

4. CRIMINAL LAW (§ 1151*)—APPEAL—REVIEW—ABUSE OF DISCRETION.

Where one jury had disregarded the court's affirmative charge to find the accused guilty of a violation of the local option law if they believed the evidence, and the judge administered a severe rebuke to the jury declaring that he would no longer permit them to pollute the streams of justice and discharged them from further service as jurors, and on the following day, defendant being again put on trial for another violation of the law, the court called the attention of the jury then impaneled to the conduct of the preceding jury, and stated that there was a public sentiment in the community against conviction for violation of the liquor laws, in the absence of a pledge by the judge that sentence at hard labor would not be imposed, but that he would not give such a pledge, or compromise with the jury, and that it was their duty to convict if they believed the evidence of guilt and no conflicting inferences could be drawn. The original jurors were in the courtroom during the charge to the second jury. Defendant asked for a continuance on the ground that the remarks of the court were calculated to

prejudice and intimidate the jury. *Held*, that a denial of the continuance was not such a manifest abuse of discretion as to require a reversal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1151.*]

5. INTOXICATING LIQUORS (§ 15*)—CRIMINAL OFFENSES—SALES—WHAT CONSTITUTES.

The prohibition against any sale of intoxicating liquor applies to a sale which passes the title, regardless of the seller's ownership; and so Acts Sp. Sess. 1909, p. 94, § 83, providing that any person who shall act as agent or assisting friend of the buyer or seller of intoxicating liquors shall be guilty, is valid.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 15.*]

6. CRIMINAL LAW (§ 814*)—TRIAL—INSTRUCTIONS—ABSTRACT INSTRUCTIONS.

In a prosecution for the sale of intoxicating liquor, where there was no evidence tending to show that accused was not the seller, a charge raising the question of whether he was the assisting friend of the purchaser is abstract, not being supported by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 814.*]

Appeal from Circuit Court, Barbour County; M. Solly, Judge.

Ab. Scott was convicted of violating the prohibition law, and appeals. Affirmed.

What transpired as to the first jury was as follows: "Gentlemen, this court does not need your services, and will not use you any longer. You cannot, and I will not permit you to, pollute the streams of justice any further by such verdicts as that you have just rendered. I will not permit you longer to obstruct the orderly administration of the law, or further to interpose yourselves as an obstacle between the criminal and the law. I am going finally to discharge you, and the clerk will take a list of your names and enter an order upon the minutes discharging you. You and I cannot longer serve together in our present relations here. Either you or I must get down and out, and I have decided it is you that must do so. While I will not take steps against you for contempt upon my own motion, if the solicitor desires it, I will hold you until he shall determine whether or not he desires in the name of the state to institute contempt proceedings against you."

After impaneling a jury in the place of the one discharged, the court addressed the new jury as follows: "Matters which are extraordinary have been transpiring here. It chances that there are certain cases standing for trial upon this docket charging unlawful sales of spirituous liquor. Reports come to me that the public opinion of this community is in sympathy with the person so charged, and that the people do not approve the notion of punishing people convicted of selling liquor by hard labor sentences, and I am advised that either that policy must be abandoned here, and assurance given that such persons as may be convicted of selling liquor will not be punished by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

imposition of hard labor sentences upon them, or that the juries will not convict persons charged with that crime; but I have refused to enter into the bargain. I refused to make any promise, or to commit myself to any policy. One of the liquor cases came on for trial, and upon the law and under the evidence an affirmative charge was given by me to the jury who has been discharged, and against that charge the defendant was acquitted. That which led to the discharge of the other jury and sending for this was the refusal on the part of the jury to convict when an affirmative charge was given. Cautiously looking over the lay of the land, a circuit judge ought not to permit that kind of a jury to sit and serve. When a man is guilty, if the evidence is believed, and no conflicting inferences can be drawn, and it bears no impeachment upon its face, and no reasonable construction of it can impeach it—in a case like that, if the jury believe the evidence beyond a reasonable doubt, it becomes their sworn duty to convict. It rarely can happen that a jury can find against an affirmative charge, when it does not mean a finding against the law according to what the judge holds the law to be. I guess that, if 1,000 such cases were put to the test, not less than 999 out of the 1,000 verdicts so rendered would prove to be rendered as a protest against the law, and as an expression of the jury's unwillingness to be governed by the law. There is vested in certain judges the power to discharge and punish a petit juror who flatly refuses to obey the law. The people in this community have it in their power to allow criminals to escape justice; and if that were ever so repulsive to me, I cannot compel the conviction of any man. Twice in the last few weeks I have had to discharge juries because they did not do their duty; for I believe in my heart that the law ought to prevail everywhere, even right here in Eufaula. Do I owe it to the general public to trade from this bench? I desire to say that I will not trade with any man. If I would have done so, I could have traded here, and probably the juries would have agreed upon convictions and fines where from the evidence they believe the defendant guilty. I believe the law ought to be enforced; but I will not raise a row with you, if you see fit to release the criminal, and turn him loose, and abandon the law, and turn your community over to chaos. You have the power to do it, and I am going to furnish you an opportunity to say what you will do, by putting the cases on trial." The court said a great deal more, but the above will indicate the nature and character of his address.

Peach & Thomas, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. [1] The indictment in this case, which was filed in court on the

30th day of November, 1910, charged that "before the finding of this indictment Ab. Scott sold spirituous, vinous, or malt liquors without a license and contrary to law, against the peace," etc. It is to be observed that the indictment is in the form prescribed by section 7353 of the Code for the cases of sales of such liquors without a license or in violation of special or local laws regulating or prohibiting their sale. The defendant by demurrer raised the question of its sufficiency as a charge of a violation of the general prohibition law which was in force at the time it was found. Under the provisions of section 29½ of the act approved August 25, 1909, entitled "An act to further suppress the evils of intemperance," etc. (Acts Sp. Sess. 1909, pp. 63, 90), in an indictment, complaint, or affidavit for selling, offering for sale, keeping for sale, or otherwise disposing of spirituous, vinous, or malt liquors, it is sufficient to charge that the defendant sold, offered for sale, kept for sale, or otherwise disposed of spirituous, vinous, or malt liquors contrary to law. The indictment in this case uses the language which the statute makes sufficient to constitute a charge of a sale of such liquors in violation of the general prohibition law which was then in force, and also makes the further charge that the sale was made without a license. In other words, the indictment alleged all that the statute required to be alleged, and also averred in effect that the sale was made by a person not having a license. In legal effect this latter allegation added nothing to the charge made by the other language contained in the indictment, as the traffic in such liquors had ceased to be licensed. This being true, the words "without a license" are to be regarded as wholly superfluous. Certainly, in view of the law that was in force at the time the indictment was framed, they did not add to or detract from the charge, which was sufficiently made by the use of the other words with which they were associated. The words quoted are to be treated as surplusage—without effect upon the legal sufficiency of the charge made by the indictment.

[2] The rulings in the cases of Kelley v. State (Ala. Sup.) 55 South. 141, and Marks v. State, 159 Ala. 71, 88, 48 South. 864, 133 Am. St. Rep. 20, do not stand in the way of this conclusion. So far as the question now under consideration is concerned, those rulings were merely to the effect that, as an indictment for a misdemeanor is to be understood as charging that the offense was committed within the next preceding 12 months. If the law creating the offense first became operative during that period, an indictment under it is subject to demurrer for a failure to aver that the offense was committed after the law became effective. Glenn v. State, 158 Ala. 44, 48 South. 506. No such reason exists in this case for alleging that the sale of liquor charged against the defendant was made at a time subsequent to the date when

the general prohibition law went into effect, as that law had been in force more than 12 months when the indictment was found. The act charged was a crime during the entire period which is to be understood as covered by the indictment. The presence in it of the words "without a license" cannot be allowed to have such an influence as to make the charge an ineffectual one of a violation of a law which had gone out of existence more than 12 months before, when the indictment contained all that was required to constitute it a legally sufficient charge of a violation of the law which was in force when it was returned, and its superfluous allegation was not such a one as could, at that time, change its legal import. The court was not in error in overruling the demurrer to the indictment.

[3] On the day before this case was tried a jury which had acquitted the defendant on a similar charge was discharged from further service, the presiding judge saying to them that he would not permit them to pollute the stream of justice by such verdicts; and another jury was organized in its stead. After the organization of this new jury, the court addressed it at some length; the remaining original jurors being in the courtroom at the time. When the present case was called for trial on the next day, the defendant, by his counsel, objected to being put on trial at that time, and moved the court to continue the case, on account of the proceedings and remarks of the court to the discharged jury and the remarks of the court to the new jury, because, as stated by the counsel, "said remarks and proceedings were calculated to prejudice and intimidate the jury in the present case, and make them feel that they were not free to bring in a verdict according to their own convictions, and because said remarks and proceedings intimate that the court was of opinion that the defendants in all liquor cases on the docket were guilty." The court overruled this objection and motion, and required the defendant to go to trial before a jury selected from the jurors then in attendance, all of whom were cognizant of the matters made the basis of the objection. To this action of the court the defendant excepted. It is a well-established rule in this state that the grant or refusal of a continuance rests in the sound discretion of the trial court, and is not the subject of revision on appeal. It is not denied that there may be a case of such a gross and palpable abuse of this discretion as to constitute an exception to this rule, and to require a reversal in order to afford the defendant an opportunity for a fair trial. *White v. State*, 86 Ala. 69, 5 South. 674; *Davis v. State*, 92 Ala. 20, 9 South. 616; *Cunningham v. State*, 117 Ala. 59, 23 South. 693.

[4] We are not of opinion that the record in this present case shows that there was such an abuse of discretion. Though it may be

presumed, the record not showing to the contrary, that the discharge of the former jury was in consequence of a flagrantly unwarranted acquittal at its hands, yet we are not concerned with the question as to the propriety of that action, except in so far as the manner of it, and the remarks with which it was accompanied, in connection with the subsequent remarks of the trial judge to the new jury, might have had such an effect upon the jury which tried this case as to make it apparent, or at least probable, that the trial could not have been a fair one. In his remarks to the jury which was impaneled to take the place of the one that had been discharged, the presiding judge made mention of the fact that the discharged jury had rendered a verdict of not guilty in a liquor case in which they had been charged by the court to find the defendant guilty if they believed the evidence beyond a reasonable doubt, and referred to reports that had been brought to the notice of the court that the juries in that county disapproved of hard labor sentences for persons convicted of violations of the liquor laws, and that, as the presiding judge was reputed to have imposed hard labor sentences on persons convicted elsewhere of such offenses, they would not convict in such cases unless some promise or assurance was given that hard labor sentences would not be imposed. The statement was made with emphasis that the presiding judge would give no such promise or assurance. He addressed the jury at some length in reference to the respective functions and duties of the court and of the jury, and they were plainly admonished as to their duty to convict when the evidence satisfied them beyond a reasonable doubt that the defendant was guilty of the charge made against him; in the course of its remarks the court saying: "When the evidence is without conflict, and clearly shows guilt, and there is not in it room for any other inference or conclusion than that the defendant is guilty, and when it is reasonable and fair and free from suspicious or impeaching conditions, and you believe it beyond a reasonable doubt, it is your duty to convict." In no part of the remarks was there an intimation that the jury should convict in any case unless they were convinced from the evidence beyond a reasonable doubt that the defendant was guilty; and it was expressly stated to them that, "although an affirmative charge should be given, still, if they did not believe beyond a reasonable doubt that the defendant was guilty, it would be their duty to acquit."

In the argument of the counsel for the appellant it is urged that this address of the presiding judge was calculated to affect unfavorably the fairness of the trial entered upon on the following day; but no part of it is pointed out as embodying a misstatement of the law as to the duties of jurors as triors of the facts. Nor do we discover in

the remarks any improper instructions in that regard. As to the specific grounds stated in support of the objection and motion, it is enough to say that the one suggesting that "said remarks and proceedings intimate that the court was of opinion that the defendants in all liquor cases on the docket were guilty" was without any foundation in fact, as the record does not indicate that the court was guilty of making in any way such an intimation, and that the other one, suggesting that "said remarks and proceedings were calculated to prejudice and intimidate the jury in the present case, and make them feel that they were not free to bring in a verdict according to their own convictions," cannot be sustained without deciding in effect that an emphatic admonition to the jurors in attendance, given before the trial of a case has been entered upon, as to their duty to convict when they believe from the evidence beyond a reasonable doubt that the defendant is guilty, must be condemned as a prejudicial and intimidating influence, though the giving of such admonition was occasioned by occurrences which had made it apparent to the court that juries in that locality were disposed to acquit persons charged with the commission of a certain class of offenses, specifically referred to, on considerations other than the lack of the requisite proof of guilt. We are not of opinion that the action of the court in requiring the defendant to go to trial after such an admonition had been given to the jury, under the circumstances stated, constituted so palpable an abuse of discretion as to suggest that the defendant was thereby deprived of the right to a fair trial. *Landthrift v. State*, 140 Ala. 114, 87 South. 287.

[5, 6] The evidence without conflict showed a sale of the liquor. There was no evidence tending to prove that the defendant's relation to the transaction was other than that of seller. A sale completed, which passes title to the liquor as between the parties to the contract, is within the terms of the law prohibiting such a sale, without regard to the ownership of the seller. *Taylor v. State*, 121 Ala. 24, 25 South. 689. The requested charges which sought to raise a question as to whether the defendant was the seller or the "assisting friend" of the purchaser were abstract. There was no evidence tending to prove that any one other than the defendant was the seller or interested in the sale. Besides, it seems that it is entirely competent for the Legislature to provide that a

charge of selling prohibited liquor may be sustained by evidence showing either that the defendant was the seller or acted "as agent or assisting friend of the seller or buyer in procuring an unlawful sale of any prohibited liquors" as it undertook to do by section 38 of the act approved August 25, 1909, above referred to. Acts Sp. Sess. 1909, p. 63; *Jones v. State*, 136 Ala. 118, 84 South. 238.

Affirmed.

SHELLY v. STATE.

(Court of Appeals of Alabama. Jan. 16, 1912.
Rehearing Denied Jan. 30, 1912.)

Appeal from Circuit Court, Barbour County; Mike Solly, Judge.

John Shelly was convicted of crime, and appeals. **Affirmed.**

Peach & Thomas, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed, on authority of the case of *Ab. Scott v. State*, 57 South. 413, present term.
Affirmed.

WILSON v. STATE.

(Court of Appeals of Alabama. Jan. 16, 1912.
Rehearing Denied Jan. 30, 1912.)

Appeal from Circuit Court, Barbour County; Mike Solly, Judge.

Albert Wilson was convicted of crime, and appeals. **Affirmed.**

Peach & Thomas, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed, on authority of the case of *Ab. Scott v. State*, 57 South. 413, present term.
Affirmed.

BRANNON v. STATE.

(Court of Appeals of Alabama. Jan. 16, 1912.
Rehearing Denied Jan. 30, 1912.)

Appeal from Circuit Court, Barbour County; Mike Solly, Judge.

Rob (alias Robert) Brannon was convicted of crime, and appeals. **Affirmed.**

Peach & Thomas, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed, on authority of the case of *Ab. Scott v. State*, 57 South. 413, present term.
Affirmed.

PERSONS v. OLDFIELD. (No. 15,430.)
(Supreme Court of Mississippi, Feb. 12, 1912.)

1. PARTNERSHIP (§ 125*)—AUTHORITY OF MEMBERS.

The authority of one partner to bind his copartner is based solely upon the ground of agency; and hence one can bind the other only within the scope of the agency.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 190; Dec. Dig. § 125.*]

2. PARTNERSHIP (§ 146*)—COMMERCIAL PAPER—LIABILITY.

The presence of a partnership's name on commercial paper prima facie binds the firm; but a partner can avoid liability by showing that the copartner who signed had no power to do so.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 242-255; Dec. Dig. § 146.*]

3. PARTNERSHIP (§ 147*)—UNAUTHORIZED ACTS—LIABILITY OF NONCONSENTING MEMBER.

A nonconsenting member of a partnership is not bound by his copartner's unauthorized act in becoming a surety for another, the other partner having received no benefit from the transaction, and it being foreign to the firm business, even though the obligee was ignorant of the partner's want of authority.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 256, 257; Dec. Dig. § 147.*]

4. PARTNERSHIP (§ 219*) — FOREIGN JUDGMENTS—EFFECT.

A judgment against a partnership in a foreign state binds only the individual member upon whom service of process was had and partnership property there situate.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 429-445; Dec. Dig. § 219.*]

Appeal from Chancery Court, Hinds County; G. G. Lyell, Chancellor.

Bill by John F. Oldfield against J. W. Persons. Decree for complainant, and defendant appeals. Reversed and remanded.

The appellant, who is a resident of Jackson, Hinds county, Miss., was engaged as a partner in the lumber business with Charles C. Ruggles; the domicile of the partnership being at Mobile, Ala., and the style of the firm being Charles C. Ruggles & Co. Oldfield, a resident of Baltimore, Md., having an order from Adams Bros., a firm in Rankin county, Miss., for certain material, amounting to \$500, was referred by Adams to Charles C. Ruggles & Co. Oldfield then wrote to Chas. C. Ruggles & Co., at Mobile, to know if that company would assume responsibility for the payment in cash of one-half of the account of Adams Bros. to Oldfield, and if Chas. C. Ruggles & Co. would indorse Adams Bros.' note for the balance. Persons knew nothing of this transaction; but Ruggles, acting without authority from Persons, wrote to Oldfield as follows: "We assume responsibility of the \$250 cash payment written you by Adams Bros., of Rankin county, Miss., and in accordance with the terms as outlined in your letter." Adams Bros. became insolvent and did not

make a cash payment. Oldfield presented the Adams notes for the deferred payments to Chas. C. Ruggles, and demanded that they be signed and the cash payment of \$250 be made. Both demands were refused. These facts were embodied in a bill in chancery. Persons, answering, denied knowledge of the transaction, also denying authority of his partner to act for the partnership and bind it for the debts of Adams as being an act beyond the scope of the partnership business. The bill of the complainant also set up the fact that a judgment had been obtained in Mobile county, Ala., against both Ruggles and Persons; but it was shown that service had never been obtained on Persons. There was a decree for the complainant against Persons for the whole amount, from which comes this appeal.

Flowers, Alexander & Whitfield, for appellant. J. H. Thompson, for appellee.

McLEAN, J. [1,2] The authority of one partner to bind his copartner is placed solely upon the ground of agency, and hence one can bind the other only within the scope of the agency. A partnership is organized to conduct the business for the benefit of its members, and it is foreign to its business to become surety for the members of the firm (unless this is the business in which the firm is engaged), or responsible for the debts of the individual members of the firm. This is elementary. It is doubtless true that, when the firm's name is found upon commercial paper, prima facie the firm is bound. *Faler v. Jordan*, 44 Miss. 288. But this casts upon the party attempting to escape liability only the burden of showing that the party signing the name of the firm had no power so to do.

It was held at an early day in this state that where one of two persons subscribes the partnership name to a note as surety for a third person, without the authority or consent of the other partner, the latter is not bound, and it lies upon the plaintiff to prove the authority or consent of the other partner. *Andrews v. Planters' Bank*, 7 Smedes & M. 192, 45 Am. Dec. 300. And the rule has never been departed from. *Bloom v. Helm*, 53 Miss. 21. The same is true in Alabama, wherein it is held that one partner cannot bind his copartner by signing their names as sureties in a note, nor can he draw, indorse, guarantee, or accept in the firm name a note or bill of exchange for the benefit of a third person; and where it appears that he has thus used the partnership name, it devolves upon the party who seeks to enforce such a security to show that the transaction was sanctioned by the inactive partner. *Lang v. Waring*, 17 Ala. 145. And it may be said that this is the law in all other states.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

[3] The suit in this case is not upon a piece of commercial paper; but the defendant is sought to be bound upon a letter, written by Ruggles on behalf of Ruggles & Co., of Mobile, Ala.; and the correspondence shows that Ruggles & Co. became the mere surety of Adams Bros., without the knowledge or consent of Persons. Therefore, prima facie, the nonconsenting partner is not liable. It is sought to evade this by showing, first, that Oldfield was ignorant of the want of authority upon the part of Ruggles & Co. to bind the absent partner; and, second, that there was a consideration moving between Adams Bros. and Ruggles & Co., whereby the latter agreed to guarantee the payment of the debt.

There are two answers to the first contention, to wit: It was Oldfield's duty to ascertain whether Ruggles & Co. had the authority to bind the individual members of the firm; and, second, Oldfield's good faith cannot supply the want of power of Ruggles & Co. to bind Persons.

As to the second proposition, it is sufficient to say that counsel have not cited us to, and we have been unable to find, any authority which holds that it is sufficient to bind the nonconsenting member of a partnership to show that the partnership, in consideration of becoming surety, expected to reap some benefit from the transaction. It is unnecessary for us to go to the length this court went in *Pickels v. McPherson*, 59 Miss. 216, to show that appellant is not liable. The partnership of Ruggles & Co. received no benefit whatever from this transaction, and becoming the surety of Adams Bros. was entirely foreign to the business in which Ruggles & Co. were engaged, and beyond the scope of the authority of Ruggles, either real or apparent, to bind the nonconsenting member of the firm.

We do not consider it at all material to decide whether the contract in this case is to be governed by the laws of this state or of Alabama, as the law of both jurisdictions is the same.

[4] It is manifest that the judgment recovered in Alabama against Ruggles & Co. only bound the individual member of the firm upon whom service of process was had and the partnership property of the firm in Alabama.

Reversed and remanded.

WILLIS v. LOWERY. (No. 15,404.)
(Supreme Court of Mississippi. Jan. 15, 1912.
Suggestion of Error Overruled.
Feb. 12, 1912.)

MASTER AND SERVANT (§ 30*)—DISCHARGE—GROUNDS—INTOXICATION.

Where a person employed as a cotton buyer had been under the influence of intoxicating liquor during the greater part of three

months, his discharge is justified; and it is immaterial that at the time of his discharge he had quit drinking, as the employer was under no obligation to take a further risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 35; Dec. Dig. § 30.*]

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Action by J. L. Lowery against Floyd Willis. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The appellee, who was the plaintiff in the court below, brought suit against the appellant for a balance alleged to be due him as salary. From a judgment for plaintiff, defendant appeals. The opinion states the facts.

On the trial the court, over the objection of the defendant, gave the following instruction at the request of plaintiff, to wit: "No. 1. If the jury believe that plaintiff quit drinking before December 28, 1909, and was not thereafter incapacitated from performing his duties as cotton buyer for defendant, and did properly perform his duties thereafter, then the jury will find for the plaintiff in the full amount sued for, with 6 per cent. interest from March 1, 1910."

The court refused the following instruction asked by the defendant, to wit: "No. 1. The court instructs the jury for the defendant that if you believe from the evidence that, unknown to the defendant, the plaintiff had been drunk during the greater part of the months of October, November, and December, A. D. 1909, so as to so seriously interfere with the proper discharge of his duties to defendant, and that defendant discharged him as soon as he found out this fact, then it makes no difference that at or about the time of the discharge plaintiff sobered up without the knowledge of defendant, still defendant had a right to discharge him, and the jury will in such case find for the defendant."

W. J. Croom and Powell & Thompson, for appellant. J. H. Thompson, for appellee.

SMITH, J. Appellant is a cotton buyer at Jackson, but maintains an office at Mt. Olive. In August, 1909, appellee was employed by appellant to buy cotton for him at Mt. Olive at a salary of \$60 per month for six months, beginning September 1st. On the 28th day of December following, appellee having up to that time purchased very little, if any cotton, appellant wrote him the following letter, which was duly received: "12/28/09. J. L. Lowery, Esq., Mt. Olive—Dear Sir: We shall have to discontinue our present arrangement there on the 1st January, but will try buy some cotton in the market later on a commission basis of 3 points. Yours truly, Floyd Willis."

According to appellant's evidence, the reason why appellee failed to purchase any cotton was that he had been for the months of October, November, and December practically

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

all the time under the influence of intoxicating liquor to such an extent as to incapacitate him for attending to business. Appellee admits that he had been drunk a good many times during these months, but claims that at no time while on duty was he incapable of attending to business, and states that the reason he bought no cotton was that the limit given him by appellant was lower than that of other buyers. Appellant's letter discharging appellee was written a few days after he ascertained the fact of appellee's use of intoxicating liquors. Appellee states that he declined to acquiesce in this discharge, and so wrote appellant, who denies having received the letter. Appellee bought some cotton after December 28th, for which appellant offered to pay him a commission; but he declined to accept it, and instituted this suit to recover his wages for January and February, and succeeded in obtaining a judgment therefor.

If it be true that appellee used intoxicating liquor to the extent and for the length of time that appellant claims he had, then appellant was justified in discharging him when he ascertained that fact, and it makes no difference that at the time of his discharge appellee had quit drinking. Appellant was under no obligation to take any further risk in the matter. It was, therefore, error for the court to grant instruction No. 1 for appellee, and to refuse instruction No. 1 for appellant.

Reversed and remanded.

NEAL v. STATE. (No. 15,043.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

CRIMINAL LAW (§ 380*)—EVIDENCE—CHARACTER OF ACCUSED—PARTICULAR ACTS.

A witness with reference to the character of accused, while entitled to testify as to his general reputation, was improperly required to testify as to the details of a number of independent transactions, fights, etc., in which it was claimed defendant had been engaged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 843, 845; Dec. Dig. § 380.*]

Appeal from Circuit Court, Yalobusha County; N. A. Taylor, Judge.

"To be officially reported."

Grant Neal was convicted of an offense, and he appeals. Reversed and remanded.

Creekmore & Stone, for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

WHITFIELD, C. We think the court erred in allowing several character witnesses to be examined with respect, not to the general reputation of the defendant, but minutely with respect to a number of independent transactions, fights, etc. Wigmore on Evidence, §§ 977 to 989, inclusive; Kearney v. State, 68 Miss. 223, 8 South. 292.

There was considerable conflict in the testimony on the merits. The testimony with respect to character for peace or violence showed the defendant to be an exceptionally good negro in this regard, and the person assaulted to be the worst negro possible in this regard—a very dangerous negro. In this state of the record, we cannot say with confidence that no different result would have been reached if the very damaging illegal testimony pointed out had been excluded, as it should have been.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the case is reversed and the cause remanded.

McCORKLE v. ILLINOIS CENT. R. CO. (No. 15,221.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

APPEAL AND ERROR (§ 520*)—EXCEPTIONS—GIVING OF INSTRUCTIONS.

Where a request for a peremptory instruction was given, and so marked and filed by the clerk, and an exception to the giving thereof was taken at the time, it became a part of the record, and was reviewable on appeal, without a motion for a new trial, on a bill of exceptions containing the evidence made a part of the record after the trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 520.*]

Appeal from Circuit Court, Carroll County; G. A. McLean, Judge.

Action by John McCorkle against the Illinois Central Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

This action was begun by the appellant, who was the plaintiff in the court below, and is for damages for injuries alleged to have been sustained by him while attempting to debark from the passenger train of the appellee. The railroad company set up contributory negligence of the plaintiff as a defense to the action. There was a peremptory instruction for the defendant, and the plaintiff appeals.

McClurg & Conger, for appellant. Mayes & Longstreet, for appellee.

SMITH, J. The evidence introduced by the plaintiff in the court below was excluded, and a peremptory instruction was granted, charging the jury to find for the defendant. No motion for a new trial was made; but an exception to the action of the court in granting this instruction was taken at the time it was given, and, in due course, a bill of exceptions, consisting of the stenographer's notes, embodying all of the evidence was filed.

When an instruction is marked "Given," or "Refused," and filed by the clerk, it becomes a part of the record; and, if duly excepted to at the time it was given or refused, the action of the court in giving or refusing the same may be reviewed in the Supreme Court on appeal, although no motion for a new trial was made. If the evidence in the case is made a part of the record by a bill of exceptions, it will be looked to by the court in order to determine the correctness of the lower court's ruling. Formerly such a bill of exceptions must have been taken and signed by the judge before the jury retired from the bar; but under our present practice of having the evidence taken down by an official stenographer, and afterwards transcribed, this is not necessary, but the stenographer's notes, when transcribed and approved, becomes the bill of exceptions. *Barney v. Scherling*, 40 Miss. 320; *Railroad Co. v. Chastain*, 54 Miss. 503; *Bourland v. Board of Supervisors*, 60 Miss. 996; *Alexander v. Flood*, 77 Miss. 925, 28 South. 787.

Under the evidence, it was for the jury to say whether or not appellant was guilty of contributory negligence, and, consequently, the peremptory instruction ought not to have been given.

Reversed and remanded.

HORNE v. McALPIN. (No. 15,229.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

EXECUTORS AND ADMINISTRATORS (§ 256*)—CLAIMS—DISALLOWANCE—REVIEW—APPEAL—RECORD—SUFFICIENCY.

A decree, sustaining objections of an administrator to the allowance of claims on the ground that the claims were not probated as required by law, will be affirmed, where the record does not contain the note or either of the accounts attempted to be probated.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 858; Dec. Dig. § 256.*]

Appeal from Chancery Court, Newton County; Sam Whitman, Jr., Chancellor.

In the matter of the estate of R. M. Wells, deceased. Decree sustaining objections of J. B. McAlpin, administrator, to claims of F. O. Horne, and claimant appeals. Affirmed.

Chalmers Alexander and J. D. Stewart, for appellant. S. A. Witherspoon, Jr., for appellee.

SMITH, J. This record does not contain the note or either of the accounts attempted to be probated, and consequently we have no means of determining whether they are such claims as could be or have been legally probated.

It follows, therefore, that the decree of the court below must be affirmed.

STATE ex rel. WAILES v. CROOM, State Comptroller.

(Supreme Court of Florida. In Banc. Jan. 6, 1912. Headnotes Filed Feb. 14, 1912.)

(Syllabus by the Court.)

1. STATES (§ 173*)—CLAIMS AGAINST STATE—AUTHORITY TO AUDIT.

Section 2 of chapter 1275, Acts of 1861 (being the same as section 27, p. 200, McClellan's Dig.), is one section of said chapter which is restricted in its scope by the title of the act, which is as follows: "An act for the relief of sheriffs and other ministerial officers"—and does not authorize the Comptroller to audit and settle a claim of a party against the state which did not grow out of the discharge of official functions as a sheriff or other ministerial officer.

[Ed. Note.—For other cases, see *States*, Dec. Dig. § 173.*]

2. STATES (§ 173*)—CLAIMS AGAINST STATE—COMPTROLLER.

The authority of the Legislature over the subject of claims against the state is not abdicated by section 6, p. 196, McClellan's Dig., and, when a party has petitioned the Legislature for payment of such a claim, and the Legislature enters into an examination of the claim, and by an act adjusts the claim and fixes the amount which shall be paid, and provides for the payment thereof, the Comptroller cannot be compelled by mandamus to reinvestigate and audit the claim at the instance of the party interested in the claim.

[Ed. Note.—For other cases, see *States*, Dec. Dig. § 173.*]

Error to Circuit Court, Leon County; J. W. Malone, Judge.

Application by the State, on the relation of Sydney I. Wailes, for a writ of mandamus to A. C. Croom, State Comptroller. From an order denying the writ, relator brings error. Affirmed.

The plaintiff in error, Sydney I. Wailes, on the 10th day of October, 1910, filed his petition for an alternative writ of mandamus against A. C. Croom, as Comptroller of the state of Florida, in the following words and figures:

"To Honorable John W. Malone, the Judge of the Circuit Court for the Second Judicial Circuit of Florida:

"The state of Florida, on the relation of Sydney I. Wailes, brings this petition against A. C. Croom, as the Comptroller of the state of Florida, and thereupon petitioner sheweth: That the Legislature of the state of Florida by an act approved on the 2d day of March, 1877, authorized and empowered the Governor of the state of Florida to appoint an agent to adjust and settle all claims between the state and the United States government growing out of the war with the Seminole Indians in the years 1856 and 1857, as well as other claims that may exist between the two governments. That by another act of the Legislature of the state of Florida, approved on the 11th day of March, 1879 (Laws 1879, c. 3113), the Governor of

the state of Florida was 'authorized and empowered to appoint a commissioner with power to proceed to Washington and adjust the claims of the state of Florida against the United States.' A copy of the said act of the Legislature of the state of Florida approved March 2, 1877, and of section 5 of said act of the Legislature approved March 11, 1879, are set out at large in the exhibit to this petition attached and called 'Statement of Account,' which said 'Statement of Account' is made part of this petition the same as if fully set out herein.

"That, under and by virtue of the aforesaid laws of the state of Florida, George F. Drew, who was then the Governor of the state of Florida, on the 16th day of July, 1879, constituted and appointed Sydney I. Walles 'agent for the state of Florida to represent the said state of Florida before the department of the general government at Washington city, and to ask, demand, and receive of the government of the United States any and all sums of money due the state of Florida for expenses incurred by said state on account of Indian hostilities in said state from the year 1849 to the year 1856, inclusive,' and for the work to be done and services to be performed by said Sydney I. Walles, under his appointment as agent for the state of Florida, he was to receive 'as compensation for performing the above work fifteen per cent. of all sums collected from the general government upon such Indian war claims, and to defray all expenses incurred in the prosecution of the same.' That under and by virtue of a resolution passed by Governor George F. Drew and his cabinet on the 9th day of August, 1879, the foregoing appointment was amended so as to include in the said appointment the year 1857. A copy of both the said appointment and the said resolution of the Governor and his Cabinet are set out at large in the exhibit to this petition attached and called, 'Statement of Account,' which said 'Statement of Account' is made part of this petition the same as if fully set out herein. And from the said year 1879 to the year 1901 every Governor of the state of Florida recognized, acquiesced in, and indorsed the appointment of petitioner as such agent for the state of Florida to perform the services hereinbefore mentioned, and no question as to the right or authority of petitioner to so represent said state of Florida and to perform the services before mentioned was raised during the period of time before mentioned. And from time to time during the period of time from 1879 to 1901 petitioner made reports to the different Governors of Florida touching and concerning the matters intrusted to him as said agent for said state of Florida, setting out in his said reports to the said Governors what had been done with said matters so intrusted to him.

"That said Sydney I. Walles accepted the aforesaid appointment as 'Agent for the

State of Florida,' and, immediately after having received the said appointment, he began work thereunder, and he employed a force of clerks and other assistants, and he devoted himself assiduously to the said work, and he finally succeeded in having the claims or accounts between the state of Florida and the general government of the United States on account of the said Indian hostilities in said state of Florida from the year 1849 to the year 1857, inclusive, duly audited, determined and settled by the treasury department of the United States government under the date of December 16, 1889, as is fully shown by Executive Document No. 68, Fifty-First Congress, House of Representatives, First Session, a copy of which said Executive Document No. 68 is set out at large in the exhibit to this petition attached, and called, 'Statement of Account,' which said 'Statement of Account' is made part of this petition the same as if fully set out herein. That, when petitioner had succeeded in having the said claims or accounts between the state of Florida and the general government of the United States on account of Indian hostilities in said state of Florida from the year 1849 to the year 1857, inclusive, determined and settled, he had done all that he had contracted to do, or that he could do or perform under his said appointment as agent for the state of Florida, and there remained nothing further that he could do or perform under the said appointment as agent for the state of Florida, and that the only thing that remained to be done after he had succeeded in getting audited, determined, and settled the aforesaid claims or accounts between the state of Florida and the general government of the United States was the passage of a bill by the Congress of the general government of the United States making an appropriation to pay to the state of Florida the money found to be due said state under the said audited, determined, and settled account aforesaid. Yet, though petitioner had done everything that he had contracted or been appointed to do, he remained in the city of Washington, giving to the Florida delegation in Congress the benefit of his long experience in matters of legislation with reference to the presentation of like matters to committees of Congress, the drafting of bills and appropriate amendments and other like matters, looking to the final passage of appropriate legislation carrying into effect the statement of account made by the Secretary of the Treasury, and the appropriation of the necessary funds to pay the state of Florida the large amount of money found to be due said state, and, on account of petitioner's wide acquaintance with Representatives and Senators in Congress, his said services so rendered were very valuable to the said Florida delegation in Congress in the manner so stated.

"That the Congress of the United States accepted the determined, audited, and settled

accounts between the general government of the United States and the state of Florida on account of Indian hostilities in said state of Florida from the year 1849 to the year 1857, inclusive, as stated by the Treasury Department of the United States in Executive Document No. 68, which said determined, audited, and settled accounts were procured through the perseverance, labor, and skill of petitioner, and by an Act of Congress of May 27, 1902, the Treasury Department of the United States was authorized to settle the mutual account heretofore stated between the United States and the state of Florida under the authority of an act of Congress according to the mode of settling the same found near the footnote at the third page of the letter of the Secretary (of the Treasury) submitting his report dated December 16, 1889, published as Executive Document No. 68, Fifty-First Congress, First Session by continuing the computation of interest to the date of settlement and ascertaining the balance due the said state. And the state of Florida received by virtue of the aforesaid act of Congress the sum of one million eighty-nine thousand one hundred and fifty-eight dollars and sixty-six cents (\$1,089,158.66) in cash and in securities of the state held by the general government of the United States on account of said Indian hostilities in said state of Florida from the year 1849 to the year 1857, inclusive. And thereupon, and because of the receipt by the state of Florida of the said sum of \$1,089,158.66 from the general government of the United States on account of Indian hostilities in the state of Florida from the year 1849 to the year 1857, inclusive, the state of Florida became indebted to petitioner in the sum of \$163,373.80, which is 15 per cent. of the sum so received by the state of Florida as aforesaid.

"That although the state of Florida has received from the general government of the United States the said sum of \$1,089,158.66 on account of Indian hostilities in said state of Florida from the year A. D. 1849 to the year 1857, inclusive, the receipt of which said sum of money was procured by petitioner in getting the claims or accounts between the state of Florida and the general government of the United States on account of said Indian hostilities duly audited, determined, and settled by the Treasury Department of the United States, petitioner has not received or been paid 15 per cent. of the said sum of money so received by the state of Florida from the general government of the United States on account of the Indian hostilities in said state of Florida from the year 1849 to the year 1857, inclusive, nor any other sum or sums of money for or on account thereof, and there now remains due and unpaid to petitioner by the state of Florida the sum of \$163,373.80, which is 15 per cent. of the said sum of money so received by the state of Florida from the general government

of the United States on account of Indian hostilities in the state of Florida from the year 1849 to the year 1857, inclusive, with interest thereon at the legal rate from the 19th day of December, 1902.

"That on the 14th day of September, 1910, petitioner duly made out his account against the state of Florida for the money due to him for his services as agent for the state of Florida under his appointment as agent for the state of Florida in having audited, determined, and settled the claims or accounts between the state of Florida and the general government of the United States on account of Indian hostilities in the said state of Florida from the year 1849 to the year 1857, inclusive, and he, in person, presented his said account against the said state of Florida for his services as aforesaid to A. C. Croom, who is, and was on that date, the Comptroller of the state of Florida, and he requested the said Comptroller of the state of Florida to examine, audit, and settle his said account against the state of Florida, but the said Comptroller refused to receive said account of petitioner, and the said Comptroller refused to examine, audit, and settle petitioner's said account, although he, the said Comptroller, is required to do so by the laws of the state of Florida. That a copy of the account made out and presented to the Comptroller on the 14th day of September, 1910, with all the exhibits thereto appended and which were thereto appended at the time of such presentation and demand, is attached to this petition, and marked 'Statement of Account,' and is, with all exhibits thereto appended, made part of this petition.

"By means whereof, and on account of the refusal of the said A. C. Croom as the Comptroller of the state of Florida to examine, audit, and settle the claim and account of petitioner against the state of Florida, petitioner is denied his right under the laws of the state of Florida to have his said claim against the state of Florida examined, audited, and settled, and is thereby prevented from receiving his just compensation for his services so rendered as aforesaid, to which compensation he is justly entitled.

"Wherefore petitioner prays that a writ of mandamus may issue, directed to said A. C. Croom as the Comptroller of the state of Florida, commanding him forthwith to examine, audit, and settle the said claim and account of petitioner so arising under the laws of the state of Florida as by statute in such case it is made and provided, and that such further order may be made in the premises as justice may require.

"Clark & Fielding,
Attorneys for Petitioner.

"State of Florida, County of Duval.

"Personally appeared before the undersigned authority, Sydney I. Wallis, who, being duly sworn, says that he is the relator

in the above and foregoing petition for mandamus, that he is acquainted with the contents of said petition and with all the matters and things therein set forth and alleged, and that such things and matters are of his own knowledge true as therein set forth.

"Sydney I. Walles.

"Sworn to and subscribed before me this the 21st day of September, A. D. 1910.

"Alexander Ray,

"Notary Public State of Florida at Large.

"My Commission Expires Feb. 6th, 1913.

"[Notarial Seal.]"

To this petition is appended as a part thereof a statement of account which is in accordance with the statement of the petition, and an affidavit of Walles setting forth the services rendered by him.

The following Exhibits, A, B, and C, are attached to the petition as parts of it:

Exhibit A.

"Chapter 3030—(No. 54).

"An act to provide for the settlement of claims between the state of Florida and the United States.

"The people of the state of Florida, represented in the Senate and Assembly do enact as follows:

"Section 1. That the Governor is hereby authorized and empowered to appoint an agent to adjust and settle all claims between the state and the United States government, growing out of the war with the Seminole Indians in the years 1856 and 1857, as well as other claims that may exist between the two governments.

"Sec. 2. The expenses of such agent shall be paid out of the amount appropriated for contingent expenses of the state, and shall not exceed the sum of eight hundred dollars.

"Sec. 3. Such agent shall report to the Legislature at its next regular session.

"Approved March 2, 1877."

Exhibit B.

"Chapter 3113—(No. 15).

"An act to provide for the examination and settlement of claims against the state of Florida for services rendered during the last Seminole Indian war, and for the settlement of claims of the state of Florida against the United States.

"The people of the state of Florida represented in Senate and Assembly, do enact as follows: * * *

"Sec. 5. That the Governor is hereby authorized and empowered to appoint a commissioner with power to proceed to Washington and to adjust the claims of the state of Florida against the United States; and the moneys paid by the United States, or so much thereof as may be necessary for that purpose, shall be and are hereby appropriated for the payment of the certificate issued as aforesaid, and to defray the expenses of the said board of commissioners; and the

sum of two thousand dollars, or so much thereof as may be necessary, from any moneys in the state treasury not otherwise appropriated, is hereby appropriated to defray the expenses of said commissioner to Washington, and the incidental expenses of the said commission."

Exhibit C.

"Contract with Governor Drew.

"State of Florida, Executive Department.

"Know all men by these presents, that I, George F. Drew, Governor of the state of Florida, reposing especial trust and confidence in the ability, fidelity and prudence of Sydney I. Walles, do hereby constitute and appoint the said Sydney I. Walles agent for the state of Florida to represent the said state of Florida before the department of the general government at Washington city, and to ask, demand and receive of the government of the United States any and all sums of money due the said state of Florida for expenses incurred by said state on account of Indian hostilities in said state from the year 1849 to the year 1856 inclusive.

"The said Walles to receive as compensation for performing the above work, fifteen per cent. of all sums collected from the general government upon such Indian war claims and to defray all expenses incurred in the prosecution of the same.

"In testimony whereof I have hereunto set my hand and caused the Great Seal of the state to be attached this sixteenth day of July, A. D. 1879.

"[Signed] George F. Drew,

"Governor. [Seal.]

"By Attest: W. D. Bloxham, Sect. State."

Other exhibits are attached, being copies of documents and proceedings in the Treasury Department of the United States relating to the investigation and settlement between the state of Florida and the United States government of claims of the state against the government of the United States growing out of the Indian wars in Florida in the years 1856 and 1857. There are also attached to the petition a letter from Governor Perry, and one from Governor Fleming, which are as follows:

Exhibit E.

Letter of Governor Perry.

"Walles' Commission.

"State of Florida, Executive Office.

"Tallahassee, August 28th, 1888.

"Hon. William C. Endicott, Secretary of War, Washington, D. C.

"Sir: Under date of July 16th, 1879, George F. Drew, then Governor of the state of Florida, issued a commission to S. I. Walles, of Washington city, in the following form: 'Know all men by these presents that I, George F. Drew, Governor of the state of Florida reposing especial trust and

confidence in the ability, fidelity and prudence of Sydney I. Wallis, do hereby constitute and appoint the said Sydney I. Wallis, agent for the state of Florida, before the departments at Washington city, and to ask and demand and receive of the government of the United States any and all sums of money due the said state of Florida for expenses incurred by said state on account of Indian hostilities in said state from the year 1849 to the year 1856 inclusive.

"The said Wallis to receive as compensation for performing the above work fifteen per cent. of the sums collected from the general government upon such Indian war claims and to defray all expenses incurred in the prosecution of the same.

"In testimony whereof, I have hereunto set my hand and caused the Great Seal of the state of Florida to be attached, this 16th day of July, A. D. 1879.

"George F. Drew, Governor. [Seal.]

"Attest: W. D. Bloxham, Sec. State.

"I hereby certify that said appointment or commission has not been revoked or canceled, and I would therefore request you to allow the said Wallis access to whatever papers in your department it may be necessary for him to examine and to give him permission to file such papers as may be needful and proper in the settlement of said claims.

"In testimony whereof I have hereunto set my hand and caused the Great Seal of the state of Florida to be hereunto affixed. Done at the capitol, this the 28th day of August, A. D. 1888. [Signed] E. A. Perry,

"Governor. [Seal.]

"By the Governor. Attest:

"John L. Crawford, Sec. State."

Exhibit F.

Letter of Governor Fleming.

"State of Florida, Executive Office.

"Tallahassee, March 28, 1890.

"Hon. William Windom, Sec. of the Treasury, Washington, D. C.

"Sir: By the 5th section of the deficiency bill, approved March 2nd, 1889, provision is made for the examination by the Treasury Department of the claim of the state of Florida, as reported in the letter of the Secretary of War, dated May 22, 1882, and a report thereon to the next regular session of Congress, and in connection therewith a report of the amount of all claims in favor of the general government against the state of Florida, and the statement of an account between the general government and said state.

"As in that examination evidence may be required, and, possibly, some now in the files of this state, I hereby respectfully request that permission be given Mr. S. I. Wallis, the agent of this state upon this claim, to file such papers and evidence as may be necessary, and to do all other nec-

essary acts required, by your department, of this state in said examination.

"Hoping that it may suit your convenience to enter upon this examination at an early day, I remain,

"Respectfully your obedient servant,

"[Signed] Francis P. Fleming,

"Governor of Florida."

A letter from petitioner to Governor Fleming and one to Governor Mitchell are also attached to the petition, setting forth what had been done before the departments and Congress in regard to the claims of the state.

The following statutes of the state of Florida and extracts from the legislative journals are also involved in the consideration of this case:

"Chapter 1275—(No. 18).

"An act for the relief of sheriffs and other ministerial officers of the court.

"Section 1. Be it enacted by the Senate and House of Representatives of the state of Florida in General Assembly convened, that the Comptroller of Public Accounts be and he is hereby authorized to credit sheriffs and other ministerial officers of the court against whom charges for the noncollection of fines or forfeitures has hitherto or may hereafter be made, upon the certificate of the judge of the circuit court under seal of the county in which said sheriff or other ministerial officer may reside, that the party or parties upon whom said fines were or are imposed, or against whom said forfeitures are rendered, were and are totally insolvent.

"Sec. 2. Be it further enacted, that any citizen shall have the right to appeal from the decision of the Comptroller to a circuit court judge at chambers or in term time, and said court, after notice to the Comptroller and full hearing on the evidence, shall give such decree as equity and justice demands, and the said Comptroller shall issue his warrant on said decree.

"Passed the House of Representatives December 7, 1861. Passed the Senate Dec. 12, 1861. Approved by the Governor December 14, 1861."

"Tallahassee, Florida, April 13, 1893.

"To the Honorable Members of the Senate of the State of Florida, Gentlemen:

"Your petitioners, S. I. Wallis and Mrs. L. G. Beard (for the estate of W. K. Beard), beg leave to present this their petition to your honorable body for such relief as they are entitled to receive under the S. I. Wallis contract for commissions due on the money recently paid by the United States to the state of Florida in the settlement of the Indian war claims of this state; and they respectfully ask that payment for services rendered in the interest of said claim may be authorized by bill or otherwise. Attached to this petition is a statement of facts show-

ing work done and monies expended as provided for in said contract, the original of which will be submitted to any committee to which your honorable body refers this petition.

"And your petitioners will ever pray.

"Wailles & Beard, By S. S. Wailles."

"Chapter 5334 (No. 229) Acts of 1903.

"An act for the relief of S. I. Wailles and the estate of W. K. Beard, deceased, and in full settlement of any claims which the said S. I. Wailles and the estate of W. K. Beard, deceased, may have against the state of Florida.

"Whereas, S. I. Wailles and L. G. Beard, representing the estate of W. K. Beard, deceased, claim that the state of Florida is indebted to them in a large sum of money for services rendered by the said S. I. Wailles and the said W. K. Beard in securing the settlement of the claim of the state of Florida against the United States for expenses incurred in suppressing Indian hostilities in the years 1849 and 1857, inclusive, and,

"Whereas, after full investigation we find the sum of twenty-five thousand dollars (\$25,000.00), is full and just compensation for any and all services which may have been rendered to the state of Florida by the said S. I. Wailles and W. K. Beard, deceased, therefore,

"Be it enacted by the Legislature of the state of Florida :

"Section 1. That the Comptroller be and he is hereby directed to draw two warrants upon the Treasurer, payable out of the Indian war claims fund now in his hands, in full and final settlement of any and all claims which the said S. I. Wailles and the said L. G. Beard, representing the estate of W. K. Beard, deceased, may have against the state of Florida. The said two warrants aggregating the sum of twenty-five thousand dollars (\$25,000.00), and that the Treasurer be and he is hereby directed to pay the same; one of said warrants shall be made to S. I. Wailles, and one to Mrs. L. G. Beard, representing the estate of W. K. Beard, deceased, for such sums, respectively, as may be determined between them by agreement, arbitration, litigation or otherwise. The said warrants shall be delivered to S. I. Wailles and Mrs. L. G. Beard upon the presentation of receipts in full against the state of Florida, from S. I. Wailles, W. E. Wailles and the legal representatives of the estate of W. K. Beard.

"Sec. 2. This act shall take effect immediately upon its approval by the Governor, or upon its becoming law without his approval.

"Approved June 18, 1903."

This petition was presented to the judge of the Second judicial circuit, and the application for the alternative writ was denied. From this judgment a writ of error was sued out.

Clark & Fielding, for plaintiff in error.
Park Trammell, Atty. Gen., for defendant in error.

PER CURIAM. The contention here is that section 2 of chapter 1275 of the Acts of 1861 (being the same as section 27, p. 200, McClellan's Digest), and sections 1 and 2 of the act of 1848 (Laws 1847-48, c. 146), embraced in sections 6, 7, p. 196, of McClellan's Digest, were in force at the time that Governor Drew made his alleged contract with plaintiff in error; that they became a part of his contract, "and that, under section 27 of McClellan's Digest, he has a remedy by which, if the Comptroller does not examine, audit, and settle his account satisfactorily, he may go into court and have such decree as equity and justice demands."

[1] It will be observed, however, that the title of chapter 1275 is a restrictive one. It is entitled "An act for the relief of sheriffs and other ministerial officers." The first section authorizes the Comptroller to credit sheriffs and other ministerial officers with certain uncollected fines and forfeitures, and the second section gives any citizen a right of appeal from the decision of the Comptroller to a circuit judge who is empowered to hear evidence and give such decree as equity and justice demands, and the Comptroller is required to issue his warrant on said decree. To bring the second section within the purview of the title, and thus get at the intention of the Legislature, we think that the said section cannot be held to include any other citizen than those mentioned in said title and in said first section, and said act has no reference to such a claim as that of plaintiff in error. Moreover this act was adopted before the Constitution of 1868 was adopted. In this Constitution the duties and powers of the Comptroller are not so extended as they were in the laws existing previous thereto as to settling claims and drawing his warrants therefor. See section 16, art. 5, and section 4, art. 8, Constitution of 1868. We therefore are unable to give to section 2, chapter 1275, the application which the plaintiff in error contends for.

[2] The other statute law referred to, viz., section 6, p. 196, McClellan's Digest, when narrowed down by the application to it of the constitutional provisions we have referred to, at most makes it the duty of the Comptroller to audit claims and accounts against the state. But this statute, so far as we are informed, does not abdicate the general jurisdiction and authority of the Legislature over the question of claims against the state. It appears from the Senate Journal of the session of the Legislature of 1903 (p. 48) that the petition of Wailles and Beard which is copied in the statement was introduced in the Senate by Mr. G. Crill, Senator from the Twenty-Sixth district. The journal shows that, when said petition was presented, it was referred to a committee;

that the committee heard the testimony of Wallis and others, and went into an extensive investigation of this claim; that it is the same claim as the one before us; that there were majority and minority reports upon it. The Journal of the House of Representatives shows similar proceedings. The result, whether equitable and just is not for us to judge, was the passage of chapter 5334, Laws 1903, which is copied in the foregoing statement. The preamble alleges there was a full investigation, and fixes what is alleged to be just compensation, and directs the Comptroller to draw two warrants upon the Treasurer in full and final settlement of said claim. We have no doubt that under the circumstances the Legislature had authority and power to adjust and settle this claim, and, that, having done so, the Comptroller was not authorized, to entertain the petition of Wallis. *De Groot v. United States*, 5 Wall. 419, text 432, 433, 18 L. Ed. 700; *Julian v. State*, 122 Ind. 68, text 78, 23 N. E. 690; *Danley v. Whiteley*, 14 Ark. 687; *State ex rel. State Savings Association v. Draper*, 44 Mo. 245; *State ex rel. Sayre v. Moore*, 40 Neb. 854, text 860, 861, 59 N. W. 755, 25 L. R. A. 774.

The judgment refusing an alternative writ and dismissing the petition is affirmed.

TAYLOR, SHACKLEFORD, COCKRELL, and HOCKER, JJ., concur. WHITFIELD, C. J., not participating.

STATE ex rel. NILES v. SMITH, City Jailor.
(Supreme Court of Florida, Division A. Jan. 3, 1912. Headnotes Filed Feb. 6, 1912.)

(Syllabus by the Court.)

1. LICENSES (§ 6*)—REGULATION OF SALE OF MILK—VALIDITY.

The city of Jacksonville may regulate the sale of milk within its territorial limits, and require a license tax therefor.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 6.*]

2. LICENSES (§ 22*)—POLICE POWER.

The city of Jacksonville may authorize a board of health created by it to prescribe the forms to be used by applicants for licenses; it not appearing that the board had added therein burdens outside those fixed by ordinance.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 22.*]

3. LICENSES (§ 20*)—REFUSAL OF APPLICATION—MILK LICENSE.

A board of health may be given power to withhold license to sell milk, if the place of business or wagons or vehicles be not "in a sanitary condition and fit and proper for the use and purpose to which they are intended to be put."

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 20.*]

Error to Circuit Court, Duval County; R. M. Call, Judge.

Application by the State, on the relation of Edward Niles, for writ of habeas corpus to Jefferson D. Smith, City Jailor of the City of Jacksonville. From an order denying writ, relator brings error. Affirmed.

S. T. Shaylor and L. R. Milton, for plaintiff in error. P. H. Odom, for defendant in error.

COCKRELL, J. This is a writ of error allowed to the judgment of the circuit court for Duval county, remanding Edward Niles to serve a sentence imposed by the municipal court of Jacksonville for selling milk in said city without a license.

The ordinance regulating the sale of milk is too long for full insertion in this opinion, but the first section reads:

"Section 1. Every person, firm or corporation desiring to sell or deliver milk or cream in the city of Jacksonville, shall make application annually to the city recorder for a milk license, paying therefor the sum of three (\$3.00) dollars, and the license therefor shall be issued at the time and in the manner as now provided by ordinance. Such application shall be made on a printed form prescribed by the city board of health, and the applicant, if an individual, shall state his or her full name and residence, and if a firm or corporation, shall state therein the full name and residence of each of its officers, place at which it is proposed to carry on the business, the number of wagons or other vehicles to be used in said business, and such other data as the city board of health shall require. The city recorder, upon receipt of such application, shall hand the same to the city health officer, who shall investigate or have investigated, the place of business described in such application and the wagons and other vehicles if any, intended to be used by such applicant. If such places of business, and such wagons or vehicles are found, upon such investigation, to be in a sanitary condition and fit for the use and purpose to which they are intended to be put, the city health officer shall, within forty-eight hours, report said applicant favorably to the city recorder, and the recorder shall issue a license to carry on, engage in and conduct the business of vendors of milk in Jacksonville, at the place designated in such application only. All licenses granted pursuant to this ordinance may, at any time, be revoked by the city board of health, for the persistent, repeated or willful violation of any law or ordinance, or of any regulation of the board of health governing the sale of milk in the city; provided, however, that no such license, shall, at any time, be revoked by the city board of health, unless it shall have first given the holder of same not less than ten days notice in writing of its intention

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

to revoke such license, and an opportunity to be heard why such should not be done. This proviso shall not be interpreted to apply to cases where the sale of milk or cream may be temporarily prohibited by the city health officer because of disease in the families, where the milk is produced or handled, temporary unsanitary conditions or similar cases. Such licenses shall not be transferable and no license issued hereunder shall entitle or authorize the holder thereof to carry on, engage in or conduct the business of vendor of milk in any place or places other than that described or set out in such license. The location of such place of business can be changed only on approval of the city board of health."

[1] It is first objected that the city has no authority to impose a license tax upon the vending of milk in that the state law providing "all boats or vehicles engaged in the sale of vegetables or fresh meats, the product of the farm or plantation, and which is butchered upon the farm, and plantation products, fish and oysters, shall not be considered as peddling boats or vehicles." Chapter 5597, Laws of 1907, p. 45. Many replies to such contention may be made. Should we concede that milk comes within the statute, and that it is a tax upon the milk wagon, it appears that this is not so much a license tax, but rather an inspection tax. *City of Norfolk v. Flynn*, 101 Va. 473, 44 S. E. 717, 62 L. R. A. 771, 90 Am. St. Rep. 918. A more emphatic answer, however, is found in the charter of Jacksonville (chapter 5065, Laws of 1901), conferring power to levy and impose license taxes for municipal purposes upon any and all occupations and upon any and all privileges, as fully and to the same extent and in the same manner that the Legislature could impose such licenses and taxes for state purposes, and without regard to any of the provisions of any general revenue law of this state not specifically repealing this act. The general license law of 1907 does not attempt to supersede, supplant, or repeal any special charter rights, but it does repeal and supersede section 33, chapter 5106, Laws of 1903, relied on by one of the counsel for the plaintiff in error.

The record does not show nor does the plaintiff in error claim that he has been refused a license nor had his license revoked, and having found the power in the city to require a license to vend milk, whether under the power to tax privileges or occupations, or under its specific power "to regulate the inspection of milk" and generally "to pass all ordinances necessary to the health, convenience and safety of the citizens," we might well refuse to consider any other objections to the ordinance until a proper case is made before us. In *Ex parte Thelsen*, 30 Fla. 529, 11 South. 901, 82 Am. St. Rep. 36, the petitioner was directly affected by the invalid portion of the ordinance, in that his

liquor saloon was within the prescribed distance of a church, and under the ordinance the grant or refusal of the license at that location was controlled by the whim or caprice of the board, with no guide to regulate their action.

[2] We may add, we think with propriety, that the provision for the use of printed forms to be used by applicants for license, the form to be prescribed by the board of health, is but in line with the general revenue laws of the state, which always require the printed forms to be prescribed by the State Comptroller. If the city board of health should add unreasonable and improper overinquisitorial questions to be answered, and the applicant should refuse for that reason to comply with the form, he could then raise the question of the propriety of those questions, but we are not advised that the board of health has added any questions not included in the ordinance.

[3] Again, the board of health is not given uncontrolled discretion as to granting a license originally or in acting upon requests to change the location of the dairy. As we read the ordinance, it has only to ascertain if the place of business and the wagons and vehicles "be in a sanitary condition and fit and proper for the use and purpose to which they are intended to be put," and, if they are, then the permit is issued.

The provision for revoking the license is probably controlled by section 16, which confers the power after a second conviction in the municipal court during a license year. The fine varies from \$5 to \$100, thus anticipating minor or major infractions, and there is vested a discretion in the board of health to further penalize, after notice, by withdrawing the license. There may be some doubt as to whether this discretion may be properly safeguarded, but as we said at the outset we are not now called upon to solve the doubt.

We may add in conclusion that the courts with apparent unanimity uphold these milk inspection ordinances, and that we are not impressed seriously with any of the many attacks made upon the real life of the ordinance before us. The *Virginia Case* cited, *supra*, answers in detail many of these objections. See *State v. Nelson*, 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318, 61 Am. St. Rep. 399; *Littlefield v. State*, 42 Neb. 223, 60 N. W. 724, 28 L. R. A. 588, 47 Am. St. Rep. 697; *Deems v. City of Baltimore*, 80 Md. 164, 30 Atl. 648, 26 L. R. A. 541, 45 Am. St. Rep. 339.

The judgment is affirmed.

WHITFIELD, C. J., and SHACKLEFORD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

MERRILL-STEVENS CO. v. DURKEE et al.
(Supreme Court of Florida. Jan. 6, 1912.
Rehearing Denied Feb. 14, 1912.)

(Syllabus by the Court.)

1. NAVIGABLE WATERS (§§ 4, 36, 44*)—OWNERSHIP OF WATERS—RIPARIAN RIGHTS—LANDS UNDER WATER—ACCESS—ACCRETION AND RELICTION.

At common law, all navigable waters and the lands thereunder were held by the sovereign for the benefit of the whole people, and the owner of land abutting on navigable waters had no exclusive right in the waters below ordinary high-water mark or in the lands under the waters, except the right of access to and from the navigable waters, and rights in the land growing out of accretion or reliction.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 1, 180-200, 266-278, 281, 282; Dec. Dig. §§ 4, 36, 44.*]

2. NAVIGABLE WATERS (§§ 4, 36*)—OWNERSHIP OF WATERS—LANDS UNDER WATER—TITLE OF STATE.

Upon its admission into the federal Union by the act of Congress of March 3, 1845 (Act March 3, 1845, c. 48, 5 Stat. 742), the state of Florida by virtue of its sovereignty assumed title to and sovereignty over the navigable waters in the state and the lands thereunder. Such title is held, not for purposes of sale or conversion into other values, or for reduction into several or individual ownership, but for the use of all the people of the state for purposes of navigation, commerce, fishing, and other useful purposes afforded by the waters.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 1, 180-200; Dec. Dig. §§ 4, 36.*]

3. NAVIGABLE WATERS (§ 37*)—LANDS UNDER WATER—GRANTS OF RIGHTS.

The state may, in the interest of the public welfare, grant limited rights in portions of the lands under navigable waters within its borders, or may permit the use thereof, when the rights of the whole people of the state as to navigation and other uses of the waters are not materially impaired.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-227, 285; Dec. Dig. § 37.*]

4. NAVIGABLE WATERS (§ 37*)—LANDS UNDER WATER—GRANTS.

The state may fix the exterior lines of a navigable river if the rights of the people to the use of the waters and the shores of the river are not thereby substantially impaired; and rights in the submerged lands not within the reasonably fixed exterior lines of the river may be granted by legislative authority, if such grant does not impair the rights of the whole people to the use of the waters for any purpose expressed or implied by law.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-227, 285; Dec. Dig. § 37.*]

5. NAVIGABLE WATERS (§ 39*)—RIPARIAN RIGHTS—STATUTORY PROVISIONS—"IN THE DIRECTION OF THEIR LINES CONTINUED TO THE CHANNEL."

As the rights granted by the riparian act of 1856 (sections 643, 644, General Statutes of 1906) extend to "all lands covered by water lying in front of any tract of land * * * lying upon any navigable stream or bay of the sea or harbor, as far as the edge of the channel," and the right of action given the grantees to prevent encroachments extends to "all such submerged lands in the direction of their lines continued to the channel," this right of action

extends to the space between lines drawn at right angles from the shore line "to the edge of the channel," where the channel runs parallel or practically so with the shore line.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-244; Dec. Dig. § 39.*]

6. NAVIGABLE WATERS (§ 39*)—RIPARIAN RIGHTS—EXTENT.

The rights granted by the riparian statute of 1856 (Gen. St. 1906, §§ 643, 644) relate to the space between the shore line and the edge of the channel of navigable streams, bays, or harbors, and such rights are not controlled by the direction of lines dividing the uplands.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-244; Dec. Dig. § 39.*]

7. NAVIGABLE WATERS (§ 39*)—PLEADING (§ 34*)—RIPARIAN RIGHTS—ENCROACHMENT.

It is incumbent upon one asserting a right to prevent encroachments upon rights granted by the riparian act of 1856 (Gen. St. 1906, §§ 643, 644) to show by proper allegations that the encroachments complained of are upon lands in which the complainant under the statute has the exclusive right. Any ambiguity in the allegations will be construed against the complainant in considering a demurrer to the bill of complaint.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-244; Dec. Dig. § 39.* Pleading, Cent. Dig. §§ 66-75; Dec. Dig. § 34.*]

8. NAVIGABLE WATERS (§ 39*)—RIPARIAN RIGHTS—ENCROACHMENTS—BILL FOR REMOVAL.

Where the allegations of a bill of complaint for the removal of alleged encroachments upon rights under the riparian act of 1856 (Gen. St. 1906, §§ 643, 644) do not show that the complainant has any rights under the statute in the submerged lands where the obstructions are, or that the encroachments complained of are upon submerged land "in front of" complainant's shore line or between lines running at right angles from the ends of complainant's shore line to the edge of the channel, to which the complainant has a right under the statute, an appropriate demurrer to the bill of complaint should be sustained.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-244; Dec. Dig. § 39.*]

In Banc. Appeal from Circuit Court, Duval County; R. M. Call, Judge.

Bill in equity by the Merrill-Stevens Company against Jay H. Durkee and another. From a decree for defendants, complainant appeals. Affirmed.

The following bill of complaint was filed: "Merrill Stevens Company, a corporation organized and existing under the laws of the state of Florida, by its solicitors, Cockrell and Cockrell, brings this its bill of complaint against Jay H. Durkee and Cora L. Durkee, each of the county of Duval and state of Florida, and humbly complaining your orator shows as follows:

"(1) Chester Bisbee, Henry Henderson, Francis Hudnall, and his wife Eliza Hudnall, Jacob Gutterson and his wife, Mary A. Gutterson, Lawrence Fatio, David L. Palmer and Darius Ferris, being on, to wit, the 4th day of July, A. D. 1839, seized and pos-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

sessed of a certain parcel of land on the south bank of the St. Johns river in Duval county, Florida, south of where the city of Jacksonville now stands, said lands being more particularly described on a plat made by one J. A. Coffey, said plat being recorded on, to wit, the 30th day of May, A. D. 1839, in Deed Book D, page 244 of the former public records of Duval county, Fla., executed a deed by which said land was divided, the part marked on plat as lot 4 becoming thereby the property of Francis Hudnall, the part marked on said plat as lot 5 becoming thereby the property of I. Fatio. Said lot 4 remained the property of said Hudnall up to and until, to wit, the 5th day of December, 1884.

"(2) On, to wit, December 27, 1856, the said lot 4 was lying upon a navigable stream, to wit, St. Johns river, and was owned by a citizen of the United States, to wit, the said Hudnall, and the state of Florida was then and there the proprietor of all submerged lands and water privileges within the boundaries of said state. That on the said date the state of Florida, by an act approved on said date, divested itself of all right, title, and interest, and vested in said Hudnall the full title to the lands covered by water lying in front of said lot 4, so far as to the edge of the channel, and gave to the said Hudnall the right and privilege to build wharves into the St. Johns river and to fill up from the shore of the St. Johns river to the channel, and also granted to said Hudnall the right to prevent encroachments of any other person upon all such submerged lands in the direction of his lines continued to the channel by bill in chancery, and that the said grant inured to the benefit of the said Hudnall, his heirs and assigns. That said Hudnall was then and there the riparian proprietor of said property. That the said Hudnall, on, to wit, December 5, 1884, conveyed by warranty deed to one M. W. Drew a part of said lot 4 and of the submerged lands in front of said lot 4; the said lands so conveyed to the said Drew being more particularly described as follows:

"Beginning at a stake on the south side of St. Johns river 24 links north of the center of the mouth of a small branch flowing into said river on grantor's land south 10 degrees east 40.20 chains; north 70 degrees west 5.73 chains; north 10 degrees west 39.34 chains; thence to the channel of said river on same line; thence east in said channel to a point north 10 degrees west from beginning; thence south 10 degrees east to beginning, except right of way of the Jacksonville & Atlantic Railroad 50 feet from the center of roadbed on each side, and 50 feet south of right of said way, for a public road, containing 18.25 acres.

"That the said deed was on, to wit, December 6, 1884, duly recorded in Book A. R., page 435 of the former public records

of Duval county. That on, to wit, December 22, 1884, the said Drew by warranty deed conveyed to Jacksonville Marine Railway Company the lands described in the deed from the said Hudnall to said Drew. That the said deed was duly recorded on, to wit, the 26th day of December, 1884, in Book A. R., at page 657 of the former public records of Duval county, Fla. That the said Jacksonville Marine Railway Company went into possession of said property and improved the same by building thereon a shipyard and by erecting a wharf for facilitating the landing and storing of goods, pilings, and a marine railway into said St. Johns river upon the submerged lands conveyed as aforesaid, and the said Jacksonville Marine Railway Company used and occupied said premises as a shipyard. That on, to wit, December 1, 1896, the said Jacksonville Marine Railway Company by warranty deed conveyed the said lands, with the exception of a few small parcels removed some distance from the St. Johns river, and not involved in this litigation, to Merrill Stevens Engineering Company. That the said deed was duly recorded on, to wit, December 26, 1896, in Book 105, at page 618 of the former public records of Duval county, Fla. That the said Merrill Stevens Engineering Company thereafter had possession of and occupied as a shipyard said land so conveyed and made further improvements thereon. That thereafter on, to wit, December 17, 1903, said Merrill Stevens Engineering Company by warranty deed conveyed to your orator the said lands so conveyed by Jacksonville Marine Railway Company. That said deed was duly recorded in the public records of Duval county, Fla., in Book 19, at page 137. That ever since said time your orator has been in the possession of said property, has occupied the same as a shipyard, and has improved same from time to time.

"(3) On information and belief your orator alleges that the defendants Jay H. Durkee and Cora L. Durkee, are the owners of the land lying next west and contiguous to your orator's said property; that the said property of said Durkee is the said lot 5 hereinbefore described or a part thereof; that the said Durkee's title to said land is based upon the partition deed described in paragraph 1 of this bill.

"(4) That a fence divides said lands of your orator south of high water of St. Johns river, and the said land of defendants south of high-water mark of St. Johns river. That said fence is on the line that originally divided the lands of Hudnall from the lands of Fatio as described in paragraph 1 of this bill. That said fence continues on a straight line from high-water mark of St. Johns river out into the said river for a long distance, to wit, 40 feet. That the said fence, both the part above high-water mark and the part below high-water mark, was

built many years ago, to wit, 14 years or more, and has been in existence continuously along said line ever since it was built.

"(5) That about two years before the exhibition of this bill of complaint your orator had wooden pilings driven into the bed of St. Johns river along the western line of its said submerged lands. That the said western line is a continuation of the fence line referred to in paragraph 4 of this bill and is a continuation of the line dividing the lands of your orator south of high-water mark of St. Johns river from the lands of defendants south of high-water mark of St. Johns river, the said dividing line being the same line that formerly divided the lands of Hudnall and the lands of Fatio mentioned in paragraph 1 of this bill. That said pilings your orator intended to use in connection with a marine railway which your orator intended and intends to build out under St. Johns river on its submerged lands hereinbefore described.

"(6) That the defendant Jay H. Durkee, acting for himself and as agent for the defendant Cora L. Durkee, by his agents and servants has recently pulled up and carried away all of the said pilings of your orator and has driven a large number of pilings into the said submerged lands of your orator. That the said removal of said pilings of your orator and the said driving by said defendant of said pilings into the said submerged lands of your orator constitute encroachments upon the submerged lands of your orator in the direction of its lands continued to the channel. Your orator is informed and believes that the defendants intend to continue to encroach upon the said submerged lands of your orator in the direction of its line continued to the channel by leaving the said pilings upon the said submerged lands of your orator and by using for themselves and to the exclusion of your orator the said pilings, and that the said leaving of said pilings driven into your orator's said submerged lands and the said use of said pilings will constitute encroachments upon the submerged lands of your orator in the direction of its lines continued to the channel. That said conduct has already caused your orator serious injury and unless restrained will cause your orator greater and more serious injury.

"The premises considered, your orator prays that this honorable court issue an interlocutory decree restraining and enjoining the defendants, Jay H. Durkee and Cora L. Durkee, their servants, employes, agents, and all persons acting or claiming to act by, through, or under said defendants from leaving the said pilings upon the submerged lands of your orator, and from using the said pilings while the same are driven upon the said submerged lands of your orator, and from in any way encroaching upon said submerged lands of your orator; that at a final hearing said injunction be made per-

petual; that a decree be entered requiring these defendants to compensate your orator for the damage done it by reason of the pulling up and carrying away of its pilings and by reason of the driving and using of said pilings of defendants, and for such other and further damages as may come upon your orator by reason of said encroachments; and that your orator may have such other and further or other or further relief as may consist with equity and the course of this honorable court.

"And to the ends aforesaid may it please this honorable court to grant unto your orator the state's most gracious writ of subpoena commanding the defendants Jay H. Durkee and Cora L. Durkee and each of them to appear on a day therein to be named, under a penalty therein to be fixed, and answer if they can all and singular the matters and things aforesaid, but not under oath, answer under oath being hereby expressly waived, and to abide by, comply with, and conform to the orders and decrees of this honorable court, and as in duty bound your orator will ever pray, etc."

A demurrer to the bill of complaint on the following grounds was filed:

"(1) That said bill is without equity.

"(2) That said bill sets up no facts which entitle complainant to any relief in a court of equity.

"(3) That the facts alleged in said bill show that the complainant has no right, title, or interest in, to, or upon the lands upon which these defendants are alleged to have encroached.

"(4) That the facts alleged in said bill of complaint are vague, indefinite, and uncertain.

"(5) That said bill of complaint does not state clearly and definitely any facts that entitle complainant to any relief therein sought."

From an order sustaining this demurrer the complainant appealed and assigns the order as error.

The statute under which the complainant asserts its right is as follows:

"Chapter 791.—(No. 17.)

"An act to benefit commerce.

"Whereas, it is for the benefit of commerce that wharves be built and warehouses erected for facilitating the landing and storage of goods; and whereas, the state being the proprietor of all submerged lands and water privileges, within its boundaries, which prevents the riparian owners from improving their water-lots: Therefore,

"Section 1. Be it enacted by the Senate and House of Representatives of the state of Florida in General Assembly convened, that the state of Florida for the considerations above mentioned, divest themselves of all right, title and interest to all lands covered by water, lying in front of any tract of land owned by a citizen of the United

States, or by the United States, for public purposes, lying upon any navigable stream, or bay of the sea, or harbor, as far as to the edge of the channel, and hereby vest the full title to the same in and unto the riparian proprietors, giving them the full right and privilege to build wharves into streams or waters of the bay or harbor as far as may be necessary to effect the purposes described, and to fill up from the shore, bank or beach, as far as may be desired, not obstructing the channel, but leaving full space for the requirements of commerce, and upon lands so filled in, to erect warehouses or other buildings, and also the right to prevent encroachments of any other person, upon all such submerged land in the direction of their lines continued to the channel, by bill in chancery, or at law, and to have and maintain action of trespass in any court of competent jurisdiction in the state, for any interference with such property, also confirming to the riparian proprietors all improvements which may have heretofore been made upon submerged lands, for the purposes within mentioned.

"Sec. 2. Be it further enacted, that nothing in this act contained shall be so construed as to release the title of the state of Florida, or any of its grantees, to any of the swamp or overflowed lands within the limits of the same, but the grant herein contained shall be limited to those persons and body corporate owning lands actually bounded by, and extending to low water mark, on such navigable streams, bays and harbors.

"(Passed the House of Representatives December 26, 1856. Passed the Senate, December 27, 1856. Approved December 27, 1856.)"

See sections 643 and 644, General Statutes of 1906.

Cockrell & Cockrell, for appellant. E. J. L'Engle, for appellees.

WHITFIELD, C. J. (after stating the facts as above). The main question to be determined is whether the allegations of the bill of complaint that are admitted by the demurrer show the encroachments complained of to be upon the exclusive riparian rights of the complainant in the lands under the waters of the navigable stream.

[1] At common law, all navigable waters and the lands thereunder were held by the sovereign for the benefit of the whole people, and the owner of land abutting on navigable waters had no exclusive right in the waters, below ordinary highwater mark or in the lands under the waters, except the right of access to and from the navigable waters, and rights in the land growing out of accretion or reliction.

[2] Upon its admission into the federal Union by the act of Congress of March 3, 1845, the state of Florida by virtue of its sovereignty assumed title to and sovereignty over the navigable waters in the state and the lands thereunder. Such title is held not

for purposes of sale or conversion into other values, or for reduction into several or individual ownership, but for the use of all the people of the state for purposes of navigation, commerce, fishing, and other useful purposes afforded by the waters. [3] The state may, in the interest of the public welfare, grant limited rights in portions of the lands under navigable waters within its borders, or may permit the use thereof, when the rights of the whole people of the state as to navigation and other uses of the waters are not materially impaired. The rights of the people of the state in the navigable waters and the lands thereunder, including the shores or spaces between ordinary high and low water marks, are designed for the public welfare, and the state may regulate such rights and the uses of the waters and the lands thereunder for the benefit of the whole people of the state as circumstances may demand, subject of course to the powers of Congress in the premises. For the purpose of aiding navigation or commerce, or of encouraging new industries and the development of natural or artificial resources in the interest of all the people, the state may grant reasonable and limited rights and privileges to individuals in the use of lands under navigable waters in the state; but such privileges should not unreasonably impair the rights of the whole people of the state in the use of the waters or the lands thereunder for the purposes implied by law, nor relieve the state of the control and regulation of the uses afforded by the lands and the waters thereon. [4] The state may fix the exterior lines of a navigable river if the rights of the people to the use of the waters and the shores of the river are not thereby substantially impaired; and rights in the submerged lands not within the reasonably fixed exterior lines of the river may be granted by legislative authority if such grant does not impair the rights of the whole people to the use of the waters for any purpose expressed or implied by law. State ex rel. Ellis v. Gerbing, 56 Fla. 603, 47 South. 353, 22 L. R. A. (N. S.) 337; Ferry Pass Inspectors' & Shippers' Ass'n v. White River Inspectors' & Shippers' Ass'n, 57 Fla. 399, 48 South. 643, 22 L. R. A. (N. S.) 345.

[5] By the statute set out in the statement, the state of Florida, in consideration of the benefits to accrue to commerce, vested in the riparian owner a qualified fee to "all lands covered by water, lying in front of any tract of land owned by a citizen of the United States, or by the United States for public purposes, lying upon any navigable stream or bay of the sea or harbor, as far as to the edge of the channel, * * * giving them the full right and privilege to build wharves into streams or waters of the bay or harbor as far as may be necessary to effect the purposes described, and to fill up from the shore, bank or beach as far as may be desired, not obstructing the channel, but leaving full space for the requirements of commerce, and upon

lands so filled in, to erect warehouses or other buildings, and also the right to prevent encroachments of any other person upon all such submerged lands in the direction of their lines continued to the channel, by bill in chancery, or at law, and to have and maintain action of trespass in any court of competent jurisdiction in the state, for interference with such property." *State v. Black River Phosphate Co.*, 32 Fla. 82, 18 South. 640, 21 L. R. A. 189.

The proprietary right of the riparian owner of the classes named in the statute extends to "all lands covered by water lying in front of any tract of land * * * lying upon any navigable stream or bay of the sea or harbor, as far as to the edge of the channel." The right of action given to prevent encroachments extends to "all such submerged lands in the direction of their lines continued to the channel."

As the grant is of the use of "all lands covered by water, lying in front of" the particular classes of riparian land, "as far as to the edge of the channel," the right given to prevent encroachments upon "such submerged lands in the direction of their lines, continued to the channel" must mean the right to prevent the encroachments upon the land granted "in front of" the shore line, and directly between the shore line and the channel. "In the direction of their lines continued to the channel" means the space between lines drawn at right angles from the shore line "to the edge of the channel."

This is necessarily so as to bodies of water and the channels therein that run parallel or practically so with the shore line, as is apparently the case here. The right granted by the statute is not to individuals, but it is a general grant of right to all who come within the designated classes; the purpose of the grant being that each member of the designated classes may have the same exclusive rights in front of the shore line of his own lands, but that no one may have by virtue of the grant a right of the kind granted in submerged lands in front of the shore line of other riparian owners. *Hannon v. Delaware, Lackawanna & Western R. Co.*, 37 N. J. Law, 276; *Groner v. Foster*, 94 Va. 650, 27 S. E. 493; *Wood v. Appal*, 63 Pa. 210; *Clark v. Campau*, 19 Mich. 325; *Newell v. Leathers*, 50 La. Ann. 162, 23 South. 243, 69 Am. St. Rep. 395; *Gorton v. Rice*, 153 Mo. 676, 55 S. W. 241; 3 *Farnham on Waters*, § 841 et seq.

[6] The rights granted by the riparian statute of 1856 relate to the space between the shore line and the edge of the channel of navigable streams, bays, or harbors, and such rights are not controlled by the direction of lines dividing the uplands.

[7] It is incumbent upon the complainant to show by proper allegations that the encroachments complained of are upon the lands in which the complainant under the statute has exclusive right. Any ambiguity in actions will be construed against the complaint in considering the demurrer.

[8] The bill of complaint alleged that the lands are on the south side of St. Johns river, and that a fence on the line between the lands of complainant and defendants "continues on a straight line from high-water mark of St. Johns river out into the said river for a long distance, to wit, 40 feet"; that complainant "had wooden pilings driven into the bed of St. Johns river along the western line of its said submerged lands; that said western line is a continuation of the fence line referred to * * * and is a continuation of the line dividing the lands of complainant south of high-water mark of St. Johns river from the lands of defendants south of high-water mark of St. Johns river"; that the defendants have "recently pulled up and carried away all of the said pilings * * * and has driven a large number of pilings into the said submerged lands of complainant; that the said removal of said pilings of complainant and the said driving by said defendant of said pilings into the said submerged lands of complainant constitute encroachments upon the submerged lands of complainant in the direction of its lines continued to the channel."

The line between the uplands of complainant and the defendants apparently does not approach the navigable river at right angles or nearly so; but the description of the land line indicates that it approaches the river at an angle of 10 degrees west of north, while the river apparently runs approximately east and west in front of the land.

It does not appear from the allegations of the bill of complaint that the complainant has any rights in the submerged lands "in front of" the lands of the defendants that are included within lines run at right angles from each end of the defendants' shore line "to the edge of the channel." Nor does it clearly appear that the encroachments complained of are upon submerged land "in front of" complainant's shore line or between lines running at right angles from the ends of complainant's shore line to the edge of the channel.

Even if the conveyance to the complainant in terms covers submerged land in front of the defendants' land between lines running at right angles from the ends of the defendants' shore line to the edge of the channel of the navigable river, it does not appear that the complainant's predecessors in title had any right to make such a conveyance. The pleadings do not show a possessory right of the complainant in the submerged lands between the defendants' shore line and the edge of the channel of the navigable river.

As the complainant does not make it clearly to appear that the encroachment complained of is upon lands as to which it has the right to the relief sought, the decree appealed from is affirmed.

TAYLOR, SHACKLEFORD, and HOCKER, JJ., concur.

COCKRELL, J., took no part.

HOLMES et al. v. THOMPSON.

(Supreme Court of Florida, Division B. Dec. 19, 1911. Rehearing Denied Feb. 20, 1912.)

(Syllabus by the Court.)

EJECTMENT (§ 106*)—TITLE OF PLAINTIFF—AFFIRMATIVE CHARGE.

In ejectment the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of the title of his adversary; and where, in the trial of such a suit, it appears that the plaintiff's claim rests upon a deed that is a nullity to convey title because made by parties who had no title to convey, and no title by adverse possession is shown in the plaintiff, it is not error for the court to give an affirmative charge to the jury to find for the defendant.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 307-310; Dec. Dig. § 106.*]

Error to Circuit Court, Duval County; R. M. Call, Judge.

Action by W. Parker Holmes, for the use of John G. Christopher and others, against William R. Thompson. Judgment for defendant, and plaintiffs bring error. Affirmed.

H. H. Buckman, for plaintiffs in error. Baker & Baker, for defendant in error.

TAYLOR, J. The plaintiffs in error, as plaintiffs below, instituted their action of ejectment against the defendant in error, as defendant below, in the circuit court of Duval county. The defendant pleaded the general issue of not guilty. The case was tried before a jury, who, at the close of the evidence, were affirmatively instructed by the circuit judge to return a verdict for the defendant, which was done and final judgment was entered in accordance therewith, and for a review of this judgment the plaintiffs below bring the case here by writ of error. It is admitted that both the plaintiffs and defendant claim title through one James Lewis, who acquired title by a deed from Abel S. Baldwin dated September 13, 1867. The said James Lewis and his wife, Elizabeth, on August 5, 1893, executed to William A. McLean as trustee a deed wherein they conveyed to said William A. McLean as trustee for certain uses and trusts all of the said tract of land conveyed to him, the said James Lewis, by the said Abel S. Baldwin, except such parts or portions thereof as had been previously sold and conveyed to other parties. The evidence further shows that the said James Lewis died in 1893, subsequent to the execution of this trust deed. His wife, Elizabeth, died in July, 1896, and William A. McLean, the trustee under this deed, died in 1898.

The plaintiffs claim title to the land in dispute, being a part of the land conveyed to James Lewis by Abel S. Baldwin through conveyances executed after the death of said W. A. McLean, trustee, by W. A. McLean, Jr., for himself as heir at law of W. A. Mc-

Lean, Sr., deceased, and as trustee for James and Elizabeth Lewis and as administrator of the estate of W. A. McLean, deceased, and by John McLean for himself and as heir at law of W. A. McLean, Sr., deceased, and as trustee for James and Elizabeth Lewis. These deeds from W. A. McLean, Jr., and John McLean executed on their own behalf as heirs at law of W. A. McLean, Sr., deceased, and as his administrator and as trustees for said James and Elizabeth Lewis, are the only conveyances by which the plaintiffs undertook to show the passage to them of the title, if any, of James Lewis and Elizabeth, his wife, or of their heirs at law.

In the case of Christopher v. Mungen (decided here at the last term) 61 Fla. 513, 55 South. 273, where this deed of trust from James Lewis and wife to William A. McLean was directly involved for construction, it was held that: "As the trusts were not performed at the death of the trustee, and as before that time both James Lewis and his wife, Elizabeth, had died, the purpose for which the trust was raised failed; and as there was no intention to convey to the trustee an estate of inheritance, but only to confer a power to sell and convey in fee simple, the title descended to the heirs of James Lewis at his death; and at the death of the trustee, or upon the failure of the objects of the trust, the title of the heirs of James Lewis was subject only to such debts as were made a charge upon the lands by the mortgage feature of the deed of trust." With this construction of this trust deed we are still content; and it follows, consequently, that the deed from W. A. McLean, Jr., and John McLean, whereby they attempted to convey the property in dispute in their own right as heirs at law of W. A. McLean, deceased, trustee, and as his administrator and as trustee for James and Elizabeth Lewis, both of whom were at the date of such deeds deceased, were nullities and conveyed no sort of title to the premises upon which ejectment could be sustained. And since the plaintiffs have failed to show any title by occupancy or possession, and show title only through these deeds from W. A. McLean, Jr., and John McLean as heirs at law of W. A. McLean, Sr., deceased, and as his administrator, it follows that they had failed to show any title to the property in dispute, and the trial judge was correct in instructing the jury to return a verdict for the defendant, since the rule is well established here, as elsewhere, that in ejectment the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of the title of his adversary. As this disposes of the main issue presented in the case, it is unnecessary to consider in detail any of the other assignments of error.

The judgment of the circuit court in said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cause is hereby affirmed, at the cost of the plaintiffs in error.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

Ex parte OVERTON.

(Supreme Court of Alabama. Jan. 18, 1912.)

JUDGMENT (§ 139*)—DEFAULTS—SETTING ASIDE.

Where a default was taken, the damages not being liquidated, and not yet having been assessed, the judgment was interlocutory, and might, in the discretion of the circuit court, be set aside after 30 days from its rendition; Loc. Acts 1888-89, p. 801, § 11, providing that final judgments are, after the expiration of 30 days, beyond the control of that court, not applying.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 265-268; Dec. Dig. § 139.*]

Application by Andy J. Overton for writ of mandamus directed against the judge of the circuit court of Jefferson county. Writ refused.

Sepsalon & Davis, for petitioner. A. C. & H. R. Howze, for respondent.

SAYRE, J. This is an original application to this court for a writ of mandamus. It appears that the petitioner brought his suit in the circuit court of Jefferson county against Octavia A. Wood. On October 7, 1911, more than 30 days after due service of the summons and complaint, defendant being in default, plaintiff had judgment by default with leave to execute a writ of inquiry for the assessment of damages. On November 10, 1911, the inquiry was executed and damages assessed by a jury. Subsequently the defendant moved the court to set aside the judgment and for leave to plead to the merits, averring that she had been prevented from making defense by surprise, accident, and mistake, and that she had a just, full, and complete defense. On November 18, 1911, the court set aside the verdict and judgment. Petitioner prays that the judge of the circuit court be required to vacate, annul, and set aside the judgment by which his judgment was vacated, annulled, and set aside.

The act regulating the practice in the circuit court of Jefferson (Local Acts 1888-89, p. 797) provides in section 11 that "final judgments rendered in said court shall, after the expiration of 30 days from their rendition, be taken and deemed as completely beyond the control of the court as if the term of said court at which said judgments are rendered had ended at the end of said 30 days." The motion was addressed to the sound discretion of the court, and it is not alleged that the court's ruling was infected with error,

except that the motion and the judgment were made and rendered more than 30 days after the judgment by default. But the limitation of 30 days is placed upon the power of the court to interfere with judgments which are final. Interlocutory judgments are as much under the control of the court as they ever were. The judgment by default was an interlocutory judgment. It is generally held that a final judgment cannot be entered where the damages are, as in this case, unliquidated, or the amount of plaintiff's claim uncertain or indeterminate. There must first be an interlocutory judgment by default, and the final judgment is entered after the damages have been assessed by a writ of inquiry or otherwise determined according to law. 23 Cyc. 765. It was so ruled by this court in *Martin v. Price*, Minor, 68. There was no error in the court's action, and the writ of mandamus will be denied.

Mandamus denied. All the Justices concur, except DOWDELL, C. J., not sitting.

BARANCO v. BIRMINGHAM TERMINAL CO.

(Supreme Court of Alabama. Jan. 18, 1912.)

PLEADING (§ 248*)—AMENDMENT—NEW CAUSE OF ACTION.

Code 1907, § 5329, providing that actions ex delicto may be joined with actions ex contractu arising out of the same transaction or relating to the same subject-matter, and section 5367, providing that in permitting an amendment new counts shall not be held to state a new cause of action, so long as they refer to the same transaction, property, title, and parties as the original, did not change the law existing theretofore that an amendment could be had where it did not change the term of the action, make an entire change in parties, or introduce an entirely new cause; so that an amendment of a complaint charging a wrongful obstruction of a street, by merely changing the description of the lot alleged to have been damaged, though it described a totally different lot, charged the same injury and should have been allowed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by Raffaella Baranco against the Birmingham Terminal Company. From a nonsuit, on a refusal to allow an amendment to the complaint, plaintiff appeals. Reversed and remanded.

Frank S. White & Sons, for appellant. Weatherly & Stokely, for appellee.

SAYRE, J. In this case plaintiff sued for damages alleged to have been caused by defendant's wrongful act in placing a permanent obstruction across the street upon which his lot fronted. The averment is that the obstruction diminished the value of his property and caused the loss of profits in his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

business conducted thereon. Plaintiff offered to amend his complaint by changing the description of his lot. The amendment described a totally different lot, but one contiguous to that described in the original complaint. Upon the court's refusal to allow the amendment, plaintiff took a nonsuit, with a bill of exceptions.

The amendment should have been allowed. Previous to the Code of 1907 it was always held by this court that the only limitation upon the right of a plaintiff in a civil action at law to amend his complaint was that the form of the action should not be changed. There could not be an entire change of parties; nor could there be the substitution or the introduction of an entirely new cause of action. *Mahan v. Smitherman*, 71 Ala. 563. Now it is provided that actions ex delicto may be joined in the same suit with actions ex contractu arising out of the same transaction or relating to the same subject-matter. Code, § 5320. And in the way of further definition of those cases in which amendments must be allowed it is now provided that new counts or statements of the cause of action shall not be held to relate to new causes of action, or causes of action other than that stated in the original complaint, so long as they refer to the same transaction, property, title, and parties as the original. Code, § 5367. The wrong complained of in this case, the gist of both the original complaint and the complaint as stated in the proposed amendment, was the same, to wit, the wrongful obstruction of the street. The allegations in respect to the diminished value of plaintiff's lot and the loss of profits which would have been earned in plaintiff's business served only to show how and to what extent the alleged wrong wrought injury to plaintiff different in kind and degree from that suffered by the general public. Under the statute, and the rule which has always prevailed, the amendment should have been allowed.

We have considered the question as to the propriety of the amendment, the only question presented for review. We will not be understood as intending anything in respect to other questions which will arise in the case.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

NEYMAN v. ALABAMA GREAT SOUTHERN R. CO.

(Supreme Court of Alabama. Jan. 18, 1912.)

1. EVIDENCE (§ 546*)—EXPERT TESTIMONY—DETERMINATION OF COMPETENCY—DISCRETION OF COURT.

In an action against a railroad for the wrongful death of plaintiff's intestate, a flagman, who testified that he had been in railroad work since a boy, in the transportation department for four years, and familiar with the handling of cars, though he had never had

charge of a train or run an engine, and could not run an engine and cars with safety, was asked to tell the jury whether it was safe to couple an engine onto a caboose, and to explain the proper manner of handling the train and engine. *Held*, that the exclusion of such testimony as expert testimony was within the proper discretion of the lower court.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2363; Dec. Dig. § 546.*]

2. EVIDENCE (§ 373*)—DOCUMENTARY EVIDENCE—SUFFICIENCY OF IDENTIFICATION.

In an action against a railroad for the wrongful death of plaintiff's intestate, where a pass had been described by witnesses, and defendant's conductor had testified that the intestate told him that he had that pass, and that he took his word for it, and let him proceed without seeing the pass, the pass was admissible in evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1581; Dec. Dig. § 373.*]

3. EVIDENCE (§§ 123, 143*)—RES GESTÆ—MATERIALITY.

In an action against a railroad for wrongful death, where it appeared that deceased was allowed to ride on a pass, a question to a witness as to whether the conductor "was trying to find Bernard's pass" after the accident had happened was properly excluded as being immaterial and no part of the *res gestæ*.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 351-368, 424, 426-428; Dec. Dig. §§ 123, 143.*]

4. EVIDENCE (§ 471*)—MATTERS OF OPINION OR FACTS.

In an action against a railroad for the wrongful death of his intestate, who had been allowed to ride on a pass, a question as to whether the conductor, after the accident, was trying to find the pass, was objectionable as calling for a conclusion.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2150; Dec. Dig. § 471.*]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Action by Benjamin H. Neyman, as administrator of B. F. Neyman, against the Alabama Great Southern Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Pinkney Scott, for appellant. A. G. & E. D. Smith, for appellee.

SIMPSON, J. This is the second appeal in this case (55 South. 509), and it is stated by counsel for both appellant and appellee that the evidence on this trial is the same as that given on the first trial.

[1] The first assignment of error insisted on is to the action of the court sustaining objections to the question to the witness Parr: "Tell the jury whether or not it was a safe thing to do, to couple that engine on to their caboose." The witness is a flagman, and while he stated in his examination in chief that he had been in the railroad business since a boy, in the transportation department for four years, and familiar with handling cars, yet on cross-examination he stated that he had never had charge of a train, never ran an engine, that he did not know how, and could not run an engine and

cars with safety. The court, in the exercise of the discretion which it has in regard to the admission of expert testimony, did not err in sustaining said objections. For the same reasons, there was no error in sustaining the objection to the further question to said witness to explain the proper manner of handling the train and engine.

[2] There was no error in overruling the objection to the introduction of the pass in evidence. The pass had been described by other witnesses as "M 42," and the conductor—Suddeth—had testified that the intestate told him he had that pass, and that he took his word for it and let him proceed, without seeing the pass.

[3, 4] There was no error in sustaining the objection to the question to the witness B. H. Neyman as to whether the conductor, Suddeth, "was trying to find Bernard's pass" after the accident had happened, as it was immaterial, not part of the res gestæ, and, even if otherwise unobjectionable, the question should have asked for facts, from which the jury could say what he was "trying" to do.

After a re-examination of the evidence in this case, and considering the arguments of appellant, we see no reason for overruling the former decision of this court to the effect that the general charge was properly given in favor of the defendant.

The judgment of the court is affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

JORDAN v. JORDAN.

'Supreme Court of Alabama. Jan. 18, 1912.)

1. DIVORCE (§§ 177, 280*)—APPEAL—DECISIONS REVIEWABLE.

An order made in an action for divorce denying a motion to require the complainant to pay the costs of previous suits as a condition precedent to prosecution of the action, and granting complainant's petition for alimony pendente lite, and an order of reference to ascertain the amount thereof, are not appealable.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 563, 764; Dec. Dig. §§ 177, 280.*]

2. MANDAMUS (§§ 53, 59*)—ALLOWANCE OF ALIMONY—VACATION OF DECREE—MANDAMUS.

Mandamus is the proper remedy to require the lower court to stay a proceeding in a divorce action until complainant pays the costs of previous suits, and also to show cause why the order allowing alimony should not be vacated.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. §§ 53, 59.*]

3. COSTS (§ 277*)—PAYMENT—STAY OF SUBSEQUENT ACTION.

When a complainant has failed in one suit and brings another against the same party for substantially the same cause of action, the court will stay the proceedings in the second suit until the costs in the former suit are paid, but it has some discretion in the matter, and, where there is a valid excuse for the failure to pay the costs of the former suit, it will not

compel such payment as a condition of permitting the second to proceed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1048-1060; Dec. Dig. § 277.*]

4. DIVORCE (§ 195*)—ALIMONY PENDENTE LITE—DISCRETION OF COURT—PAYMENT OF COSTS.

In a suit for divorce defendant moved to require the payment of costs of previous suits as a condition precedent to a prosecution of the case, and excepted to complainant's petition for alimony pendente lite. Plaintiff alleged that the former suit was dismissed on the solicitation of defendant to effect a reconciliation; defendant agreeing to provide for her and that they would live together, and that, after she had dismissed the suit, he refused to carry out his promise. *Held*, that the allowance to complainant of alimony in a second suit without first requiring her to pay the costs of the former suit was within the discretion of the court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 581; Dec. Dig. § 195.*]

5. DIVORCE (§ 214*)—APPEAL—REVIEW.

Where counsel for defendant in divorce had notice of the time and place for the execution of the reference as to alimony, but failed to appear, defendant could not except to the confirmation of the report.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 626-631; Dec. Dig. § 214.*]

6. JUDGMENT (§ 948*)—PLEADING JUDGMENT IN BAR.

In an action for divorce, the defense of a bar by a former action should be invoked by a plea, and not by motion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1787-1794; Dec. Dig. § 948.*]

Appeal from Circuit Court, Jefferson County; E. C. Crowe, Judge.

Mandamus by John J. Jordan, defendant-appellant in an action for divorce brought by Annie Jordan, praying in the alternative that, upon denial of a motion to require the adverse party to pay costs of previous suits as a condition precedent to prosecution and to vacate allowance of alimony pendente lite, to require the Jefferson circuit court to stay proceedings until payment of costs, and to show cause why the order allowing alimony should not be vacated. Appeal dismissed, and mandamus denied.

Pinkney Scott, for appellant. J. B. Aird, for appellee.

ANDERSON, J. [1] This appeal seems to be prosecuted from the action of the court in failing to sustain the appellant's motion to require the complainant to pay the costs of the previous suits as a condition precedent to a prosecution of the case at bar, and to the granting of the complainant's petition for alimony pendente lite, and in ordering a reference to ascertain the amount. None of these orders are appealable. *Brady v. Brady*, 144 Ala. 414, 39 South. 237.

[2] The appellant has, however, prayed in the alternative in a motion for the writ of mandamus to be addressed to the lower court requiring it to stay the proceedings until the cost is paid and to show cause why the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

order allowing alimony should not be vacated, and mandamus is no doubt the proper remedy. *Brady v. Brady*, supra; *Bradshaw's Case*, 57 South. 16.

[3] Regardless of the rule as to actions at law, it is well settled in equity that when the complainant, as here, has failed in one suit, and brings another against the same party for the same, or what is substantially the same cause of action, the court will stay the proceedings in the second until the costs in the former suit are paid. *Street's Case*, 106 Ala. 102, 17 South. 779; *Brown v. Brown*, 81 Ala. 508, 2 South. 95. Whether or not it is the imperative duty of the court to stay the proceedings and the matter is not therefore discretionary in actions at law we need not decide. In equity, however, the rule has its limitations, and it would seem that the chancery court would have some discretion in the matter, if a proper excuse is shown. *Updike v. Bartles*, 13 N. J. Eq. 231. "A court of equity will be governed by the circumstances of each case, and, where there is a valid excuse given for the failure to pay the cost incurred in the former action, it will not compel such payment as a condition of permitting the second to proceed." *N. P. Co. v. Mertes*, 35 Neb. 207, 52 N. W. 1100. In *Stebbins v. Grant*, 19 Johns. (N. Y.) 196, the court recognized the rule at common law, but refused to apply it in equity.

[4] We cannot put the trial court in error for declining to stay the proceedings until the cost in the former suit was paid. The complainant answered the motion under oath, that the former suit was dismissed by her without seeing her counsel, upon the solicitation of the respondent, for the sole purpose of effecting a reconciliation; "that, if she dismissed the pending suit, he would provide for her, and give her money to live on, and that they would go back together as man and wife," and, after she had dismissed said suit, he flatly refused to carry out his promise. This answer was sworn to, and we are not inclined to put the trial court in error for proceeding to award the complainant alimony pendente lite without first requiring her to pay the costs of the former suit.

[5] The record shows that the respondent's counsel had notice of the time and place for the execution of the reference, and failed to appear. The respondent, having failed to appear before the register or master, could not except to the report, and which said report was properly confirmed when read.

[6] Whether or not the former suit was a bar to the present suit, the case not having been disposed of after being set down for the hearing on its merits, or because dismissed at the instance or request of the respondent, we need not decide, for, if it is a bar, a question extremely doubtful, the defense

should be properly invoked by a plea, and not by the motion in question.

The appeal is dismissed, and the mandamus must be denied. All the Justices concur except DOWDELL, C. J., not sitting.

DRIVER et al. v. NEW.

(Supreme Court of Alabama. Jan. 11, 1912.)

INJUNCTION (§ 38*)—SUBJECTS OF RELIEF—TRESPASSES UPON LAND.

While a bill to enjoin trespasses cannot supplant an action of ejectment, injunction lies for a reasonable time to enable one of the parties to bring suit at law to establish his legal title.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 86-90; Dec. Dig. § 88.*]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Bill by Charley New against J. B. Driver, and others. Decree for plaintiff, and defendants appeal. Affirmed.

Bestor, Bestor & Young, for appellants. Frederick G. Bromberg, for appellee.

SIMPSON, J. The bill in this case was filed by the appellee to enjoin the committing of trespasses on land, which said trespasses are alleged to be of such a continuous nature as to justify the interposition of a court of equity. It is settled that this proceeding cannot take the place of an action of ejectment, thus invoking the jurisdiction and powers of a court of chancery to decide in which party the title to land resides. The court, however, exercises its powers temporarily, enjoining the commission of the trespasses for a reasonable time, in order to enable one party or the other to bring suit in a court of law to establish his legal title.

In the case of *Kellar v. Bullington*, 101 Ala. 267, 14 South. 466, the evidence showed that the respondent was in possession of the land under color of title, and that the complainant claimed title under a government patent subsequent to respondent's entry, and this court denied the injunction, holding that it was merely a case of controversy as to the title to the land, which could not be tried in a court of equity. The court also gave as a further reason why the injunction was denied, that the value of the stone which had been and could be taken by the respondent was so inconsiderable in comparison to the vast quarry involved that no irreparable injury would follow the assertion of complainant's legal remedies without resort to injunction, and, quoting from *High on Injunctions*, said: "If the title to the locus in quo is in doubt, the injunction, if allowed at all, should only be temporary until the title can be determined at law." 101 Ala. 270, 271, 14 South. 467.

In the case of *Ashurst v. McKenzie*, 92

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Ala. 484, 491; 9 South. 262, 264, this court said, "With respect to the relief sought in the bill by way of injunction of trespasses, it may be conceded that, pretermittting the question of title, the continuous or recurring character of the threatened trespasses alleged entitle the complainants to have their commission enjoined, since redress at law could only be had by a multiplicity of suits, a fact of itself sufficient to determine the inadequacy of the legal remedy, and especially so in view of the defendant's alleged and admitted insolvency," and after alluding to the fact that the matter of title was contested between the parties, and that the evidence was in irreconcilable conflict, stated that the chancery court only "conserves and protects the property by its restraining process," and that "the only relief equity can grant in the first instance is by way of a temporary injunction of trespass, giving the parties opportunity to litigate the title in the courts at law," etc., and as the complainant was in possession the temporary injunction was allowed.

In the later case of *Hamilton v. Brent Lumber Co.*, 127 Ala. 78, 84, 28 South. 698, the court held that the chancellor was in error in decreeing that the complainant had the constructive possession, basing it upon "the doctrine which refers the possession to the title," because the court of equity has no jurisdiction to determine the title, yet, although there was no averment in the bill that the complainant was in possession, and no proof of possession, in him, but it was shown to the satisfaction of the court that the respondent was in the actual possession of the land, this court rendered a decree continuing the injunction until the complainant should have a reasonable time to bring action at law to recover possession of the land.

It seems, from these decisions of our own court, that when the title is in dispute, and the trespasses are continuous and create irreparable injury, the court will allow the temporary injunction, whether the complainant or the defendant be in possession, the object being to preserve the property until the rights of the parties can be judicially determined. The bill in this case shows the continuous and irreparable nature of the trespasses in this case, and alleges that the complainant is in possession and has title to the premises. The respondent also sets up title.

The evidence offered by complainant shows that complainant's father entered upon the land under color of title in 1870, lived on it for many years, and exercised acts of ownership, and since he moved off he and his son, the complainant, who succeeded to his father's possession under a deed, kept numerous notices of their ownership and possession at a number of places on the land, besides doing other acts indicating owner-

ship. While there is some conflict in the evidence, we think that the chancellor correctly held that the possession of the land was in the complainant, and, under the authorities cited, properly granted the temporary injunction, until the title to the land can be determined by a proceeding at law brought within a reasonable time.

The decree of the court is affirmed. Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

OATES v. SMITH.

(Supreme Court of Alabama. Jan. 9, 1912.)

1. BANKS AND BANKING (§ 77*)—INSOLVENCY—RECEIVERSHIP—NATURE—STATUTORY PROVISIONS.

Code 1907, § 3560, providing that, whenever the treasurer finds a bank or corporation doing a banking business is not in a solvent condition, the Attorney General shall institute proceedings to put the bank in the hands of some competent person, who shall collect its assets and pay off its liabilities, creates a statutory receivership for banks subject to the general principles of receivership and section 3509, providing that the assets of insolvent corporations constitute trust funds for the payment of creditors.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

2. BANKS AND BANKING (§ 77*)—INSOLVENCY—RECEIVERSHIP—EFFECT.

The appointment of a receiver under Code 1907, § 3560, providing that, when a bank is found to be insolvent, the Attorney General shall institute proceedings in a court having jurisdiction to put the bank into the hands of some person to wind up its affairs, operates as an adjudication of insolvency fixing the status of corporate assets and qualifying the rights of creditors.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

3. RECEIVERS (§ 69*)—APPOINTMENT—EFFECT.

Ordinarily the appointment of a receiver does not vest in him any title to the property involved, but only the right of possession.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 124, 125; Dec. Dig. § 69.*]

4. BANKS AND BANKING (§ 80*)—INSOLVENCY—RECEIVERSHIP—ALLOWANCE OF CLAIMS—SET-OFFS.

Where a receiver was appointed under Code 1907, § 3560, to collect the assets and pay off the liabilities of an insolvent bank, a debtor cannot offset a debt due the bank with an obligation acquired after its insolvency, for section 3509 provides that the assets of insolvent corporations constitute a trust fund for the payment of creditors, and, while the changed status wrought by insolvency does not impair or defeat existing rights of set-off, debtors are not required to have offset against their debts claims which they have acquired subsequent to insolvency, for, after insolvency is established, a creditor is only entitled to file his claim and share ratably in the distribution of the assets, and so his assignee has no greater rights.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 184-196; Dec. Dig. § 80.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. BANKS AND BANKING (§ 80*)—INSOLVENCY—RECEIVERSHIP—ALLOWANCE OF CLAIMS—SET-OFFS.

Code 1907, § 5858, providing that mutual debts subsisting between the parties at the commencement of the suit may be set off, does not give one indebted to an insolvent bank, which has been placed in the hands of a receiver, the right to offset an obligation acquired since insolvency, for it refers to a debt to and a claim against the same legal person, each of which must equally afford the obligee a right of action against the obligor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 184-196; Dec. Dig. § 80.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Proceedings by the Attorney General against the Guarantee Bank & Trust Company, in which E. D. Smith was appointed receiver of the defendant. On petition John B. Oates against the receiver. From a decree sustaining a demurrer to the petition, the petitioner appeals. Affirmed.

Henry Upton Sims, for appellant. J. B. Garber and Garber & Garber, for appellee.

SOMERVILLE, J. Section 3560 of the Code of 1907 (section 16 of the state banking act of October 2, 1903) is as follows: "Whenever the treasurer finds that a bank or corporation chartered by the laws of this state and doing a banking business, is not in a solvent condition, he shall immediately report the condition of the bank to the Governor, and the Governor shall direct the Attorney General to institute proceedings in a court having jurisdiction in the county where the bank or parent bank is located, to put the bank in the hands of some competent person, who shall give bond in an amount to be fixed by the judge for the faithful discharge of his duties, and said person so appointed shall immediately take charge of the business of said bank, collecting its assets and paying off its liabilities under the law and rules of such court."

Proceeding in accordance with this statute, the Attorney General filed his bill in the Jefferson chancery court against the Guarantee Bank & Trust Company, alleging that the State Treasurer had certified to the Governor that the respondent bank was not in a solvent condition, and praying for the appointment of some competent person as receiver to immediately take charge of the business and property of said bank, to collect its assets, and hold them subject to the orders of the court. The court thereupon appointed the appellee, E. D. Smith, as such receiver, who took charge of the bank, and proceeded to collect its assets. The receiver soon afterwards filed his report showing that the bank was hopelessly insolvent, and on November 8, 1910, the court ordered that all creditors should file their claims against the bank on or before January 10, 1911; and on

December 17, 1910, further ordered that the receiver should allow set-offs only in those cases where debtors held or owned certificates of deposit of said bank, general or interest-bearing, at the time of the commencement of the receivership. On January 10, 1911, the appellant, John B. Oates, filed in the court his sworn petition, showing that he was indebted to said insolvent bank in the sum of \$1,404 by his promissory note of July 2, 1910, due and payable on July 2, 1911, to which was attached certain collateral securities the property of petitioner; that this note was among the assets of said bank, and in the possession of said receiver; that, before the institution of this cause, said bank for value received had issued an interest-bearing certificate of deposit in the sum of \$1,750 to the Interstate Fire Insurance Company, payable on July 2, 1911; and that petitioner had become the owner and purchaser of said certificate by indorsement, and for a valuable consideration. The prayer of the petition was in substance and effect that this certificate of deposit should be allowed as a set-off against petitioner's said debt to the bank, that his said note be canceled and his collateral returned to him, and that any balance found due on the certificate be allowed to him as a claim against the bank. The receiver demurred to the petition on various grounds, among others, that it did not show that the certificate of deposit was transferred to petitioner before the appointment of the receiver. The demurrer was sustained by the chancellor, and, petitioner declining to amend, a decree was entered dismissing the petition. The controlling question raised by the appeal is, therefore, whether a claim acquired by the debtor of an insolvent banking corporation in the hands of a receiver, after the appointment of the receiver, is available as a set-off against his debt previously existing.

[1] The effect of section 3560 of the Code is to create a statutory receivership, subject, of course, to the general principles which govern that branch of equity law, and subject specifically to section 3509 of the Code, which provides that "the assets of insolvent corporations constitute a trust fund for the payment of the creditors of such corporations, which may be marshaled and administered in courts of equity in this state." These two statutes are, of course, parts of a single system, and co-operate in the clearly defined purpose of the Legislature to promptly sequester the assets of insolvent state banks, to the end that such assets may be impartially administered in favor of all the creditors.

[2] Upon the filing of a bill of complaint, appropriate in form and substance, a court of equity is authorized to appoint a receiver for the purposes stated, and the decree of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

appointment operates ipso facto as a potential adjudication of insolvency, fixing the status of corporate assets, and qualifying the rights of corporate creditors. Whether, for our present purposes, this status relates back to the filing of the bill, or to the State Treasurer's report of insolvency, or to the date of actual insolvency, we need not consider. See the various rulings collected in case note to *Stone v. Dodge* (Mich.) 21 L. R. A. 280.

[3] In ordinary cases of receivership, it is very generally held that the appointment of the receiver does not vest in him any title to the property involved, but only the right and duty of possession. *Sullivan Timber Co. v. Black*, 159 Ala. 587, 48 South. 870; *Talladega Merc. Co. v. Jenifer Iron Co.*, 102 Ala. 259, 14 South. 743; *South. Granite Co. v. Wadsworth*, 115 Ala. 570, 22 South. 157; *High on Receivers*, § 5; 23 Am. & Eng. Ency. Law, 1042.

[4] But this question is of no importance in the present case, for the trust fund theory of the statute, as well as the equitable rights of the receiver, just as effectually hold and protect the assets of the bank for the purposes in view as if the legal title were vested in the receiver. In a similar case, however, the Supreme Court of Massachusetts has held that such a receiver "is to be regarded as a quasi assignee, and as being vested with the legal title to the assets of the bank." *Howarth v. Lombard*, 175 Mass. 570, 579, 56 N. E. 888, 891, 49 L. R. A. 301. And this ruling seems to meet with the approval of Mr. High. *High on Receivers* (4th Ed.) § 317c. It is universally conceded that the changed status wrought by insolvency, or by the appointment of the receiver, does not impair then existing rights of set-off in favor of debtors. See note to *St. Paul Trust Co. v. Leck* (Minn.) 47 Am. St. Rep. 585; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; 34 Cyc. 194.

But it is held with equal unanimity that such debtors are not entitled to have set off against their debts claims which they have acquired subsequent to such insolvency, of which they have notice, or subsequent to the appointment of the receiver. *Stone v. Dodge*, 96 Mich. 514, 56 N. W. 75, 21 L. R. A. 280, and note; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; *Nix v. Ellis*, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111; *St. Paul Trust Co. v. Leck*, 57 Minn. 87, 58 N. W. 826, 47 Am. St. Rep. note, pages 582-586-588; *Davis v. Ind. Mfg. Co.*, 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; *In re Hamilton*, 26 Or. 579, 38 Pac. 1088; *In re Van Allen*, 37 Barb. (N. Y.) 225; *Smith v. Mosby*, 9 Helsk. (Tenn.) 501; *Van Dyck v. McQuade*, 85 N. Y. 617; *Clarke v. Hawkins*, 5 R. I. 219; *Jackson v. Lahee*, 114 Ill. 300, 2 N. E. 172; *High on Receivers* (4th Ed.) § 247; 23 Am. & Eng. Ency. Law, 1094; 34 Cyc. 198. The reason in each case

is elementary: (1) The receiver succeeds to the assets as they are, and subject to every specific right and equity which existed against the insolvent; and, where a set-off exists, the debtor equitably owes only the balance over and above the amount of his counterclaim, and this is the debt that passes to the receiver; and (2) the impartial distribution of the assets, which constitute a trust fund in equity, without any preference of one creditor at the expense of others, would be palpably defeated. After insolvency is established, a creditor's claim, so far as the assets are concerned, gives him no more than the right to file his claim seasonably and to share ratably in their distribution. And when he assigns his claim to another, after such insolvency is established, the assignee acquires no other nor higher right than had his assignor.

[6] Our statute of set-offs (section 5858, Code 1907) provides that "mutual debts * * * subsisting between the parties at the commencement of the suit, etc., may be set off one against the other." This means a debt to and a claim against the same legal personality, each of which must equally afford the obligee a right of action against the obligor. *St. L. & T. R. Packet Co. v. McPeters*, 124 Ala. 451, 27 South. 518. This language of the statute in no way impugns the principles above laid down, even if it were conceded that a court of equity must apply it in all requests and in all cases as must courts of law. Manifestly the test just above stated is fatal to the petitioner's asserted right of set-off, for mutuality is essentially lacking, and his general right of action upon his claim acquired by assignment is qualified by the pre-established rights of the receiver and of the other creditors.

Appellant's theory, and his argument in support of it, have taken no account of the force and effect of section 3509 of the Code, which re-establishes the once discarded trust fund theory in regard to the assets of insolvent corporations; and this alone would differentiate such cases from insolvent estates of deceased persons administered by personal representatives. But, even with respect to these latter, it seems to be settled law that claims acquired by debtors by assignment after the decedent's death cannot be set off against the estate in an action by the personal representative. Note to *St. Paul*, etc., *Trust Co. v. Leck*, 47 Am. St. Rep. 588. Nor do the Alabama cases cited by appellant hold to the contrary. In fact, in *Palmer, Adm'r, v. Steiner*, 68 Ala. 400, the right of set-off in such cases is expressly limited to demands against the decedent "held and owned at the time of his death."

The decree of the chancery court is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

REPUBLIC IRON & STEEL CO.
v. WOODY.

(Supreme Court of Alabama. Jan. 11, 1912.)

1. MASTER AND SERVANT (§ 153*)—INJURIES
TO SERVANT—WARNING AND INSTRUCTING
SERVANT—MASTER'S DUTY.

Where an inexperienced servant had nothing to do with loading pots of molten metal, and was only engaged in coupling the metal cars together and unloading them, his employer was not bound to instruct him as to the proper methods of loading the pots, so as to enable him to discover whether they were negligently loaded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317; Dec. Dig. § 153.*]

2. MASTER AND SERVANT (§ 216*)—INJURIES
TO SERVANT—ASSUMED RISK—NEGLIGENCE
OF FELLOW SERVANT.

A servant, though a minor and inexperienced, assumed the risk of injury from the negligence of fellow servants as well as other dangers necessarily incident to his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 567-578; Dec. Dig. § 216.*]

3. MASTER AND SERVANT (§ 264*)—INJURIES
TO SERVANT—ACTIONS—VARIANCE.

Where the negligence alleged in a foundry employe's action for personal injuries, by the pots in which molten metal was hauled exploding and throwing the metal on him, was in not warning plaintiff, an inexperienced servant, as to the method of doing his work, plaintiff cannot recover by showing negligence in failing to warn him of negligence of the other employes in permitting water to get into the pot, causing it to explode.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

Appeal from City Court of Birmingham;
C. W. Ferguson, Judge.

Action by Mack Woody against the Republic Iron & Steel Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Percy, Benners & Burr, for appellant.
Bowman, Harsh & Beddow, for appellee.

SAYRE, J. All other counts of the complaint having been eliminated, the court submitted the case to the jury on the issues made by the second, fifth, eighth, and ninth counts, defendant's general denial, and the plea of the statute of limitation, about which last no question is raised on this appeal. The case proceeded in all the aspects presented by these counts upon the alleged negligence of one Black while in the exercise of superintendence. Variations in the counts need not be noticed, for the gist of all of them is that defendant's superintendent failed to warn or instruct plaintiff, who was young and inexperienced, in reference to the danger of the business in which he was engaged.

Conceding that everything else was proved according to plaintiff's contention, we are unable to see that any instruction in reference to the nature of the business in which

he engaged and which defendant's superintendent was in duty bound to give would have helped plaintiff to avoid the casualty which caused his hurt; that is to say, the failure to instruct does not appear to have had any causal connection with plaintiff's injury. In some respects the facts were not clearly developed, but, as we read the record, they were as follows: Plaintiff had been employed for two or three years as a common laborer about defendant's furnace. A few days before his injury he had been put to work at dumping slag, a work he had not previously done. At the furnace molten slag was poured into hot-pots, and carried thence to the dump, which was about a mile away. These hot-pots were small cars made of steel and drawn by a small locomotive. At the dump, doors, said by the witness to be about 12 inches in diameter, were opened, and the slag flowed out upon the dump. Plaintiff, standing upon the ground or dump, as we gather, was engaged in an effort to open the door of a hot-pot by knocking up the latch with an iron bar, when the hot-pot exploded; that is, there was a sudden and violent upheaval of the contents, some of which was thrown over the side of the hot-pot, falling upon plaintiff, whereby he was severely burned. There is no room for an inference that the effort to open the door could have been made in a safer way. The only explanation—and it is accepted as the only hypothesis which would exclude the theory of inevitable accident—is that it was caused by steam which had been generated under the slag from water which may have been negligently left in the hot-pot when it was loaded. It is to be inferred that after hot-pots were unloaded, and before they were returned to the furnace to be reloaded, they were wetted or washed to cool or clean them. So far as the evidence shows, plaintiff had nothing to do with loading the hot-pots. He states that his business was to couple hot-pots, throw switches, and dump slag. Other persons appear to have had charge of the loading. Nothing appeared in the evidence, all of which is stated in the bill of exceptions, tending to show a case more favorable to plaintiff's recovery.

[1, 2] The master's obligation is to give his inexperienced servant such instructions in regard to the latent dangers of his employment, if we may so speak of those dangers which an inexperienced employe may be presumed not to appreciate, as will enable him to avoid, as far as due care may, injury while in the performance of the duties assigned to him. The master is not required to forewarn or instruct his servant in respect to special dangers which cannot arise without negligence on the part of fellow servants. 1 Labatt, § 236. By accepting his employment a servant, though a minor and inexperienced, assumes the risk of injury from the negligence of fellow servants and

those dangers necessarily incident to the service. *Moss v. Mosely*, 148 Ala. 168, 41 South. 1012. On the facts stated, and they are without conflict, plaintiff had no duty to perform in connection with loading the hot-pot. His inexperience was no reason why defendant should have instructed him as to the proper and safe method of loading hot-pots; but plaintiff's injury must be attributed to negligence, if negligence there was, in loading the hot-pot, rather than to the failure to instruct plaintiff in respect to the method of performing the duties assigned to him.

[3] Nor can defendant's liability be worked out on the theory that the superintendent, Black, was negligent in failing to warn plaintiff of the fact that the particular hot-pot had been negligently loaded, and that there was danger that it might explode. This, on these considerations: Black had nothing to do immediately with loading slag into hot-pots. That was committed to the care of others. Nor did he know that the particular hot-pot had been negligently loaded. Or, if plaintiff would push the inquiry one step further back and beyond the negligence involved in loading the hot-pot, then, conceding that the conflict between plaintiff's testimony and that of Black was such as to make it a question for the jury whether Black had anything to do with the wetting, washing, or cooling of hot-pots in general, it seems clear on the uncontradicted testimony that he had no knowledge of the fact that water had been left in this hot-pot when it was washed or cooled, or that it contained water when loaded. And so the appellee, seeking to sustain his recovery on the complaint as he framed it, appears to appreciate the fact that his version of the proof relegates him to the proposition that Black in the exercise of the superintendence committed to him ought to have warned plaintiff of a fact of which he had no knowledge. He meets the situation by saying that Black ought to have known. It would seem anomalous to hold that defendant's superintendent should warn plaintiff of his (superintendent's) mere inadvertence or previous negligence. But, without denying defendant's liability on the facts contended for by plaintiff, we think a necessary principle of judicial administration intervenes to prevent his recovery on those counts which the trial court submitted to the jury. The case on which plaintiff was permitted to have judgment was not the case declared upon. Certainly the duty to give notice of whatever negligence there may have been in having water in the hot-pot, if it existed at all, existed in the case of all employes who might be exposed to the danger created by the manner in which the hot-pot was loaded or prepared for loading, and was not in the least affected by the fact that plaintiff was young and inexperienced. In other words, defendant, if responsible at all for any simple negligence of its superintendent, Black, was

responsible for his omission to see that the hot-pot was in a fit condition to be loaded, not for his failure to instruct plaintiff in reference to the general dangers of his employment or to warn plaintiff, not indeed that he (Black) had in fact by his negligence made it dangerous for the plaintiff to be near the hot-pot, but that he (Black) did not know whether the hot-pot had been left in proper condition for loading, and that, therefore, there was a possibility that some other employe may have been guilty of negligence which would render plaintiff's presence near the hot-pot dangerous. But, assuming for the moment there was merit in this involved theory of law and fact, there was no intimation of it in the counts upon which the jury were permitted to pass. Those counts proceeded upon a different theory, simple enough, but not supported by the evidence.

The trial court did not observe these principles in ruling on the admission of testimony and in refusing to instruct the jury as requested by the defendant, and we are of opinion that, on the record as it now stands, the judgment ought to be reversed. Possibly on another trial the case may be differently presented.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

ASHURST et al. v. ASHURST.

(Supreme Court of Alabama. Jan. 9, 1912.)

1. APPEAL AND ERROR (§ 1033*)—PERSONS ENTITLED TO ALLEGE ERROR.

A respondent who demurs and files a cross-bill against which demurrer is filed cannot on appeal from a decree overruling both demurrers complain that the demurrer to his cross-bill was overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

2. APPEAL AND ERROR (§ 863*)—QUESTIONS REVIEWABLE.

On appeal from the overruling of a demurrer to a bill to remove the settlement and administration of an estate from the probate to the chancery court on the ground that the aid of the chancellor was necessary in construing the will and administering the trusts therein provided for, the will cannot be construed, but only the propriety of the overruling of the demurrer may be determined, for the jurisdiction of the Supreme Court is wholly appellate, and the chancellor could not construe the will until he had acquired jurisdiction, which the mere filing of the bill did not give him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3450-3455; Dec. Dig. § 863.*]

3. COURTS (§ 487*)—TRANSFER OF CAUSES.

Where a bill is filed to remove the settlement and administration of an estate from the probate to the chancery court on the ground that the assistance of the chancellor in construing a will and administering the trusts is necessary, the chancellor could not on hearing a demurrer to the bill construe the will, for he was not entitled to construe it until he acquired jurisdiction thereof, and the mere filing of the

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bill did not remove the proceedings from the probate to the chancery court, but only authorized the chancellor, if the bill was sufficient, to order the removal of such proceedings.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 487.*]

4. EQUITY (§ 46*)—JURISDICTION—GROUNDS OF JURISDICTION.

The jurisdiction of equity is extraordinary, and matters cognizable at law are the subject of equitable jurisdiction only when the ordinary tribunals are inadequate to full and complete relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 159-163; Dec. Dig. § 46.*]

5. COURTS (§ 484*)—TRANSFER OF CAUSES.

Where the assistance of a court of chancery is necessary in construing a will and administering trusts therein provided for, the settlement and administration of the estate may be removed from the probate court to the court of equity.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 484.*]

Appeal from Chancery Court, Tallapoosa County; W. W. Whiteside, Chancellor.

Bill by Gillie D. Ashurst, as executrix, against her coexecutor, Harry G. Ashurst, and others, to remove the settlement and administration of the estate to the chancery court. From a decree overruling demurrers both to the bill and cross-bill, respondents appeal. Affirmed.

James W. Strother, for appellants. Thetford & Mackenzie, for appellee.

MAYFIELD, J. The bill in this case is filed by an executrix to remove the settlement and administration of the estate of her testator from the probate to the chancery court. The special ground alleged for the removal is to obtain the aid and assistance of the chancery court in the construction of the will, and in the administration of the trusts necessary to a proper settlement of the estate. The respondents, some of whom are coexecutors and devisees, demurred to the bill, which demurrer was overruled. The bill was subsequently amended, however, and the demurrer was interposed to the amended bill. An answer was also filed, which was made a cross-bill, and to this answer and cross-bill demurrers were interposed.

[1] The cause was submitted to the chancellor on demurrers only to the amended bill and to the cross-bill; and from the interlocutory decree overruling the demurrers the respondents prosecute this appeal. Of course, respondents cannot and do not complain of the overruling of the demurrer to the cross-bill.

[2, 3] It is earnestly insisted on this appeal by both appellants and appellee that we should so far construe the will in question as to determine whether certain clauses therein are valid or void. We cannot accede to the correctness of this proposition. Our jurisdiction in this instance is appellate only, for the purpose of reviewing the correctness

of the interlocutory decree of the chancellor from which the appeal is taken. The chancellor has not yet passed upon the merits of the case; nor can we act on this appeal further than to affirm or overrule the decree rendered by him. If we affirm the decree of the chancellor overruling the demurrer, then the case will proceed on its merits and the chancellor will have to construe the will; and on an appeal from a decree construing the will, or settling the rights of the parties thereunder, we could review such decree, and, if necessary, construe the will. But we cannot construe the will on this appeal, and any attempt to do so would not be binding on us nor on the parties. The demurrers to the amended bill, at most, merely tested the sufficiency of the averments of the bill as amended. The chancellor decreed only that the demurrer was not well taken, and that it was overruled. We fully concur with the chancellor, and must therefore affirm his decree.

The chancellor on that hearing was not authorized nor called upon to construe the will, but only to construe the bill. The main, if not the sole, equity of the bill, was to obtain a construction of the will by the chancellor. This he cannot do until he acquires jurisdiction of the subject-matter; and he can acquire jurisdiction only by the filing of a bill sufficient to confer it. The only decree so far rendered was one which, in effect, held that the bill filed was sufficient to confer jurisdiction to remove the settlement and proceedings from the probate to the chancery court. Until the proceedings are so removed, or, at least, are by a proper decree or order authorized to be removed, the chancellor has no authority to construe the will nor to authorize any proceedings in the administration of the estate. The mere filing of the bill does not remove the proceedings from the probate to the chancery court. The bill, if sufficient, merely authorizes the chancellor to order or decree the removal; and, until he does so order or decree, the matter is still in the probate court, and not in the chancery court. Thus far, in this case, there has been no order or decree of removal of the administration from the probate to the chancery court, and, until such removal order or decree is had, the chancellor cannot construe the will except in so far as it may be necessary to pass upon the equity or the sufficiency of the bill. To this extent, and for this purpose only, will we construe the will on this appeal.

[4] In nearly all equity cases a preliminary inquiry is first to be made: Has the court jurisdiction? Is the bill or petition sufficient to authorize equitable interposition and relief? The interposition of chancery is extraordinary, and can be obtained only when the ordinary tribunals are inadequate to full and complete relief.

[5] In the case before us the complaint sets out the will or parts thereof, and alleges that parts of the will are involved, complicated, and that complainant is advised that parts thereof are void, and that for this reason she seeks the advice of the chancery court as to the proper construction of the will, and to the end that she may properly administer the trust imposed on her. As was said by this court, in the early case of *Trotter v. Blocker*, 6 Port. 269, 290: "Applications of this kind are neither novel nor unusual. It is the peculiar office of chancery to compel the performance of trusts, where trustees are either perverse or negligent. So, on the other hand, it will assist and protect trustees, in the performance of trusts, whenever they seek the aid and direction of the court, as to the establishment, management, or execution of them. This case comes clearly within the principle here stated. The bequests of the will are trusts imposed upon the executor or administrator, cum testamento annexo, and whether they are valid, and how to be performed, are questions on which the aid of the court is asked." In *Lake View Co. v. Hannon*, 93 Ala. 88, 89, 9 South. 539, Stone, C. J., quotes the rule as follows: "In 2 Pom. Eq. § 1064, it is said: 'Whenever there is any bona fide doubt as to the true meaning and intent of provisions of the instrument creating the trust, or as to the particular course which he ought to pursue, the trustee is always entitled to maintain a suit in equity, at the expense of the trust estate, and obtain a judicial construction of the instrument, and directions as to his own conduct.' 1 Pom. Eq. § 352 and note; 3 Id. § 1156; 2 Sto. Eq. Ju. § 1065 et seq. In *Bowers v. Smith*, 10 Paige (N. Y.) 193, Chancellor Walworth employed this language: 'But I am not aware of any case in which an heir at law of a testator, or a devisee, who claims a mere legal estate in the real property, where there was no trust, has been allowed to come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will. On the contrary, the decision of such legal questions belongs exclusively to the courts of law, except where they arise incidentally in this court in the exercise of its legitimate powers, or where the court has obtained jurisdiction of the case for some other purpose.' In *Bailey v. Briggs*, 56 N. Y. 407, the court, Folger, J., delivering the opinion, said: 'It is when the court is moved in behalf of an executor, trustee, or cestui que trust, and to secure a correct administration of the power conferred by a will, that jurisdiction is had to give a construction to a doubtful or disputed clause in a will.' Bills for this purpose have often been entertained, to the sole end of construing certain items of wills. Such a bill was that in the case of *Tompkins v.*

Troy, 130 Ala. 555, 30 South. 512. What was said by Stone, C. J., in the case of *Carroll v. Richardson*, 87 Ala. 605, 610, 6 South. 343 (a case much like this, and an appeal from a decree on demurrer), is, we think, conclusive of the correctness of our holding in this case. It is there said: "We hold that this bill, in each of its aspects, contains equity. The will itself, including the codicil, presents several questions of disputable solution, on which different legal minds might well differ. And it is shown that Mrs. Rothenhoffer and Carroll differ in the interpretation of the will in the assertion of the interests they severally claim thereunder. And the question may arise whether the codicil does not create a precatory trust in favor of Mrs. Kelley and Mrs. Carroll; and, on the other hand, whether the language is not too uncertain to authorize relief. *Jones v. McPhillips*, 82 Ala. 102, 2 South. 468; 3 Pom. Eq. §§ 1156, 1157; *McRee v. Means*, 34 Ala. 349; *Hollingsworth v. Hollingsworth*, 65 Ala. 321; *Cowles v. Pollard*, 51 Ala. 445. It is not our intention to express or intimate any opinion as to the proper interpretation of any clause of the will. The question of rightful interpretation, of rightful directions, is not before us. The chancellor has declared no interpretation, and has given no directions. He has simply decided that the bill makes a case calling for interpretation and direction, and from that decretal order the present appeal is prosecuted. There is no error in his rulings."

We conclude that the chancellor correctly overruled the demurrer to the amended bill; and that, for the reasons before assigned, the bill contains equity.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

QUEEN INS. CO. OF AMERICA v. VINES.
(Supreme Court of Alabama. Dec. 22, 1911.)
INSURANCE (§ 665*)—IRON SAFE CLAUSE—
SUBSTANTIAL PERFORMANCE.

In an action on a policy, evidence held to show a substantial performance of the clause requiring an inventory and a complete set of books showing the business to be kept in an iron safe, though the books were not as full and complete as they might have been.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1707-1728; Dec. Dig. § 665.*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by H. L. Vines against the Queen Insurance Company of America. Judgment for plaintiff, and defendant appeals. Affirmed.

John T. Glover, for appellant. Frank S. White & Sons, for appellee.

MAYFIELD, J. This is an action on an ordinary fire insurance policy, which con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

tained the "iron safe clause" in usual form. The only defense interposed which is proper to be considered on this appeal is that of a special plea setting up a breach of this "iron safe clause," in that no inventory was made and no books were kept by the insured as required by this clause. A trial was had upon this issue, among others, and resulted in a judgment for plaintiff, from which the insurance company prosecutes this appeal.

This court has very recently discussed the main questions raised on this appeal, and announced what it conceives to be the law upon the subject of the sufficiency of inventories to comply with this clause of insurance policies; and we deem it unnecessary to restate the law here, deeming it sufficient to refer to that case as the law upon the questions therein decided. The case is that of *Day v. Home Insurance Company*, 57 South. —.† Under the issues and the evidence in this case the trial court properly declined to instruct the jury to find for the defendant. There was certainly a bona fide attempt on the part of the insured to comply with this clause of the policy requiring the making of inventories and the keeping of books. While the inventories made and the books kept are not as full and complete as they might have been, we are unwilling to hold that there was not a substantial compliance.

The insured testified that he had made a complete inventory of the stock of goods when he purchased his mother's interest therein, and that this was less than 12 months before the policy was issued, and that he made an inventory for the purpose of obtaining the insurance, and that thereafter he kept books showing the goods bought and sold thereafter. He turned over one of these inventories, and his books, to the adjusting agents, and the defendant introduced them in evidence; and, while they are probably not as complete and as full as they might have been, had they been prepared by an expert bookkeeper, we think they were sufficient to prevent an avoidance of the policy under this clause. The insured testified that he kept the books in accordance with the instructions given him by the insurance agent when the policy was issued.

Some of the charges requested by the defendant were in bad form. It may be that this occurred because the charges were improperly copied into the transcript. As the charges appear in the transcript, their refusal could not have been injurious to defendant, because they requested the court to instruct the jury that they could not find for the "defendant." But, under the view we take of the case, the refusal would have likewise been proper, if the charges had requested the court to instruct the jury that they could not find for the "plaintiff."

These are the only errors insisted upon,

and the result is that the judgment appealed from must be affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

TALLEY v. STATE

(Supreme Court of Alabama. Jan. 18, 1912.)

1. JURY (§ 70*)—IMPANELING—SPECIAL VENI-RE.

Where 12 of the jurymen whose names were on the special venire, impaneled to try a capital case, were engaged in the trial of another case, accused cannot object to being required to begin striking the list without these names being placed thereon.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 310-332; Dec. Dig. § 70.*]

2. WITNESSES (§ 277*)—CROSS-EXAMINATION.

In a prosecution for homicide, where accused testified, his motives in going to the place of the homicide were relevant, and might properly be elicited by direct questions on cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 979-984; Dec. Dig. § 277.*]

3. CRIMINAL LAW (§ 1165*)—APPEAL AND ERROR—HARMLESS ERROR.

Accused, who testified in his own behalf, cannot complain that his objections to certain questions were overruled, where his answers were exculpatory and beneficial to himself.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3085-3089; Dec. Dig. § 1165.*]

4. CRIMINAL LAW (§ 858*)—TRIAL—DISCRETION OF COURT.

Whether a jury should be allowed to take to the jury room a writing, admitted as the testimony of accused's absent witness, rests in the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2056-2059; Dec. Dig. § 858.*]

5. HOMICIDE (§ 307*)—TRIAL—INSTRUCTIONS.

In a prosecution for homicide, where the wound inflicted by accused might not have caused the death, a charge that accused should be acquitted if it did not was erroneous, because he might in any case have been convicted of felonious assault.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 307.*]

6. HOMICIDE (§ 5*)—DEFENSES—CAUSE OF DEATH.

Where accused and another attacked deceased, and both of them wounded him, it is not a defense that the death was not the result of a wound inflicted by accused; for if accused inflicted a wound which promoted or hastened the death of deceased he might be guilty of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 7-10; Dec. Dig. § 5.*]

7. CRIMINAL LAW (§ 600*)—TRIAL—ABSENT WITNESS—SHOWING.

Where the bill of exceptions showed that the court allowed accused to make a showing for an absent witness, the admission of the showing by the state was not a judicial admission of the truth of the showing, but merely a consent to its admission in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1342-1347; Dec. Dig. § 600.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
† Rehearing pending.

8. CRIMINAL LAW (§ 561*)—BURDEN OF PROOF—EXTENT.

In a criminal case, the jury need not be absolutely convinced of defendant's guilt, but only convinced beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.*]

9. HOMICIDE (§ 122*)—DEFENSE OF ANOTHER.

In a prosecution for homicide, where accused saw a woman engaged in a fight with deceased, and intervened and killed deceased, in order to save the woman from a deadly attack, the killing was not justified, unless the woman was free from fault, and could not have retreated without increasing her peril.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 177-181; Dec. Dig. § 122.*]

10. HOMICIDE (§ 11*)—MALICE AFORETHOUGHT.

The fact that accused struck a fatal blow on the impulse of the moment does not negative malice aforethought.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 15, 16; Dec. Dig. § 11.*]

11. CRIMINAL LAW (§ 553*)—EVIDENCE—CREDIBILITY OF WITNESSES.

While the jury should not capriciously disregard testimony of any witness, they may disregard it for reasons other than that it has been impeached.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1252; Dec. Dig. § 553.*]

12. CRIMINAL LAW (§ 815*)—INSTRUCTION.

In a prosecution for homicide, where the jury might have found that accused was aiding, abetting, and encouraging another in committing the homicide, instructions assuming the contrary were erroneous and properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.*]

Appeal from Criminal Court, Jefferson County; M. Frank Cahalan, Judge.

Son Talley, alias Paul Talley, was convicted of murder in the first degree, and appeals. Affirmed.

The exceptions to evidence sufficiently appear in the opinion. The following charges were refused to the defendant: (1) "I charge you that you cannot convict the defendant in this cause, if you believe Armstead Lawler came to his death as a result of a wound inflicted by Clanny Bird." (2) "I charge you that if, from the evidence in this case, you believe beyond a reasonable doubt that there is a probability that Clanny Bird inflicted the wound upon Armstead Lawler that caused his death, and you further believe from the evidence that there was no conspiracy between Clanny Bird and the defendant, you cannot convict the defendant for the murder of Clanny Bird." (3) "I charge you that you cannot find from the evidence in this case that Armstead Lawler came to his death as a result of a wound inflicted by the defendant in this case." (4) "I charge you that, unless you are convinced from the evidence in this case that the wound in the back of deceased was made by the defendant, and that it was one of the causes of his death, then you cannot convict the defendant." (5) "I charge you that if you believe from the evidence that Clanny Bird engaged

in the difficulty with Armstead Lawler, and she was seen by this defendant while engaged in said difficulty, and this defendant on the impulse of the moment struck deceased the blow in the back in an effort to save Clanny Bird from an attack which was likely to result in her death or serious bodily harm, you cannot convict the defendant of murder in the first degree." (6) "I charge you that you will consider the evidence introduced in this cause by showing the same as though the witness were present in court, and that you cannot disregard such testimony without the same has been impeached in some manner recognized by law."

Black & Davis, for appellant. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

SOMERVILLE, J. The defendant was convicted of murder in the first degree, and sentenced to life imprisonment.

[1] Twelve of the jurymen whose names were on the special venire were engaged in the trial of another cause when the jury was selected for the trial of defendant. Defendant objected to being required to strike without these 12 names being placed on the list. This objection was properly overruled. See Trammell v. State, 1 Ala. App. 83, 55 South. 431; Patterson v. State, 54 South. 696.

[2, 3] Defendant testified in his own behalf, and on cross-examination the solicitor was allowed to ask him, "Why did you go to Lovett?" and, "How came you to get out of the way?" The witness' motive in doing these things was relevant to the issue, and could be properly elicited by a direct question on cross-examination. Linnehan v. State, 120 Ala. 293, 25 South. 6. Moreover, his answers were exculpatory and distinctly beneficial to himself. There was no error in overruling the objections to the questions or the motions to exclude the answers.

[4] Before the jury retired, defendant requested that the jury be allowed to take out with them the written showing admitted as the testimony of his witness, Helen Davis, and excepted to the court's refusal to allow it. This action was within the discretion of the trial court. Smith v. State, 142 Ala. 14, 27, 39 South. 329; Koosa v. Warten, 158 Ala. 496, 48 South. 544.

[5, 6] The court refused to give six of the charges requested in writing by the defendant. The first charge was bad for two reasons: (1) Although the wound inflicted by defendant did not cause the death of the deceased, defendant might still have been convicted of a felonious assault; and (2) if the wound inflicted on deceased by defendant materially promoted or hastened his death, defendant might be guilty of murder, although the wound just previously inflicted on deceased by another assailant also could be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

said to have caused his death. Jones v. State, 57 South. 31; Huckabee's Case, 159 Ala. 45, 48 South. 796. In this second aspect, the charge was highly misleading, if not actually erroneous. The second charge was properly refused for the second reason above stated.

[7] The paper showing introduced in evidence as the testimony of Helen Davis contained statements of fact which, if true, completely established the innocence of defendant. The bill of exceptions recites that "the court allowed defendant to make a showing for said witness, which said showing is admitted by the state." The third refused charge is founded upon the idea that the state admitted the truth of the showing, and was conclusively bound thereby. We cannot so interpret this recital of the bill; for, admitting the showing was one thing, and admitting the *truth* of the showing was quite another. It is sufficiently obvious that the state merely admitted the showing as the evidence of the absent witness.

[8] The fourth charge is faulty in not qualifying the word "convinced"; for the jury need not be absolutely convinced of defendant's guilt, but only convinced beyond a reasonable doubt. It also presented the misleading tendency condemned in the first and second charges.

[9, 10] The fifth charge was patently bad. The fact that defendant saw Clanny Bird engaged in a fight with deceased, and that he intervened and killed deceased, in order to save her from a deadly attack, is no justification, unless she was herself free from fault in provoking the difficulty, and could not have retreated without increasing her peril. The charge falls to hypothesize these necessary elements of self-defense. Nor would the fact that defendant struck the fatal blow "on the impulse of the moment" withdraw from the act the implication of malice aforethought.

[11] The sixth charge is erroneous; for, though the jury should not capriciously disregard the testimony of any witness, they might nevertheless, in their sound discretion, disregard it for reasons other than that it has been impeached. This charge therefore invades the province of the jury in this respect, and was at least misleading in its use of the word "impeached."

[12] From all the evidence, the jury might have inferred and found that, although the blow struck by defendant did not cause, and was not one of the causes of, Lawler's death, defendant was nevertheless present, aiding, abetting, or encouraging the unlawful act of Clanny Bird. In assuming the contrary to this, charges 1 and 4 were erroneous and properly refused therefore. Jordan v. State, 82 Ala. 1, 2 South. 480.

We have examined all the questions pre-

sented by the record, and find no error prejudicial to the appellant.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

ZADEK et al. v. BURNETT et al.

(Supreme Court of Alabama. Jan. 11, 1912.)

1. CHATTEL MORTGAGES (§ 300*)—ACTION TO REDEEM AND FOR ACCOUNTING—PARTIES.

A widow and heirs of a mortgagor of chattels are jointly interested in the property covered by the mortgages, and are proper co-complainants in a bill for an accounting and redemption, whether any of the property in question is subject to administration or not.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 586-590; Dec. Dig. § 300.*]

2. EQUITY (§ 149*)—MULTIFARIOUSNESS—JOINDER OF COMPLAINANTS.

Where complainants, in an action against a mortgagee of chattels for an accounting, have a community of interest in the mortgaged property, the bill is not multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 368-370; Dec. Dig. § 149.*]

3. EQUITY (§ 362*)—JOINT BILL WITHOUT CASE FOR JOINT RELIEF—DISMISSAL.

Where several complainants file a bill jointly and make no case for joint relief, the bill should be dismissed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 758-761; Dec. Dig. § 362.*]

4. EQUITY (§ 424*)—JOINT BILL—RELIEF.

Where it is shown by the pleadings and proof that all the complainants in a bill against a mortgagee of chattels for an accounting are entitled to the main relief prayed for, the court has power to adjust the rights of individuals, and to grant individual relief also, where such rights grow out of and are inseparably connected with the main subject-matter of the bill, as to which common relief may be and is granted.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 991; Dec. Dig. § 424.*]

5. USURY (§ 117*)—REMEDIES—SUFFICIENCY OF EVIDENCE.

Evidence, in a proceeding against a mortgagee of chattels for an accounting, held sufficient to support a finding that a certain balance carried forward included usurious interest.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 328-340; Dec. Dig. § 117.*]

6. USURY (§ 111*)—REMEDY—NECESSITY OF PLEADING USURY.

The rule that, where usurious interest is embodied in the contract for the payment of money, the debtor, whether he is attacking or defending on that ground, must distinctly set forth facts showing usury, and specify the items infected thereby, has no application where, without any agreement, usurious interest is added to an account; and especially where it does not appear that complainants had any knowledge thereof, or made any payments with respect thereto.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 272-306; Dec. Dig. § 111.*]

7. CHATTEL MORTGAGES (§ 300*)—ACTION FOR ACCOUNTING—FINDINGS—CREDIT.

In an action against a mortgagee of chattels for an accounting, a receipt given by him

showed four bales of cotton, \$196, less storage, \$20, etc.; the net credit being footed up as \$190. *Held*, that the charge for storage was patently erroneous, and complainant was properly credited with \$190.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 586-590; Dec. Dig. § 300.*]

8. CHATTEL MORTGAGES (§ 165*)—ACTION FOR ACCOUNTING—EXPENSES.

The rule that a chattel mortgagee in possession is to be credited upon an accounting with all reasonable and actual expenses incurred in caring for the property applies only where the mortgagee holds possession as bailee for the mortgagor, and not where he assumes to hold in his own right for his own use.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 297-300; Dec. Dig. § 165.*]

9. CHATTEL MORTGAGES (§ 261*)—ACTION FOR ACCOUNTING—EXPENSES OF HOLDING AT SEIZURE FOR SALE.

A mortgagee who seizes the mortgaged live stock for sale under the power in the mortgage is entitled to reasonable expenses incurred by him in the care and maintenance of the stock prior to the sale; and it is his duty to sell as expeditiously as he reasonably can, and to limit the rate of maintenance to the best of his ability.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 531, 537; Dec. Dig. § 261.*]

10. CHATTEL MORTGAGES (§ 300*)—ACTION FOR ACCOUNTING—BURDEN OF PROOF—EXPENSES OF SALE.

In an action against the mortgagee of chattels for an accounting, in which the mortgagee made a charge of \$40 for stable bills, feed, etc., for one horse, without offering any evidence to sustain the burden of proof that such expenses were necessarily or reasonably incurred, the rejection of the item will not be disturbed.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 586-590; Dec. Dig. § 300.*]

11. INTEREST (§ 18*)—ACTION FOR ACCOUNTING BY MORTGAGEE OF CHATTELS.

Where the cash items shown, in an action against a mortgagee of chattels for an accounting, were small in amount, and were mixed indistinguishably with merchandise charges, and were carried into a general balance at the end of each year, the same as the merchandise items, and no claim or charge for interest was made by the mortgagee, except on the annual balances, interest was properly disallowed on cash items, except as included in the general annual balance.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 32-34; Dec. Dig. § 18.*]

12. CHATTEL MORTGAGES (§ 262*)—FORECLOSURE BY SALE—CREDIT.

A mortgagee of chattels who sells at a private sale, under a power of sale in the mortgage, is accountable for at least the fair and reasonable value of the property, regardless of the price actually received by him.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 538-541; Dec. Dig. § 262.*]

13. APPEAL AND ERROR (§ 1019*)—REVIEW—CONCLUSIVENESS OF FINDINGS.

The finding by the register, in an action against a mortgagee of chattels for an accounting, as to the value of a horse, based up-

on conflicting evidence, is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4008-4110; Dec. Dig. § 1019.*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Bill for an accounting by Hattie Burnett and others against S. Zadek and others. Decree for complainants, and defendants appeal. Affirmed.

W. A. Gunter, W. M. Blakey, and W. C. McGuire, for appellants. L. A. Sanderson, for appellees.

SOMERVILLE, J. The bill of complaint was filed by the appellees, who are the widow and minor children of one Jim Burnett, and its primary purpose was for an accounting to ascertain the residue of indebtedness, if any, due to the respondent from said Jim Burnett on an account covered and secured by several mortgages on live stock and other property executed by him to respondent Zadek, who was an advancing merchant, with prayer for redemption, if any balance were due thereon, and for cancellation, if found to have been satisfied. By amendment, the scope of the bill and prayer for relief were made to include, also, certain mortgages executed by complainant Hattie Burnett, the widow, to said Zadek, and covering the same property embraced in her husband's mortgages. Demurrers to the amended bill were overruled, and a decree was finally rendered, ordering the register to state an account between the parties, and report same to the court. An account was stated, pursuant to this decree, and the report showed a balance due complainant of \$150. The respondent filed a number of exceptions to the report, only two of which were sustained; the result being a final decree in favor of Hattie Burnett for \$89. It was decreed, also, in favor of all the complainants that the several mortgages recited in the bill, as amended, had been satisfied in full; and that the register should so mark them.

The assignments of error are based on the overruling of respondent's demurrers, and certain of his exceptions to the register's report; and on the decreeing of personal relief to Hattie Burnett, to which her co-complainants were not entitled.

[1, 2] 1. Complainants, being all jointly interested in the property covered by the mortgages, are proper co-complainants in a bill for accounting and redemption or cancellation. And whether the property in question was subject to administration or not, as widow and heirs at law of Jim Burnett, their interest is sufficient to entitle them to prosecute such a suit. It is clear, also, that their community of interest in the mortgaged property refutes the charge of multifarious-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ness in the bill. We think the demurrers were without merit, and were properly overruled.

[3] 2. It may be conceded that, as a general rule, where several complainants file a bill jointly and make no case for joint relief, the bill should be dismissed. *Davis v. Williams*, 130 Ala. 530, 30 South. 488, 54 L. R. A. 749, 89 Am. St. Rep. 55. On final submissions this rule is qualified by section 3212, Code 1907.

[4] However, where on the pleadings and proof all the complainants are entitled to the main relief prayed for, as in the case before us, the court is not impotent to adjust the rights of individuals, and to grant individual relief also, where such rights grow out of and are inseparably connected with the chief subject-matter of the bill, as to which common relief may be and is granted. This accords with the equitable maxim which requires all the rights of the parties to be settled in one suit, when the jurisdiction is in proper exercise for one purpose; and we are aware of no authority which denies this view. The decree, finding a balance due from respondent to Hattie Burnett, was not, in this aspect, erroneous.

[5] 3. The register found that the balance carried forward from the year 1903 included usurious interest, and corrected it by reduction to an 8 per cent. basis. It is insisted that the only evidence relating to this item—the testimony of Abraham—shows that 15 per cent. interest was calculated on the balance, but did not enter into its composition. The record shows question and answer as follows: "Q. You charged them at the rate of 15 per cent. interest, did you not, on the balance brought forward from 1903, and also for merchandise sold him during *this* year? A. Yes, sir." It is obvious that, whatever the witness really intended to say, his answer, as here reported, whether considered alone or in connection with the rest of his testimony, is sufficient to warrant the finding of the register. If the answer quoted was mistaken, the trouble lies in the answer itself; and we cannot impute error to the interpretation given to it by the register.

[6] But it is urged that the finding is erroneous, because the bill contains no charge of usury as to this item. Where usurious interest is embodied in a contract for the payment of money, whether the debtor is attacking or defending on that ground, it is well settled that he must distinctly set forth the facts showing the usury, and specify the items thus infected. But this rule has no application where, without any agreement, express or implied, usurious interest is gratuitously added to an account; and especially where, as here, it does not appear that complainants had any knowledge thereof, or made any payments with respect thereto. In such a case the law fixes the rate of interest, and the accounting must conform

thereto, though unaided by suggestion from the pleadings.

[7] 4. Respondent's account, as stated by him, shows a credit of 2,083 pounds of cotton on October 4, 1904, amounting to \$196.58, with deductions of \$2, \$4.58, and \$20; the net credit entered being \$170. The original transaction is shown in detail by respondent's receipt to Jim Burnett on that date, showing four bales of cotton, \$196.58, less storage, \$20, less cash, \$4.58; the net credit being footed up as \$190. A storage charge of \$20 on four bales of cotton is inconceivable, and too patently erroneous, to say the least of it, for serious argument. The register correctly found that the \$20 deduction was an error, as plainly shown by the receipt, and correctly credited complainants with \$190 on this item.

[8] 5. Independently of any provision in the mortgage, the rule seems to be established that a chattel mortgagee, in lawful possession of the mortgaged property, is entitled upon an accounting to be credited with all reasonable and actual expenses incurred in caring for it. 7 Cyc. 91, and cases cited. This we take to be true, however, only where the mortgagee holds possession as bailee or trustee for the mortgagor, and not where he assumes to hold in his own right and for his own uses.

[9, 10] Applying the rule to the present case, we think the respondent, in seizing the property for sale under the power in the mortgage, was entitled to be reimbursed for expenses incurred by him in the care and maintenance of the stock prior to the sale by him; but the burden was upon him to show that the expenses thus charged were reasonable and necessary. It was his duty to sell as expeditiously as he reasonably could, and to limit the time, as well as the rate, of maintenance to the best of his ability. Beyond this, he was not authorized to incur and burden the right of redemption. The charge made is \$40 for stable bills, feed bills, and medical attention for one horse "from the time it was sent to Montgomery to the time it was sold." No proof was offered that such expenses were necessarily incurred, nor that the charges therefor were reasonable in amount. In this state of the evidence, the register cannot be put in error for rejecting the item as a credit in favor of respondent.

[11] 6. "As a general rule, interest is not allowed on running accounts, so long as they remain open and unliquidated, unless there is some statutory provision that permits it, or some contract between the parties, express or implied, that interest shall be paid." 22 Cyc. 1510. The same authority further says that, "in some cases, however, interest has been allowed upon cash items of an account." In the cited case of *Rensselaer Glass Factory v. Reid*, 5 Cōw. (N. Y.) 587, 602, upon a review of many early authorities,

the conclusion was: "However it may be with respect to money lent, or as to money had and received, or in regard to merchandise sold and delivered, or however it may be where advances are made in pursuance of an express agreement, in which nothing is said about interest, I think the above authorities will admit of no other conclusion than that it is now a well-established, general rule of law that, where a person advances money for the use of another, under an implied authority, he who makes the advance is entitled to interest from the time it was made." Conceding the propriety of the allowance of interest on cash advances in such cases as the above, we think the nature of the present account permits of no implication that the cash items therein shown were intended to bear interest from the date on which each was furnished. They were usually small in amount, though ranging from \$1 to \$20, and frequently blended indistinguishably with merchandise charges. They were carried into the general balance at the end of each year, exactly as were the items of merchandise, and no claim or charge for interest seems to have been made by respondent, except on the annual balances. Moreover, beginning about September 15th of each year, large payments were made on account which were likewise carried into the general balance, thus giving to respondent the benefit of advance payments on an account not due until the succeeding January. We therefore approve the action of the register in not allowing interest on cash items, except as included in the general annual balance, from year to year.

[12] 7. The mortgages contained a provision authorizing the mortgagee to sell the mortgaged property at either public or private sale. At his discretion, therefore, he might sell in either way, being liable to the mortgagor only for an injurious abuse of such discretion. *Brook v. Headen*, 13 Ala. 370, 376. He sold the horse at private sale for \$60, and credited complainants with that amount. The register, however, found the reasonable value of the horse to be \$125, and entered a credit for that amount, instead of \$60. With respect to such sales, we approve the following rule of responsibility: "The creditor will be held, at his peril, to deal fairly and justly with the property, both as to the time of the notice and the manner of the sale. Although it appears that he took pains to secure the best price practicable for the goods, and that they were sold for their value, and that the mortgagor assented to the prices obtained, yet, if he can prove that they were sold unfairly, or at an under price, he will be permitted to do so, and will be allowed their full value." *Jones on Chat. Mort.* (5th Ed.) § 708. So it has been already declared by this court: "Although the mort-

gagee, by the terms of the mortgage, was authorized to sell the personal property embraced in the mortgage at private sale, this did not relieve him, in taking possession of and selling the property, from the duty of acting in the utmost good faith in selling the same. In selling the property at private sale for the satisfaction of his mortgage debt, it was his duty to sell it at a fair and reasonable valuation, and failing to do so he became liable to the mortgagor for such failure." Per *Dowdell, J.*, in *Johnson v. Selden*, 140 Ala. 418, 37 South. 249, 103 Am. St. Rep. 49. The effect of the authorities is to hold a mortgagee who sells at private sale responsible and accountable for at least the fair and reasonable value of the property, regardless of the price actually received by him. The rule is, of course, less rigid where the sale is at public outcry.

[13] We have examined the testimony upon which the register's finding is based, and, as an original proposition, unfettered by the force of that finding, we would be inclined to hold that \$60 was a fair and reasonable value for the horse. But upon disputed issues of fact the register's finding comes to us with the force and conclusiveness of a jury's verdict, and we do not feel justified in the present case, in view of the conflicting testimony before him, in setting aside his conclusion and substituting our own in its stead.

It results that the chancellor did not err in overruling the exceptions to the register's report, and the decree of the city court will be affirmed.

Affirmed. All the Justices concur, except *DOWDELL, C. J.*, and *SAYRE, J.*, not sitting.

JOHNSTON v. JOHNSTON et al.

(Supreme Court of Alabama. Jan. 11, 1912.)

1. WILLS (§§ 153, 155*)—FRAUD AND UNDUE INFLUENCE.

One mentally incompetent to make a will cannot be the subject of fraud or undue influence.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 371, 375-387; Dec. Dig. §§ 153, 155.*]

2. APPEAL AND ERROR (§ 1062*)—REVIEW—HARMLESS ERROR.

Where the probate of a will was refused because of the testator's mental incompetency, errors in submitting the issue of undue influence and fraud were harmless to the proponent, and will not be reviewed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

3. TRIAL (§ 84*)—RECEPTION OF EVIDENCE—OBJECTIONS—GENERAL OBJECTION.

An objection that testimony is illegal is a mere general objection, and does not raise the point that the question calls for a conclusion of the witness.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 214; Dec. Dig. § 84.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. TRIAL (§ 84*)—RECEPTION OF EVIDENCE—SUFFICIENCY OF OBJECTIONS TO EVIDENCE OF NONEXPERT WITNESSES.

Where the probate of a will was contested on the ground of mental incapacity, and questions as to whether, from their knowledge of the decedent, he was mentally capable of making a will and transacting business were propounded to the witnesses, who had, without objection, qualified to express their opinions that decedent's mind was unsound, the court cannot be put in error for overruling objections that the questions called for illegal evidence; for the evidence was relevant, and these questions merely involved a legal conclusion of the witness upon the premises his testimony had laid.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 214; Dec. Dig. § 84.*]

5. EVIDENCE (§ 498½*)—OPINION EVIDENCE—QUALIFICATIONS—QUESTION FOR COURT.

Whether a nonexpert witness is qualified to testify as to the mental capacity of the subject of the inquiry is a question for the court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2290, 2291; Dec. Dig. § 498½.*]

6. APPEAL AND ERROR (§ 992*)—REVIEW—DETERMINATION OF QUALIFICATIONS OF WITNESS.

The ruling of the trial court upon the qualification of nonexpert witnesses to testify as to the sanity of a person will not be reviewed, unless clearly erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3850; Dec. Dig. § 992.*]

7. WILLS (§ 310*)—CONTEST—SCOPE OF INQUIRY.

Where the mental incapacity of a testator is in issue, the inquiry must be of the broadest range.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 735-737; Dec. Dig. § 310.*]

8. EVIDENCE (§ 500*)—OPINION EVIDENCE—EXAMINATION OF NONEXPERT WITNESSES.

The examination of a nonexpert witness, testifying as to the mental capacity of the testator, should be full and ample.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2290, 2291; Dec. Dig. § 500.*]

9. EVIDENCE (§ 63*)—PRESUMPTIONS—SANITY.

Every person is presumed to be sane.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 83; Dec. Dig. § 63.*]

10. WILLS (§ 52*)—TESTAMENTARY CAPACITY—BURDEN OF PROOF.

One contesting the probate of a will on the ground of mental incapacity has the burden of overcoming the presumption of sanity; but if he shows that the testator was habitually insane before the will was executed the burden shifts to the proponent to show that it was made during a lucid interval; and so the refusal of an instruction that the burden is not shifted, except by proof of habitual insanity, is error.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101-110; Dec. Dig. § 52.*]

11. WILLS (§ 329*)—CONTEST—INSTRUCTIONS.

Where the probate of a will was contested on the ground of mental incapacity, an instruction that the burden of proof of incapacity is on the contestant and remains on him until he shows habitual and fixed insanity, or otherwise of testamentary incapacity, was erroneous; for the words "or otherwise" might refer to a condition of mind not the equivalent of habitual and fixed insanity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 776; Dec. Dig. § 329.*]

12. WILLS (§ 55*)—MENTAL INCAPACITY—EVIDENCE—SUFFICIENCY.

One contesting the probate of a will on the ground of mental incapacity need only prove to the reasonable satisfaction of the jury that the testator was incapable.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.*]

Appeal from Probate Court, Bullock County; A. E. Singleton, Judge.

Application by M. B. Johnston for probate of the will of Morgan P. Johnston, deceased, contested by M. W. Johnston and others. Decree refusing probate, and proponent appeals. Reversed and remanded.

The facts sufficiently appear in the opinion. The following charges were refused to the proponent: (A) "The burden of proof as to insanity or incapacity to make a will is on the contestants in the first instance, and that burden remains on the contestants until they show habitual and fixed insanity or otherwise of testamentary incapacity at the time the will was executed." (C) "Sanity is the normal condition of the human mind, and the testator in this case is presumed by law to have been sane when he made this will, unless the contestants have shown to the jury's satisfaction that he was under the disability of habitual or fixed insanity prior to the execution of the will, or that he was not capable of making the will at the time the will was made." (E) "The burden of proof as to testamentary capacity is on the contestants, and is not shifted, except by proof of habitual or fixed insanity on the part of the testator prior to the making of the will."

Norman & Son, E. R. Brannen, and L. M. Moseley, for appellant. Ernest L. Blue, R. E. L. Cope, and Ray Rushton, for appellees.

MCCLELLAN, J. Contest of the instrument propounded for probate as the last will and testament of Morgan P. Johnston, deceased.

The issues formed were, in substance, two: Want of mental capacity to make a will, and undue influence exerted upon the decedent in the execution thereof.

Following a general finding that the paper propounded was invalid, the verdict expressed the jury's particular finding that decedent was mentally incompetent to make a will on December 1, 1905.

[1, 2] Since one mentally incompetent to make a will cannot be the subject of fraud or undue influence in the execution thereof (Burney v. Torrey, 100 Ala. 157, 168, 14 South. 685, 46 Am. St. Rep. 33), that phase of the trial touching the issue of undue influence, by whomsoever exerted (if so), is eliminated from consideration on this appeal. Errors, if any, intervening in respect of that issue were without injury to appellant. We therefore confine the review to

errors assigned as upon the rulings and action of the court in reference to the issue of mental capacity vel non to execute a will on December 1, 1905. Without attempting to restate the very voluminous evidence bearing upon the issue of mental capacity vel non, it will suffice to affirm, after careful consideration, that the decision upon this issue was for the jury.

The contestants propounded to each of a large number of nonexpert witnesses, who had shown an acquaintance with decedent covering many years, in substance, this question: Whether, from this acquaintance with and knowledge of decedent, he was mentally capable of making a will on December 1, 1905, and whether, from this acquaintance and knowledge of decedent, he was capable of transacting business on or about that date.

With the exception of a general objection, taking the point that the testimony sought was "illegal," addressed to the questions stated when propounded to the last few witnesses examined by contestants, the only objections made (otherwise) expressed the criticism, in substance, that the witnesses had not qualified to give an *expert* opinion as thereby called for. Each of the witnesses replied in the negative.

[3, 4] Objections to proffered evidence are of two general classes, viz., those directed to the *means* of conveying evidence to the trier of fact, and those addressed to the evidence itself. Aside from the statement that the "question," or the testimony sought to be elicited thereby, was "illegal," the objections taken to the indicated matter related alone to the competency of the *means* whereby the proffered testimony was undertaken to be availed of. The criticism that testimony is "illegal" is a mere general objection. *Coghill v. Kennedy*, 119 Ala. 641, 662, 24 South. 459; *Steiner v. Trantum*, 98 Ala. 319, 13 South. 365. And the rule with us is that, unless the testimony sought is *patently* inadmissible, the court will not be put in error for overruling a general objection. *Richards v. Bestor*, 90 Ala. 352, 8 South. 30; *Espalla v. Richard*, 94 Ala. 159, 162, 10 South. 137. The objection that a question is illegal, or that it seeks to elicit illegal testimony, does not raise the point that the question calls for a *conclusion* of the witness. *Steiner v. Trantum*, supra; *Torrey v. Burney*, 113 Ala. 496, 505, 21 South. 348. The testimony the questions sought was not patently inadmissible. It was relevant to the issue of mental capacity vel non to execute the instrument propounded for probate. It was the crux of the issue the jury, in that particular, was to determine. The vice of the questions was that they called for the legal *conclusion* of the witness, an infirmity not pointed out by the general objection of illegality. *Steiner v. Trantum*, supra.

[5, 6] Whether a nonexpert witness is qualified to testify to the want of mental capaci-

ty of the subject of the inquiry is a question for the court. *Parrish v. State*, 139 Ala. 16, 42, 36 South. 1012. It was said on Parrish's appeal that the ruling of the trial court on this preliminary matter would not "be revised, unless it clearly appears to have been erroneous." The qualifications of the witnesses who affirmed that decedent was mentally incompetent were ascertained by the court. We cannot say there was error in this conclusion as to any one of the witnesses who so testified. There was support for such a finding in the testimony before the court, and so within the doctrine of *Burney v. Torrey*, 100 Ala. 157, 14 South. 685, 46 Am. St. Rep. 33. Being hence qualified to express their opinions that decedent's mind was unsound, the further questions, before in substance stated, involved but the legal conclusion of the witness upon the premise his testimony had laid; and, if unobjected to on that ground, the court cannot be held to have erred. *Steiner v. Trantum*, supra. There was, in consequence, no merit in the objections addressed to the competency of the witnesses to express an opinion upon the mental status of the decedent in either of the respects to which the questions refer.

[7, 8] We find no prejudicial error in the rulings of the court admitting or rejecting evidence bearing upon the issue of mental capacity vel non. That issue must, of necessity, evoke an inquiry of the broadest range. *Howard v. State*, 55 South. 255, 34 L. R. A. (N. S.) 990. So, too, under the rules prevailing here with respect to the right of a properly qualified nonexpert to give his opinion that the subject of the inquiry was of unsound mind, it is essential that his opportunity for the formation of such an opinion be fully discovered by examination; and that its correctness be tested by an ample inquiry upon cross-examination. The relative strength or previous soundness of the mind of one whose mental status is being investigated at different times is a subject of inquiry, and also of opinion, of a witness who possesses the requisite qualification to form, entertain, and express an opinion in the premises. *Watson v. Anderson*, 11 Ala. 43. The matter found in the bill, having reference to an indebtedness, or to payments, by decedent to children of his former marriage, rendered entirely proper that testimony tending to show the source of that liability to have been the estate of the former wife and of the mother of the children mentioned.

[9-11] The presumption, as is familiar, is that every person is sane. A contestant has the burden to overcome this presumption. If he shows that the subject of the inquiry was *habitually* insane before the paper was attempted to be executed, the burden then shifts to the proponent to show that the will was made during a lucid interval. *Murphree v. Senn*, 107 Ala. 424, 18 South. 264; *John-*

son v. Armstrong, 97 Ala. 731, 12 South. 72; O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322. If habitual, fixed insanity, prior to the act in question, is not shown by the contestant, the burden does not pass to the proponent. Charge A would have correctly invoked this rule but for the employment therein of the words "or otherwise." That phrase might, and doubtless did, have reference to a condition of mind not equivalent to *habitual, fixed insanity*. It was hence well refused.

[12] Charge C, in one alternative, exacted, as a condition to the shifting of the burden of proof, according to the doctrine just stated, that the contestants show to the jury's *satisfaction* that Johnston was, prior to the execution of the paper propounded, under the disability of habitual, fixed insanity. The degree of proof required by the instruction was too great. Reasonable satisfaction is the degree the law requires. Moore v. Heinke, 119 Ala. 627, 24 South. 374; Coghill v. Kennedy, 119 Ala. 641, 666, 667, 24 South. 459. This charge was correctly refused.

According to the doctrine of Murphree v. Senn, Johnson v. Armstrong, and O'Donnell v. Rodiger, *supra*, the court erred in refusing charge E (assignment 50).

For the error just stated, the judgment is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur, save DOWDELL, C. J., not sitting.

HARRIS v. RANDOLPH LUMBER CO.

(Supreme Court of Alabama. Dec. 22, 1911.)

1. NUISANCE (§ 42*)—PRIVATE NUISANCE—RIGHT OF ACTION.

Under Code 1907, § 5198, providing that a private nuisance may injure either the person or property, in either of which cases a right of action accrues, plaintiff has a right of action where defendant's maintenance of a nuisance results in her loss of rents on property owned.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 101-103; Dec. Dig. § 42.*]

2. NUISANCE (§ 48*)—PRIVATE NUISANCE—ACTIONS FOR DAMAGES—PLEADING.

A complaint, alleging that defendant maintained a planing mill in a residence portion of a city and adjacent to plaintiff's residence property, and that, because of the unreasonable noise and the dust and dirt deposited on plaintiff's property, she had been unable to rent it advantageously and had suffered a diminution of rents, states a cause of action for a private nuisance sufficiently precise to be good on general demurrer.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 113, 114; Dec. Dig. § 48.*]

3. NUISANCE (§ 53*)—PRIVATE NUISANCE—ACTIONS FOR DAMAGES—QUESTIONS FOR JURY.

Whether the noises made by a planing mill, situated in a residence section of a city, are unreasonable and a nuisance to other property owners, are questions for the jury.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 129; Dec. Dig. § 53.*]

4. NUISANCE (§ 3*)—PRIVATE NUISANCE—DETERMINATION OF QUESTIONS.

The fact that a planing mill was erected in a district already used for residences would be a material consideration in determining whether it was a nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 4, 5, 9-25; Dec. Dig. § 3.*]

5. NUISANCE (§ 7*)—PRIVATE NUISANCE—NEGLIGENCE.

Negligence or want of ordinary care in operating the offensive factory is not ordinarily an element of an actionable nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 3, 7; Dec. Dig. § 7.*]

6. NUISANCE (§ 7*)—PRIVATE NUISANCE—NEGLIGENCE.

Where defendant stored lumber in a building on his land adjacent to plaintiff's residence, and thereby endangered and increased the insurance rate on plaintiff's property, plaintiff was not entitled to recover as damages the increased premium, for the mere storing of lumber is not a nuisance *per se*, and to render a building a nuisance, by reason of exposure of other buildings to fire, the hazardous character of the business therein carried on must be unmistakable, and must be shown to be negligently conducted, so that injurious results are probable.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 3, 7; Dec. Dig. § 7.*]

7. PLEADING (§ 362*)—DEMURRER—SCOPE OF DEMURRER.

Where a complaint, stating a good cause of action for a nuisance, included allegations of damage for which no recovery could be allowed, a motion to strike out the objectionable parts is the proper remedy, instead of demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1147-1155; Dec. Dig. § 362.*]

8. NUISANCE (§ 48*)—PRIVATE NUISANCE—ACTIONS FOR DAMAGES—WANTON INJURY.

A complaint, alleging that defendant, with knowledge that a district was used for residence purposes, erected and operated a planing mill therein, although it had notice of the damage and injury sustained, and that, although requested to cease the operation of the business, wantonly maintained the business and operated it, does not sufficiently show wanton injury.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 113, 114; Dec. Dig. § 48.*]

9. NUISANCE (§ 48*)—PRIVATE NUISANCE—ACTIONS FOR DAMAGES—PLEADING.

A complaint, alleging that defendant maintained a lumber mill in a residence portion of a city adjacent to plaintiff's property, and that it negligently and wrongfully caused noise, dust, smoke, and soot to fall, go upon, and be on the property of the plaintiff, in such volume as to materially discomfort plaintiff's tenants and to depreciate the renting value of plaintiff's property, states a cause of action for the nuisance of smoke, dust, and soot; the averment that these were negligently and wrongfully sent upon the plaintiff's premises not relieving the nuisance of its tortious character.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 113, 114; Dec. Dig. § 48.*]

Appeal from City Court of Birmingham; Charles W. Ferguson, Judge.

Action by Enola M. Harris against the Randolph Lumber Company for damages for maintaining a nuisance. Judgment for defendant on demurrer, and plaintiff appeals. Reversed and remanded.

The complaint is as follows:

Count 1: "The plaintiff claims of the defendant \$5,000 as damages, for that plaintiff is now, and has been for several years preceding the bringing of this suit, the owner of lots 20, 21, 22, 23, and 24, in block 178, in the city of Birmingham, upon which said lots there are situated seven houses, which said houses are and have been occupied by tenants of plaintiff, and which said property is located in a residence section of the city of Birmingham, Jefferson county, Ala. Plaintiff avers that within the past 12 months defendant has maintained and operated a certain planing mill and sash and blind factory on lots 5 and 6, in said block 178, which said planing mill is within very close proximity to said residences, being not more than, to wit, 28 feet distant from the nearest of said houses. Plaintiff avers that said planing mill, in and about the operation and running thereof, necessarily creates a noise of such volume and character as to materially distress or discomfort the tenants of plaintiff in the enjoyment and use of plaintiff's said property as a residence, and to materially interfere with the comfort, enjoyment, and use of said property by said tenants as a residence. Plaintiff further avers that, connected with said factory, defendant has a certain lumber shed, wherein lumber is stored by defendant, on lots 1 and 2 in said block, and that only an alley of, to wit, 20 feet separates the property used by defendant for its said business and the property of plaintiff upon which said houses are located, and that by reason of the close proximity and nature of said business, and the extra hazard and risk thereby created, the insurance rate on plaintiff's said dwelling is materially increased, to wit, more than \$100 per annum. Plaintiff avers, further, that at the time of the erection of said manufacturing plant said section was a residence section, and said dwellings were used for residence purposes, and that defendant has had notice of the damage and injury sustained by plaintiff incident to the operation of its said business. Plaintiff avers that by reason and as a proximate consequence of the defendant maintaining and operating said planing mill factory, planing mill shed, and lumber in such close proximity to said dwellings, the value of her residence property has been greatly depreciated; that she has suffered and sustained a loss in the rental value thereof, and has been put to great expense in the payment of an increase in the rate of insurance, which, but for the maintaining of said business by defendant, she would not otherwise have incurred, and she has been greatly annoyed, and suffered much mental and physical pain, to her damage in the sum aforesaid; hence this suit."

Second count: "Plaintiff adopts as a part of this count all the words and figures of the first, from the beginning thereof, down to and including the words, 'that defendant

has had notice of the damage and injury sustained by plaintiff incident to the operation of its said business,' where said words first occur together in said count. Plaintiff further avers that defendant has been requested to abate the operation of said business and the use of said property for said purpose. Notwithstanding said notice, and notwithstanding the fact that defendant has knowledge or notice of the injury and damage that the use of said property for said purpose does and will cause plaintiff, yet defendant has, with such knowledge of the probable injury that such use by it of its said property will cause plaintiff to suffer, nevertheless wantonly maintained said business and used said property as aforesaid. Plaintiff avers that by reason and as a proximate consequence of the defendant maintaining and operating said planing mill factory, planing mill shed, and lumber in such close proximity to said dwellings, the value of her residence property has been greatly depreciated; that she has suffered and sustained a loss in the rental value thereof, and has been put to great expense in the payment of an increase in the rate of insurance, which, but for the maintaining of said business by defendant, she would not otherwise have incurred, and she has been greatly annoyed, and suffered much mental and physical pain, to her damage in the sum aforesaid; hence this suit."

These counts were amended by inserting in each of said counts, after the words "creates a noise," where said words first occur together in said count, the following words: "Which said noise is to the residence section unreasonable, intolerable, harsh, loud, constant, and discomforting, and." Also, by inserting in said counts next after the words "such close proximity to said dwelling," where said words occur together in said count, the following words: "And of maintaining and creating said noise and disturbing said tenants as aforesaid, and of increasing the rate of insurance on plaintiff's property."

Count 3: "Plaintiff claims of defendant \$5,000 as damages, for that plaintiff is now and has been for several years the owner of lots 20, 21, 22, 23, and 24, in block 178, in the city of Birmingham, upon which said property there are situated seven houses, which are now and have been occupied by tenants of plaintiff, and which said property is located in a residence section of said city. Plaintiff avers that defendant has maintained and operated a certain planing mill and sash and blind factory in close proximity to said residences, to wit, not more than 28 feet distant from the nearest of said houses. Plaintiff avers that in and about the operation of said mill, and sash and blind factory, defendant has negligently or wrongfully caused noise, smoke, dust, and soot to fall, go upon, and be on said property of the plaintiff in such volume and character

as to materially distress or discomfort the tenants of plaintiff in the enjoyment and use of plaintiff's said property as a residence, and to materially interfere with the comfort, enjoyment, and use of said property by said tenants as a residence, and which said noise, smoke, dust, and soot, having invaded or fallen upon said residences and plaintiff's said property, have materially interfered with the comfort, enjoyment, and use of said property by said tenants. Plaintiff further avers that in connection with said operation of said plant defendant has negligently maintained or placed a certain lumber shed, wherein lumber is stored by defendant within, to wit, 20 feet of said houses, or some of them, which said lumber is inflammable, and by reason of its close proximity and nature, and the extra hazard and risk of fire thereby created, the insurance rate on plaintiff's said dwelling is and has been materially increased, to wit, more than \$100; and plaintiff avers that by reason and as a proximate consequence of the defendant's negligently causing said noise, smoke, dust, and soot to interfere as aforesaid with the comfort and enjoyment of said tenants of their said home, and negligently causing said insurance rate to be increased as aforesaid, the value of plaintiff's property has been greatly depreciated, and she has suffered and sustained a loss in the rental value thereof, and has been put to great expense in the payment of an increased rate of insurance, which she would not have otherwise incurred, to her damage," etc.

Stallings & Drennen, for appellant. A. C. & H. R. Howze, for appellee.

SOMERVILLE, J. The first and second counts of the complaint, as amended, show that the defendant had for 12 months preceding operated a planing mill and sash and blind factory in a residence portion of the city of Birmingham; that said mill was located in close proximity to certain residence lots belonging to plaintiff, upon which were seven houses occupied by her tenants. The gravamen of the counts is that the operation of said mill and factory "necessarily creates a noise of such volume and character as to create and be a nuisance and render said property undesirable for rental purposes, for which purpose alone it was adapted and suitable, and as to greatly depreciate the rental value to plaintiff of said property, and as to cause plaintiff to be unable to rent said property at the value it could and would be rented for but for said nuisance, and as to prevent plaintiff from keeping all of said houses regularly rented, and as to prevent plaintiff from keeping any of said houses rented at their full rental value, and as to injure plaintiff in her rental value of said property." It is further shown that during the 12 months mentioned plaintiff has been deprived of rent money by the reduction of

some rents and the complete loss of others; the figures for each house being given in detail. The noise complained of is described as "unreasonable, intolerable, harsh, loud, and discomforting." The second count also charges notice to defendant of the injury to plaintiff, and its wanton continuance.

The third count charges that in the operation of said mill and factory the defendant "has negligently or wrongfully caused noise, smoke, dust, and soot to fall, go, and be upon said property of the plaintiff in such volume and character" as to produce the same results complained of in the first and second counts.

Demurrers assigning numerous grounds were interposed to each of the counts, and were sustained by the trial court. The plaintiff declined to plead further, and by appeal and proper assignment of alleged errors challenges the judgment of the trial court with respect to these demurrers to the complaint.

[1] 1. The first and second counts sufficiently state a cause of action for a nuisance. The gist of these counts is not the injury to plaintiff's tenants, but to plaintiff herself, as owner, in the diminution and loss of rents by reason of the discomfort imposed upon her tenants, present or prospective. Such an injury, resulting proximately from a nuisance maintained by defendant, is clearly actionable. Code 1907, § 5198; *City of Eufaula v. Simmons*, 86 Ala. 515, 6 South. 47; 29 Cyc. 1271, 14.

[2-4] Both the conduct of the defendant, and its injurious consequences, are set out with sufficient precision, and in these respects the counts are, we think, sufficient as against the grounds of demurrer assigned thereto. Whether the noises made by the operation of defendant's plant are in fact unreasonable, destructive of the ordinary comfort of nearby residents, or intolerable to them; and whether, by reason thereof, plaintiff has been injured in her property rights—are, of course, issues of fact for the jury, to be determined in view of all the facts in the case. And in this regard the allegation of the complaint that the mill of the defendant was erected in a then already residential district would be a material if not decisive consideration. *English v. P. E. M. & L. Co.*, 95 Ala. 267, 268, 10 South. 134; *Kaufman v. Stein*, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368; *McMarron v. Fitzgerald*, 106 Mich. 649, 64 N. W. 569, 58 Am. St. Rep. 511; *Pritchard v. Edison Co.*, 179 N. Y. 364, 72 N. E. 243.

[5] Negligence or want of due care is not ordinarily an element of nuisance, though its presence might be in itself an independent cause of action. See *Vernon v. Wedgeworth*, 148 Ala. 490, 42 South. 749.

[6] 2. There is one aspect, however, in which the first and second counts are open to an objection if properly presented. Both

counts, as we have seen, are based primarily upon the noise caused by the operation of defendant's mill, and its injurious effect upon the rental value of plaintiff's premises. But in each count it is separately alleged that defendant maintained, in connection with its mill business, a lumber shed for the storing of lumber, and by reason of the nature of said business and its close proximity to plaintiff's buildings the insurance rates thereon are increased and plaintiff thereby damaged in a specified sum.

Whether this result is attributed to the proximity of the lumber shed alone, or of it and the rest of the plant combined, we think this part of the count is objectionable. The storing of lumber on one's premises is not per se a nuisance, and violates no rights of neighboring property owners. "In order to render a building a nuisance, by reason of the exposure of other buildings to danger from fire, the hazardous character of the business must be unmistakable, the danger imminent, and the use of such an *extraordinary* and *hazardous* character as to leave no doubt of the nuisance. The mere fact that the business carried on there is of a hazardous character, and largely increases the rates of insurance upon surrounding property, is not sufficient; it must appear not only that the business or use to which the building is applied is hazardous, but also that it is conducted in such a careless manner, or in such a locality, as to make injurious results probable." 1 Wood on Nuisances (3d Ed.) § 148. No facts are alleged in the complaint to stamp this building or its contents with the noxious character of a nuisance.

Any new building erected near to another would, we apprehend, increase the insurance rates on the latter; but, as declared by this court, "the law is settled, on sound reasons, that the mere fact of the diminution of the value of complainant's property, or the increased risks from hazard of fire occasioned by a structure erected by a defendant upon a lot adjoining the complainant's premises, without more, is unavailing as a ground of equitable relief." Rouse v. Martin, 75 Ala. 510, 515 (51 Am. Rep. 463). And, we may add, it would not, without more, be actionable at law. We therefore hold that plaintiff's loss by way of increased insurance rates is not recoverable under these counts.

[7] 8. It is, however, insisted for the plaintiff that, even if the added cost of fire insurance be not recoverable as an element of damage, nevertheless a motion to strike out that part of the complaint was the only proper remedy, and that sustaining a demurrer to the entire count was improper and erroneous. Such is the rule where to a good cause of action is imputed damage for which the law

allows no recovery. Kennon v. W. U. T. Co., 92 Ala. 399, 9 South. 200. "It is a general rule that a demurrer to a part of a count will not be entertained, unless the imperfect part is so material as that, being eliminated, it leaves the count without a valid cause of action. * * * The clause objected to is only one of several alleged cumulative acts of negligence, and, if it be stricken out, the count will remain amply good." L. & N. R. R. Co. v. Hall, 91 Ala. 118, 8 South. 373, 24 Am. St. Rep. 863. "Where the averments of a part of a count are defective, but could be stricken out and still leave a good cause of action, the proper way to meet the defect is by motion to strike, objection to the evidence, or by requests for instructions to the jury." W. I. Works v. Stockdale, 143 Ala. 553, 39 South. 336, 5 Ann. Cas. 578.

In accordance with this well-settled rule, the objections to this defect could not be taken by demurrer.

The case of Burns v. Moragne, 128 Ala. 493, 29 South. 460, is not in conflict with this view, for there the demurrer was allowed to reach, not merely a claim for non-recoverable damages, but a claim for damages in gross for alleged breaches of official duty, laid en masse, some of which were not breaches of duty at all. But, whether the case were thus distinguishable or not, we would in any case feel compelled to follow the numerous authorities which plainly support our conclusion.

[8] 4. We are of the opinion that the second count does not sufficiently show wanton injury, and that the ground of demurrer pointing out this defect was properly sustained. Henry Case, 139 Ala. 161, 34 South. 389.

[9] 5. The third count sufficiently states a cause of action for the nuisance of noise, smoke, dust, and soot, and the averment that these annoying agencies were "negligently or wrongfully" sent upon plaintiff's premises does not relieve the alleged nuisance of its tortious character.

With respect to the claim for damages growing out of increased insurance rates resulting from the increased risk of fire by reason of the proximity of the lumber shed to plaintiff's premises, we repeat what was said above in regard to similar averments in the first and second counts. The objection to this must be made otherwise than by demurrer.

It results that the demurrer was properly sustained as to the second count, and erroneously sustained as to the first and third counts. The judgment will be reversed, and the cause remanded.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

ELMORE v. STEVENS.

(Supreme Court of Alabama. Jan. 30, 1912.)

1. WILLS (§ 220*)—PROBATE—PERSONS WHO MAY OPPOSE.

Under Code 1907, § 6196, which permits the contest of a will before probate by any person interested therein, a purchaser claiming in good faith through one who, if the testator had died intestate, would have been an heir or a distributee, may contest a will, the probate of which would divest his interest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 532-537; Dec. Dig. § 220.*]

2. WILLS (§ 277*)—CONTESTANTS—ALLEGATIONS AS TO INTEREST.

Under Code 1907, § 6196, permitting the contest of a will by any person interested, an application to contest merely alleging that contestant's "interest will be injuriously affected by the allowance of the alleged or pretended will" shows no ground for the granting of the relief; the allegation being a mere conclusion.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 277.*]

Simpson and Anderson, JJ., dissenting; McClellan, J., dissenting in part.

Appeal from Probate Court, Montgomery County; J. B. Gaston, Judge.

Application by Belle P. Elmore against Rose Tolliver Stevens to contest a will. From a judgment upon a demurrer sustained to the application, petitioner appeals. Affirmed.

Ludlow Elmore, for appellant. J. Winter Thornton, for appellee.

SAYRE, J. This case comes here on appeal from a judgment of the probate court sustaining a demurrer to appellant's application to contest the probate of an alleged will which had been propounded for probate as the last will and testament of Hannah Chambliss, deceased. Appellant sought to contest on the ground, among others, that the paper writing propounded as a will was a forgery. The facts going to show contestant's interest are these: Hannah Chambliss died in 1891. Appellant in her petition to be admitted to contest avers that she purchased certain real estate from Edith Tolliver Richardson in 1902, and that said Edith Tolliver Richardson was the only heir at law of Hannah Chambliss. The petition for probate, which was filed in 1911, avers Edie Tolliver, Rosa Tolliver, Willie George Tolliver, and Kate Tolliver to have been the testator's next of kin and devisees under her will, all of whom have departed this life without children or descendants of children save proponent, who is the sole heir at law of Rosa Tolliver. The petition for contest avers that "petitioner's interest will be injuriously affected by the allowance of said alleged or pretended will."

[1] Appellant's theory of her right to contest is that her purchase from the sole heir

at law of realty which the will purported to vest in devisees, other than her vendor, gave her such an interest in the will as authorized her to contest under the statute which permits a will, before probate, to be contested by "any person interested therein." Code 1907, § 6196. We would be ready to concede the correctness of appellant's position if the averments of her petition for contest sustained the statement of facts to be found in the brief. We are of opinion that one who in good faith after the death of the owner acquires an interest in property from persons standing in the relation of heirs to the decedent, which interest is subsequently about to be divested by the probate of a will purporting to divert the property from the path of descent it would take under the statute, may contest the will. It seems to us, as at present advised, that, if the propounded will was in law and fact no will, such a purchaser ought to be allowed to show the fact, for he can have relief in no other way, since the probate of the will is conclusive proof of its due execution. The decision in *Lockard v. Stephenson*, 120 Ala. 641, 24 South. 996, 74 Am. St. Rep. 63, does not interfere with this conclusion. The point of the decision in that case was that a creditor of one who would have inherited property, if there had been no will, could not contest. If the language of the opinion went beyond the necessities of the case, there is nothing to indicate that the court had in mind such a case as that here presented. A purchaser claiming through a person who, if the testator had died intestate, would have been an heir or distributee, is as clearly interested in the will as his vendor would have been had he not disposed of his ostensible interest. In the earlier case of *Montgomery v. Foster*, 91 Ala. 613, 8 South. 349, the court used language which had effect to define those interested in a will as including those having an interest to be conserved by defeating its probate or jeopardized by its establishment. And in that case was also stated the reason for not permitting a creditor to contest. It was said: "The rights of petitioner," who was a creditor, "were precisely the same against the estate of decedent, whether the will was probated or not." After that the statute was re-enacted in the Code of 1896. The principle on which we go seems to have been recognized by this court in the later case of *Rainey v. Ridgway*, 148 Ala. 524, 41 South. 632, where it was held that the heir of one who would have been an heir, had testator died intestate, might contest. Again the statute was re-enacted to the Code of 1907. And in *McCutchen v. Loggins*, 109 Ala. 457, 19 South. 810, contestants would have taken nothing had decedent died intestate; nor were they named in the will offered for probate. Their only right to contest was as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

devisees under a later will. It was held that they were proper parties to contest.

[2] But appellant showed no such case to the court. The only interest shown by the petition for contest is that to be found in the general statement, the mere conclusion, that "petitioner's interest will be injuriously affected by the allowance of said alleged or pretended will." We do not know what disposition testator made or attempted to make of her property or of the particular property purchased by appellant. Non constat, as to the property in controversy, she may have died intestate—that is, she may have made no effort to dispose of it by the will offered for probate, and if we may assume, as seems probable, that the Edie Tolliver of the petition for probate was the Edith Tolliver Richardson of the petition for contest, it may be that the will purports to devise the property to her. Here again, as in *Montgomery v. Foster*, supra, is presented a case calling for the familiar rule that no mere conclusion will serve the purpose of pleading. The petition for contest should have alleged the facts out of which petitioner's interest arose, and thus enabled the court to determine for itself whether she had such an interest in the will as qualified her to contest its probate. There could be no difficulty in the way of such averment, and in its absence we must assume that the facts did not exist. The petition for contest cannot be sustained except by the indulgence of assumptions in favor of the contestant. This the court cannot do, and for this reason the judgment of the probate court will be affirmed.

Affirmed.

DOWDELL, C. J., and MAYFIELD and SOMERVILLE, JJ., concur in the opinion. SIMPSON and ANDERSON, JJ., hold that appellant was entitled to contest, and that the demurrer to the contest should have been overruled. McCLELLAN, J., concurring in the result, holds that, under the authority of *Lockard v. Stephenson*, 120 Ala. 641, 24 South. 996, 74 Am. St. Rep. 63, the statute having been, without change, since readopted, the appellant was not of either of the two classes allowed, by the statute, to contest a will offered for probate. In his opinion *Montgomery v. Foster*, 91 Ala. 613, 8 South. 349, is not opposed to the pertinent ruling in *Lockard v. Stephenson*.

FARR et al. v. CHAMBLESS.

(Supreme Court of Alabama. Jan. 18, 1912.)

1. DEEDS (§ 56*)—DELIVERY—ACTS CONSTITUTING.

A grantor who parts with the control of his deed, or does any act, or says anything, whereby he evinces an intent to part with the control over it and to pass it to the grantee,

makes a complete delivery, though he retains the physical custody of the instrument.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 117-123; Dec. Dig. § 56.*]

2. DEEDS (§ 208*)—DELIVERY—EVIDENCE.

Evidence held to justify a finding of a delivery of a deed.

[Ed. Note.—For other cases, see *Deeds*, Dec. Dig. § 208.*]

3. DEEDS (§§ 196, 211*)—INCOMPETENCY OF GRANTOR—EVIDENCE—SUFFICIENCY.

An heir suing to set aside his ancestor's deed on the ground of insanity has the burden of establishing the insanity at the time of the execution of the deed; and where the evidence is almost equally balanced the court will refuse to set aside the deed, especially where the justness of the transaction discloses a sound mind.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 587-593, 637-647; Dec. Dig. §§ 196, 211.*]

4. APPEAL AND ERROR (§ 1026*)—QUESTIONS REVIEWABLE—SEPARATE ASSIGNMENTS OF ERROR.

Where there is a severance in the assignments of error, and error is separately assigned by those appellants who are prejudiced by the decree complained of, the decree cannot be affirmed merely because some of the appellants are not prejudiced.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1026.*]

Appeal from Chancery Court, Jackson County; W. H. Simpson, Chancellor.

Suit by J. L. Chambless against Martha E. Farr and others to set aside deeds and for a sale of lands for division. From a decree for complainant, defendants appeal. Reversed and rendered, dismissing complainant's bill.

The case made by the bill is that in October, 1907, one A. T. Chambless died intestate, leaving as his heirs the parties to this suit. It is alleged that there are no debts, and no need for an administration. It is further alleged that in his lifetime Chambless was seised and possessed of tracts of land (describing same), and that while so seised and possessed, in or about 1901 or 1902, he conveyed said land by deed to Martha E. Farr and Geneva Chambless; but it is averred that whether the deed was ever delivered or not orators do not know, but they charge on information and belief that it was never delivered. It is further averred that, at the time of the making and signing of said deed, said A. T. Chambless was mentally incapable of making a deed, and that at the time said deed was made Chambless was old, was living with his daughter, and that the deed was procured by undue influence exercised over him by one of the grantees, Martha E. Farr. It is then alleged that after the preparation of that deed Geneva Chambless died, and that in 1903 Martha Farr procured Chambless to execute an instrument in writing, in form a deed, purporting to convey to her the one-half undivided interest which he had previously conveyed

to said Geneva Chambless, and that at or about the time of the execution of said deed A. T. Chambless and Martha E. Farr executed to George R. Chambless a deed attempting to convey 10 acres of said land to said Chambless off of a certain 40, and 32 acres off of another 40. It is alleged that at the time these deeds were made A. T. Chambless was very old and infirm, and was mentally incapable of making and executing a deed, and that he was never restored to sanity, but died wholly insane. Undue influence is also alleged as having been exercised over him by Martha Farr. The prayer is for a calling and cancellation of these deeds, and for a sale of land for division among the joint owners thereof.

Virgil Bouldin, for appellants. W. H. Norwood, for appellee.

ANDERSON, J. [1] In the case of Gulf Red Cedar Co. v. Crenshaw, 169 Ala. 606, 53 South. 812, this court, in discussing what would and what would not operate as a delivery of a deed, among other things, said: "If, on the other hand, he parts with the control of the deed, or does any act, or says anything, whereby he evinces an intention to part with the dominion over it and to pass it to the grantee, though he may retain the physical custody of the instrument, or whether it be turned over to another or placed upon the record, the delivery is complete, if made with the intent that it was to so operate, and regardless of what was said and done in order to perfect same." See also, the cases of Fitzpatrick v. Briman, 130 Ala. 450, 30 South. 500; Arrington v. Arrington, 122 Ala. 510, 26 South. 152; Griswold v. Griswold, 148 Ala. 241, 42 South. 554, 121 Am. St. Rep. 64.

[2] In the case at bar, the only positive proof of a physical delivery by A. L. Chambless of the deeds to Martha Farr and George Chambless is the evidence of Martha, which should probably be excluded, under the statute, as a transaction by an interested person with the deceased; but with this evidence excluded there is an abundance of legal evidence which creates a reasonable inference of the delivery of said deeds. Martha is found in possession of them, and delivered them to George to be recorded; they were duly acknowledged, and were made at or about the same time as deeds to other children, which were delivered. There was nothing clandestine about the transaction, and the deeds were made by A. L. Chambless, pursuant to an often-repeated desire and intention to make an equitable disposition of his property between his children. He reserved a life interest in the lands deeded Martha, and attempted to deliver the deeds to his son, J. G. Chambless, to give to Martha and George after his death, and the son gave them back to him, and told him to take them and give them to Martha. The grantor made frequent declarations in the

neighborhood, and to some of his sons and sons-in-law, that he had deeded the home place to Martha and the "Jack Patch" to George, stating, in effect, that they were made in order to give them an equitable interest in his estate, as compared with what he had previously advanced the complainant, and with the property that he had deeded to, or expected to deed to, the other children, and to further compensate them for their interest in their mother's estate, which had been consumed by him in providing for some of the other children. Taking all of the facts and surroundings into consideration, the most reasonable inference to be deduced therefrom is a delivery of the deeds made to Martha and George.

[3] There was proof on the part of complainant that A. L. Chambless was insane when the deeds were made; but the burden was on him (the complainant) to establish insanity, and while the great weight of the evidence shows that the grantor was insane at or prior to his death, the respondents' evidence shows that the said grantor's mind did not become seriously impaired until he suffered a severe spell of sickness the fall succeeding the execution of the deeds, and that he was in a sound state of mind prior to said attack, and we are inclined to accept the respondents' theory, as the burden of proof was on the complainant, and the evidence is almost equally divided. Moreover, the equity and justness of the transaction bespeak the action and thought of a sound, rather than a diseased, mind. We also think the evidence is sufficient to refute the imputation of undue influence, regardless of the age of the grantor and the fact that he resided with his daughter. The deeds operated as an equitable division of his property, with, perhaps, a slight preference, as to value, in favor of his youngest daughter, with whom he resided, but which said difference in value was in a measure offset by the reservation of a life estate in the land.

It is true there is a discrepancy in the testimony of Martha as to when she gave George the deeds to have recorded; but the human memory is frail and inaccurate as to exact dates, and this said discrepancy is not sufficient to overcome the reasonableness and good faith of the transaction. Nor was the refusal of George to defend the case and testify sufficient to create the inference that the deeds were falsely or surreptitiously procured from the grantor. The suit was in Jackson county, and as the lands are located in Marshall George may have believed, as he contended, that the bill should have been filed where the lands were located.

[4] It has been suggested in brief of appellee's counsel that this case must be affirmed upon the theory that some of the appellants were not prejudiced by the decree of the lower court, and in support of this contention he cites the cases of Rudolph v. Brewer, 96 Ala. 193, 11 South. 314, and

Bedell v. Mortgage Co., 91 Ala. 325, 8 South. 494. These cases apply to a joint assignment of error when some of the appellants were not injured or prejudiced by the decree. In the case at bar, there is a severance in the assignment of error, and error is separately assigned by those who were prejudiced by the decree from which the appeal was taken.

The decree of the chancery court is reversed, and one is here rendered, dismissing the complainant's bill.

Reversed and rendered. All the Justices concur, except DOWDELL, C. J., not sitting.

BELL v. BURKHALTER et al.

(Supreme Court of Alabama. Jan. 30, 1912.)

1. INFANTS (§ 58*)—CONTRACTS—AVOIDANCE. An infant's contracts being voidable on arriving at majority, he may repudiate or avoid them.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 149-160; Dec. Dig. § 58.*]

2. INFANTS (§ 57*)—CONTRACTS—RATIFICATION.

An infant's contracts being merely voidable, on arriving at majority, he may ratify them without any new consideration.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 136-148; Dec. Dig. § 57.*]

3. INFANTS (§ 58*)—CONTRACTS—AVOIDANCE—RETURN OF CONSIDERATION.

Where an infant has, during his minority, wasted or consumed the consideration which he received upon his contract, he is not required, either at law or in equity, to refund it, or its equivalent in money, or to place the party in statu quo, since to require this, as a condition to the avoidance of his contract, when he does not have the possession or control of the consideration or its proceeds, would deprive him of that protection against his improvidence and incapacity which the law designed; but when he attains his majority, and comes into a court of equity to be relieved from his contract, he must tender or offer to return so much of the consideration which he actually or constructively retains, or has it in his power to return.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 149-160; Dec. Dig. § 58.*]

4. INFANTS (§ 31*)—ACTION TO AVOID CONVEYANCE—PLEADING—DISPOSITION OF CONSIDERATION.

In view of Code 1907, § 4490, relieving married women over 18 years of age of the disabilities of minority, an averment, in an action by one who had attained her majority, and by a married woman over 18 years of age, to set aside a conveyance made by them while infants, that they had disposed of all the money received by them for their interests in the land, and were therefore unable to refund it, is not sufficient to relieve them from an offer to do equity, as they may have disposed of the proceeds of the sale after reaching majority.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 50-63; Dec. Dig. § 31.*]

5. INFANTS (§ 31*)—AVOIDANCE—CONVEYANCE—DISPOSITION OF CONSIDERATION—DEDUCTING CONSIDERATION FROM DAMAGES.

In an action to set aside a conveyance made while the plaintiffs were infants, where the consideration for the conveyance had been

disposed of during minority, plaintiffs need not offer to do equity by offering to let their part of the damages for defendant's waste be deducted from the consideration paid them.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 50-63; Dec. Dig. § 31.*]

6. HUSBAND AND WIFE (§ 70*)—CONVEYANCES—JOINDER OF HUSBAND.

Under Code 1907, § 4494, invalidating a wife's deed, unless assented to by the husband by joining therein, but providing that, where the husband is a nonresident, the wife may convey alone, the requirement that the husband shall join in the wife's deed does not apply to deeds by nonresident married women.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 301-304; Dec. Dig. § 70.*]

7. CANCELLATION OF INSTRUMENTS (§ 37*)—ACTIONS—PLEADING—HUSBAND'S JOINDER IN CONVEYANCE.

In an action to set aside a conveyance by a married woman, on the ground that her husband had not joined in the deed, an averment that the husband was of sound mind and resided with his wife, and did not give his consent to the conveyance, "as required by the statute of Alabama," in effect avers that the wife resided in Alabama, and is good as against a general demurrer.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Cent. Dig. §§ 66-81; Dec. Dig. § 37.*]

8. LIFE ESTATES (§ 13*)—INTERESTS—TIMBER.

A life tenant is entitled to the use of the wood and timber, but cannot go to the extent of committing waste or making a sale thereof.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. §§ 21, 32; Dec. Dig. § 13.*]

Appeal from Chancery Court, Pickens County; Thomas H. Smith, Chancellor.

Bill by Jodie Burkhalter and others against A. E. Bell to declare certain deeds void and to cancel same as cloud upon title. From a decree overruling demurrers to the bill, defendant appeals. Reversed, rendered, and remanded.

Paragraph 1 states the name, age, and residence of complainants and respondents. (2) Complainants are the children and heirs at law of Elvira Brown, who died previous to the filing of the bill; that said Elvira Brown owned during her life a large body or tract of land, which is herein described; that during her lifetime, and while her husband was still living, she attempted to give or sell a part of the land above described to different ones of her children (setting out the children to whom and the quarter sections of land for which deeds were executed); that at the time the above-described deeds were made John Brown, the husband, was living, and of sound mind, and that none of the above-described deeds were ever signed or executed in any way by the said John Brown, nor did the said John Brown give his consent in writing to the making or execution of said deed. (3) That on August 31, 1906, after the death of Elvira Brown, the following named parties, to wit, Lutera Brown, Lula Brown, Elvira Brown, Annabel Brown, Dora Pate, Sallie M. Pate, Ben A.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Brown, and John Brown, who was the husband of Elvira Brown, the others being heirs at law and children of said Elvira Brown, made and executed to R. D. Algee, a deed to the following described land. It is averred, then, that Jodie and William Burkhalter and Mary Skelton did not join in said deed, and have not at any time since executed a deed, and that the complainants Lutera and Lula Brown were each under the age of 21 years at the time they executed the agreement; and complainants aver, further, that they, the said Lutera Brown and Lula Brown, have disposed of all the moneys received by them for their interest in said land, and are therefore unable to refund the same. (4) It is further averred that Algee executed a deed to the above-described land to E. E. Cox, and the said E. E. Cox conveyed the land to A. E. Bell, and that the said Bell went into possession of the said land under the deed executed by said Cox, and has cut down and is still cutting a vast quantity of timber off of said lands for sawmill and other purposes, and that the chief value of the land consists in the timber growing upon the land, and that the said Bell, by so cutting the timber, is causing it to become less in value, and causing irreparable injury to the reversion of these complainants. (5) It is averred that Elvira Brown is dead, intestate, and that the complainants herein are heirs of the said Elvira Brown. The prayer is for a reference to ascertain the amount of the timber cut, that the deeds executed by Elvira Brown to her children be declared null and void and canceled, and that the deed of John Brown be declared void, in so far as the same purports to convey the interest of Lula and Lutera Brown, and that it be reformed, so as to show what interest it does convey; also for an injunction preventing Bell from cutting timber from said land, and that the said Bell be required to make bond, payable to the defendant, on the death of said John Brown, in such sum as the reversionary interest of these defendants in and to the timber already cut by said Bell is shown by the evidence to be worth. Grounds of demurrer were as follows: The complainants Lutera and Lula Brown do not offer to do equity. (2) Lutera and Lula Brown do not offer to refund the purchase money paid them for their interest in the land by Algee, under whom the defendants claim title. (5) The averments of said bill show that said bill is without equity. (6) The averments of said bill show that the complainants are not entitled to the relief prayed for therein.

Henry A. Jones, for appellant. J. S. Stone and Patton & Patton, for appellees.

ANDERSON, J. [1-3] "As a result of the voidable nature of an infant's contracts, he has the right, upon arriving at his majority, to repudiate them; so, also, may he, when his minority ceases, ratify and confirm them; and this without any new considerations.

American Mortgage Co. v. Wright, 101 Ala. 658, 14 South. 399; Sharp v. Robertson, 76 Ala. 343; Shropshire v. Burns, 46 Ala. 108; West v. Penny, 16 Ala. 186; Thomasson v. Boyd, 13 Ala. 419; Jefford v. Ringgold, 6 Ala. 544. If the infant has, during minority, wasted or consumed the consideration which he received for his contract, he is not required, either at law or in equity, to refund it, or its equivalent in money, or to place the other party in statu quo. Some authorities require this; but we have adopted the rule, in accordance with reason and the great weight of authority, that to require restitution from the infant, as a condition to the avoidance of his contract, when he has, during his minority, used or consumed the thing received, so that he has not in his possession or under his control the consideration or its proceeds, would be to deprive him of that protection against his improvidence and incapacity which the law designed. *Eureka v. Edwards*, 71 Ala. 248 [46 Am. Rep. 314]; *Craig v. Van Bebber*, 100 Mo. 584 [13 S. W. 906] 18 Am. St. Rep. 569; *Engelbert v. Troxell* [40 Neb. 195] 58 N. W. 852 [26 L. R. A. 177, 42 Am. St. Rep. 665] and authorities there cited.

"The right of an infant to avoid his contracts is intended, however, solely for his protection during that period when it may be supposed he is unable, from incapacity or inexperience, to fully protect himself in making agreements, and was never designed to be used as a means of profit to accrue to him after he became of lawful age. So it is that when the infant, upon reaching his majority, yet retains what he received by virtue of his contract, or any substantial portion thereof, or the proceeds thereof, the rule is quite different, and he may not repudiate or disaffirm his contract, except upon condition that he restores or abandons to the use of the other party that which remains in his possession of the consideration received. He will not be allowed, as an adult, to hold and enjoy the benefit of his contract, and then escape its burdens. This would turn his disability into a weapon of dishonesty. If he comes into a court of equity to be relieved of his contract, he must tender or offer to return so much of the consideration as he actually or constructively retains, and has it in his power to return. *Eureka v. Edwards*, 71 Ala. 257; *Manning v. Johnson*, 26 Ala. 446 [62 Am. Dec. 732]." *American Freehold Land Mortgage Co. v. Dykes*, 111 Ala. 187, 188, 18 South. 294, 56 Am. St. Rep. 38.

[4] The complainants, Lutera Brown and Lula Brown, attempt to avoid the offer to do equity by the averment that they "have disposed of all the money received by them for their interest in said land, and are therefore unable to refund the same." This averment is not sufficient to relieve them from the offer to do equity as they may have disposed of the proceeds of the sale, or a substantial portion of same, after reaching the age of majority, and the law relieves them from

offering to restore the consideration of the contract, or so much thereof as was disposed of during minority only. The bill avers that Lula Brown is over 21 years of age and that Lutera Brown was a married woman over 18 years of age; and section 4499 of the Code of 1907 relieves married woman over the age of 18 years of the disabilities of minority. The bill was subject to grounds 1 and 2 of the respondent's demurrer, which should have been sustained.

[5] We cannot agree, however, with appellant's contention that, even if the said parties disposed of all of the money during minority, they should offer to do equity by offering to let their part of the damages for waste be deducted from the purchase money paid them. This would not place them in statu quo, but would enable the respondent to defeat a restoration, at least in part, by denuding the land of the timber, and they would be entitled to what they sold, and not merely to so much as was undisposed of by the respondent.

[6, 7] None of the complainants, except Lula and Lutera Brown, who were repudiating their deeds, can maintain this suit if the deeds from Mrs. Elvira Brown to her children were valid. The bill does not aver the residence of Mrs. Brown when she executed said deeds; and if she was not at the time a resident of Alabama the failure of her husband to join in the deeds did not render them invalid. *Hughes v. Rose*, 163 Ala. 368, 50 South. 899; *High v. Whitfield*, 130 Ala. 444, 30 South. 449; section 4494 of the Code of 1907. The bill avers that the said husband was of sound mind and resided with his wife, and did not give his consent to the sale, "as required by the statute of Alabama." It does not aver that the wife resided in Alabama, and which was essential to make his consent necessary; but it does aver, by way of conclusion, that he did not give his consent, as required by the statute, thus averring, in effect, that she did reside in Alabama; else consent was not required by the statute. This manner of averment may be subject to an apt demurrer, but cannot be reached by the general demurrer for want of equity, as contended by appellant's counsel, and which is the only point made against the bill by grounds 5 and 6 of the demurrer.

[8] Since this case must be reversed, it is needless for us to pass on the remaining insistence, except to suggest that the decree, enjoining the respondent from cutting timber in the future, and in making him account for all timber already cut, was rather broad. Bell owned the life estate of the father, John Brown, in all of the land, and as a life tenant he was entitled to the use of the wood and timber to the extent of committing no waste or selling same.

The decree of the chancery court is reversed, one is here rendered sustaining

grounds 1 and 2 of respondent's demurrer, and the cause is remanded. All the Justices concur, except DOWDELL, C. J., not sitting.
Reversed, rendered, and remanded.

VANDIVER v. REYNOLDS.

(Supreme Court of Alabama. Jan. 18, 1912.)

1. VENDOR AND PURCHASER (§ 314*)—ACTION FOR PURCHASE MONEY—PLEADING—SPECIAL PLEAS.

Defenses to a vendor's action for the purchase money for land on the ground of the vendor's failure to perform, or to offer to perform, or to be ready and willing to perform, should be set up by special pleas.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 920-927; Dec. Dig. § 314.*]

2. VENDOR AND PURCHASER (§ 314*)—ACTION FOR PURCHASE MONEY—PLEADING—COMPLAINT.

It is not necessary that a complaint in an action by a vendor for the purchase price of lands payable on a certain day should affirmatively show that a deed was executed or tendered, nor is it necessary that the complaint should negative facts showing necessity for tender of a deed before recovery of the price.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 920-927; Dec. Dig. § 314.*]

3. VENDOR AND PURCHASER (§ 58*)—PAYMENT OF PRICE—INDEPENDENT COVENANTS.

Where a contract for the sale of land stipulates that the purchase money is to be paid on or before a specified day, and that a conveyance is to be executed at a subsequent time, the covenants are independent.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 88; Dec. Dig. § 58.*]

4. VENDOR AND PURCHASER (§ 323*)—ACTION FOR DAMAGES—CONDITIONS PRECEDENT.

Where the payment of purchase money for land sold is conditioned upon the vendor's making of a good and sufficient title, he cannot recover damages on failure to perform such condition precedent.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 948-950; Dec. Dig. § 323.*]

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Action by Walker Reynolds against H. F. Vandiver. Judgment for plaintiff, and defendant appeals. Affirmed.

Ray Rushton, William M. Williams, and Hill, Hill & Whiting, for appellant. Letcher, McCord & Harold, for appellee.

MAYFIELD, J. But two questions are insisted upon by appellant for a reversal of the judgment of the lower court. These questions are thus stated in brief of his counsel:

First. "An action will not lie at law to recover the purchase price of real property, unless the vendor has executed and delivered a deed to the vendee, and, until there has been a conveyance of the title to the vendee, the vendor's measure of damages is the dif-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ference between the contract price and the value of the land at the time of the breach."

Second. "Plaintiff's failure to allege performance on his part, or an offer to perform, or a readiness and willingness to perform, was fatal to counts 3 to 6, inclusive, of the complaint, not only as counts for the recovery of the purchase money, but also for damages, if they could be construed as counts for damages, and not for purchase money."

In order to clearly understand the propositions thus asserted by appellant, it will be necessary to state the case as made by the record, and to which the propositions are sought to be applied.

The appeal is on the record alone, and only the rulings on demurrers to counts 3, 4, 5, and 6 are sought to be reviewed.

It appears from the pleadings that prior to the time of this suit appellant and appellee were partners, and as such purchased a large plantation, and the necessary live stock, implements, and supplies wherewith to operate it as a farm; that on the 23d day of November, 1910, they made a contract as to the purchase, which was in words and figures as follows: "State of Alabama, Montgomery County. This agreement made and entered into on this, the 23d day of November, by and between H. F. Vandiver, party of the first part, and Walker Reynolds, party of the second part, witnesseth: That for and in consideration of the sum of forty-nine hundred and fifteen dollars to be paid to the party of the second part by the party of the first part, on January 15, 1910, the party of the second part does bargain, sell and convey on the above-mentioned date to the party of the first part, one half ($\frac{1}{2}$) interest in the farm now owned by H. F. Vandiver and Walker Reynolds, jointly, the said party of the first part to assume all liabilities of the firm of Vandiver & Reynolds, and also to assume the note now due at the Farley National Bank for three thousand dollars (\$3,000.00). Signed by the party of the second part, and endorsed by the party of the first part. Same to be turned over to the party of the second part as soon as agreement is terminated. H. F. Vandiver. Walker Reynolds. Witness. * * *

Appellee sued appellant on account of this contract. The complaint contained six counts. The first two were common counts on an account stated. The third, fourth, fifth, and sixth declared specially upon the contract. The third count, however, merely declared generally, as for the purchase price of a half interest in the farm. The fourth attempted to set out the contract in substance only, while the fifth and sixth set out the contract in *hæc verba*.

It is alleged in the fifth and sixth counts that the phrase, "January 15, 1910," should read, "January 15, 1911." The defendant interposed demurrers to each of the special

counts, assigning a great number of grounds. All the grounds here insisted upon are those embraced in the two propositions of law first above stated, which are taken from the brief of counsel for appellant. These two propositions find no field for operation in, nor application to, the case made by the pleadings. This is not an action by a vendee against a vendor for failure to convey or to otherwise perform the contract of sale; nor is it a suit by the vendor against the vendee to recover damages for failure or refusal to perform the contract of sale. It is purely and simply an action by the vendor against the vendee for the purchase price of sold land. So far as the complaint shows, the contract relied upon is wholly executed except as to the payment of the purchase price for which alone the action is brought.

[1, 2] If any such defenses are availing as are insisted upon by appellant, they should be brought forward by special pleas. It is not at all necessary that a complaint for the purchase price of land should affirmatively show that a deed had been executed or tendered, as is necessary when the action is to recover damages for the failure to convey or to perform the contract of sale, or when the contract shows that there are conditions precedent to the payment of the purchase price. In other words, this is not an action to recover unliquidated damages for a failure to perform the conditions of a special contract; but it is an action to recover an amount certain, agreed to be paid. Appellant has confused actions of the one kind with those of the other.

The principles of law discussed and applied in the case of Brady v. Green, 159 Ala. 484, 48 South. 807, and in the cases therein cited, are therefore not applicable to this case, which is one merely to recover the purchase price agreed on. If the purchase price should not be paid as agreed for the reasons contended for by the appellant, the facts to show that it should not be so paid should be set up by special pleas. Such facts do not affirmatively appear on the face of this complaint, nor is it at all necessary that the averments should negative such facts.

[3] The rule is well stated by Mr. Warvelle (2 Vendors, § 900, p. 1064) as follows: "Where a contract of sale contains mutual dependent covenants with respect to the payment of the purchase money and the conveyance of the estate, neither party can maintain any action upon it against the other without averring and proving performance or a readiness and willingness to perform, and, according to some authorities, notice to the other party of readiness and willingness. But where the contract stipulates that the purchase money is to be paid on or before a specified day, and that a conveyance is to be executed at a subsequent time, the covenants are independent, and an action may be maintained for the purchase money after

the day specified for its payment without making or offering to make a deed. Where the contract contains covenants by the purchaser to pay in installments, the vendor may sue for each installment as it becomes due."

The authority cited in support of the text is a decision of our own court in the case of *Broughton v. Mitchell*, 64 Ala. 210, as follows: "An application of the rule to this contract renders it certain that the payment of the purchase money by Broughton was intended to precede, and was not dependent upon, the making of titles to him by McCall. A day certain—the 1st of January, 1861—is fixed for the payment of the purchase money. No time is fixed for the making of titles. McCall is to make them, when, under the contract with his vendors, referred to in this contract, he shall have obtained them. Under that contract, McCall could not obtain title until he paid to his vendors the purchase money in full; and such payment he promised, and was bound to make, on the 1st day of January, 1862, 12 months after the time Broughton bound himself to pay McCall the purchase money. It is apparent from the contract itself that the parties could not have contemplated that Broughton's promise to pay the purchase money was dependent on making title to him. The day of payment, they knew, would precede the time when McCall would be able and ready to make title, and the day when Broughton could by right demand it. The case is, then, the one of very ordinary occurrence in this court, in which the vendee of lands, who has made an independent promise for the payment of the purchase money, has been compelled to comply, though title has not been made to him." The special contract set out in counts 5 and 6 in the case at bar falls clearly within the last class mentioned in the above quotation. A conveyance is not at all made a condition precedent to the payment of the purchase price agreed on.

A vendee has no right to refuse to pay the purchase price agreed on in a case like that made by the pleadings here, and remit the vendor solely to an action to recover damages as for "the difference between the contract price and the value of the land at the time of the breach." If he has the option so to do (which we do not decide), the law does not compel him to exercise it in a case like this. The contract price may be less than the value of the land, and hence the vendor could recover no damages, but he may prefer to have the money instead of the land, and he has a right to insist upon its payment as agreed, though it be less than the value of the land sold.

[4] Of course, if the payment was conditional upon his making a good and sufficient title to the land sold, and he had failed to perform this condition precedent, he could

not recover the agreed price nor damages; but no such conditions occur in this contract or are set up in the complaint, nor do any facts appear which render it necessary for the complaint to negative such conditions.

It therefore follows that we find no reversible errors in this record, and the judgment appealed from must be affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

ABLE v. GUNTER.

(Supreme Court of Alabama. Jan. 19, 1912.)

1. VENDOR AND PURCHASER (§ 145*)—BONDS FOR TITLE—OBLIGATIONS.

A vendor, having executed a bond for title providing for stipulated payments at specified times, is bound to convey the land upon the vendees making such payment; the vendees' only duty being to pay the sums fixed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 276; Dec. Dig. § 145.*]

2. VENDOR AND PURCHASER (§§ 191, 196*)—BONDS FOR TITLE—EFFECT.

Upon the giving of a bond for title providing only for the payment of stipulated sums, the vendee is entitled both to the rents and possession of the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 393, 397, 404–406; Dec. Dig. §§ 191, 196.*]

3. EVIDENCE (§ 419*)—WRITTEN INSTRUMENTS—PAROL EVIDENCE TO VARY.

Evidence that, while a written bond for title provided only for the payment of stipulated sums, it was agreed that the vendor should have the rent from the premises until the entire purchase price was paid, is not admissible, as showing the consideration of the contract, as, in the absence of agreement, the vendee was entitled to the rent for such evidence would vary the written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912–1928; Dec. Dig. § 419.*]

4. CONTRACTS (§ 75*)—CONSIDERATION.

Where a vendor executed a bond for title providing only for stipulated payments, the vendee being entitled to the immediate possession and the rents of the land, his parol promise to pay rent to the vendor was invalid, being without consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 273–285; Dec. Dig. § 75.*]

Appeal from Chancery Court, Covington County; L. D. Gardner, Chancellor.

Bill by W. E. Gunter against Wayne Able to specifically enforce a contract. Decree for complainant and respondent appeals. Affirmed.

The bond for title directed to be set out is as follows: "State of Alabama, Covington County. Know all men by these presents, that we, Wayne Able and H. H. Hogg, are held and firmly bound to W. E. Gunter, in the sum of \$2,200.00, for the payment of which we hereby bind ourselves, our heirs, and personal representatives. Signed and sealed by us this the 12th day of February, 1904. But the condition of the above obligation is such that, whereas, the said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Wayne Able has sold to W. E. Gunter, for the sum of \$1,100.00, which is to be paid as follows: \$220.00, Nov. 1, 1904; \$220.00, Nov. 1, 1905; \$220.00, Nov. 1, 1906; \$220.00, Nov. 1, 1907; and \$220.00, Nov. 1, 1908—a certain tract of land, lying and being in the county of Covington, state of Alabama, and described as follows, to wit: The N. W. $\frac{1}{4}$ of section 12, township 5, range 15. Now, if the said W. E. Gunter shall pay the said sum of \$1,100.00 as the payments become due, and the said Wayne Able shall by warranty deed convey a fee-simple title to the above-described premises to the said W. E. Gunter, then this instrument shall be null and void; otherwise, to remain in full force and effect." Signed by Wayne Able and H. H. Hogg. Recorded. Indorsed on the bond is as follows: "Received on the within bond \$330.29, first payment, and rent for the first year." "Received on the within bond \$220.00, second payment, and rent for second year." "Received on the within bond \$220.00, also cotton as interest." "Received on the bond \$220.00, Nov. 1, 1907." Each signed: "Wayne Able."

A. R. Powell and W. L. Parks, for appellant. Reid & Prestwood, for appellee.

McCLELLAN, J. This bill, exhibited by a vendee, seeks the specific performance of a contract to convey land. A bond for title was executed by the vendor (appellant) to the vendee (appellee). It will be set out in the report of the appeal.

Appellant's contention is thus succinctly stated in brief by his solicitors: "The contention of appellant, Able, is that it was the agreement and intention of the parties to the contract, though not so expressed, that Able should have the rent according to Benton's lease, in lieu of interest; that it was a part of the consideration of the contract. If this is not true, then appellant contends that part of the contract was orally modified subsequently by the parties when Gunter purchased the possessory interest of Benton and assumed payment of the rent to Able. If this is true, then Gunter has not complied with the contract, and was not entitled to relief."

[1] The contract, the performance of which is sought to be enforced, is that expressed in the bond for title. The sole substantive obligation placed upon and assumed by the vendee thereunder was to pay the sum named at the time stipulated therein; whereupon it was the obligation of the vendor to convey the land to the vendee as he engaged to do. Such was the construction of a similar instrument taken in *Sims v. Knight*, 71 Ala. 197, wherein Chancellor Turner's opinion was, in substance, adopted by this court. The adopted opinion there said: " * * * It is upon payment, and upon payment only, that the bond is conditioned and the agreement to sell and convey is predicated."

[2, 3] Consistent with the construction indicated, the first insistence for appellant cannot prevail, since to approve it would materially vary the obligation assumed by the vendee under the written instrument defining the condition upon which the vendor should convey to him. Parol evidence of prior or contemporaneous verbal agreements varying or adding to the written contract is not admissible. *Thompson F. & M. Co. v. Glass*, 136 Ala. 648, 33 South. 811; *Forbes v. Taylor*, 139 Ala. 286, 35 South. 855; 9 Ency. Ev. pp. 331-334. It is true that, between the parties thereto, the consideration of contracts is open to inquiry by parol. *Foster v. Bush*, 104 Ala. 662, 16 South. 625, among others. But that is manifestly a different matter from allowing parol evidence of a contemporaneous agreement, the immediate effect of which would be to impose conditions wholly omitted from the written contract. The rule against the reception of parol evidence of prior or contemporaneous verbal agreements to add to or vary written contracts comprehends verbal agreements, whereby the legal effect of the instrument would be changed. *Moragne v. Richmond L. & M. Co.*, 124 Ala. 537, 27 South. 240; *Ala. Nat. Bank v. Rivers*, 116 Ala. 1, 11, 22 South. 580, 67 Am. St. Rep. 95; 9 Ency. Ev. pp. 333, 334. If there is in a bond for title no stipulation to the contrary, "the contract of itself operates a transmutation to the vendee of the possession, entitling him to the right of entry and enjoyment." *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17; *Ashurst v. Peck*, 101 Ala. 499, 14 South. 541. In such case, the vendee is entitled to the rents and profits, as a mortgagee in possession is accountable therefor. *Ashurst v. Peck*, supra; *Loventhal v. Home Ins. Co.*, supra; *Bank of Opelika v. Kiser et al.*, 119 Ala. 194, 200, 24 South. 11. So to admit parol evidence affecting, as indicated, the legal effect of the bond given by Able would violate the rule stated.

[4] The execution by the vendor of the bond for title, without provision therein excluding the vendee's right thereunder to the possession, or the rents and profits, operates to divest the vendor of any right to the rents and profits, pending the performance of the executory contract to convey. So if, in fact, the vendee purchased the possessory rights of Benton under Benton's lease, and agreed to pay the vendor the rent stipulated to be paid by Benton to the vendor (the assignee of Neese, the original lessor to Benton), his engagement, under the authorities before cited, was no more than to pay his vendor rent to which he was not entitled—to which the vendee himself was entitled—thereby leaving his alleged engagement to pay rent to his vendee without consideration. *Thompson v. Hudgins*, 116 Ala. 93, 22 South. 632; *Maul v. Vaughn*, 45 Ala. 134; *Crim v. Nelms*, 78 Ala. 604; *Oldacre v. Stuart*, 122

Ala. 405, 409, 25 South. 38. Under this bond for title, effecting, from its omission to stipulate otherwise, the investment of the vendee with the right to rents and profits from the land, the vendee was entitled to the cotton Benton had engaged, under his lease, to deliver for the use of the land. In consequence, the vendor was not deprived of—did not part with—any right or value; nor was he placed thereby in a position of detriment to his interest, according to his bond for title, which, under established principles before adverted to, we feel bound to find the chancellor correctly applied.

The decree is affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

STATE ex rel. FARNHAM v. MIMS, County Treasurer.

(Supreme Court of Alabama. Jan. 16, 1912.)

1. MANDAMUS (§ 109*)—COUNTY OFFICERS—PAYMENT OF AWARD.

Mandamus lies to compel a county treasurer to pay a warrant founded upon a claim authorized by law to be satisfied out of county funds.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 227; Dec. Dig. § 109.*]

2. PAUPERS (§ 43*)—SUPPORT—STATUTORY PROVISIONS.

Under Code 1907, § 1607, which provides that the court of county commissioners, and, in cases of emergency, the commissioner of the district, may provide for the temporary relief of a pauper until he can be removed to the poorhouse, not exceeding one month, and section 1603, which enjoins the commissioners' court to prevent the poor from strolling from one district to another, county funds cannot be used for the use of a pauper outside of a poorhouse, in the absence of emergency; and the failure of the court of commissioners to provide a poorhouse cannot avoid the limitation of the statute.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. §§ 190-194; Dec. Dig. § 43.*]

Appeal from Law and Equity Court, Monroe County; William G. McCorvey, Judge.

Mandamus by the State of Alabama, on the relation of Chanle Farnham, against D. D. Mims, as Treasurer of Monroe County. Appeal by relator from a judgment sustaining a demurrer to the petition. Affirmed.

Hybart & Hare, for appellant. Barnett & Bugg, for appellee.

McCLELLAN, J. Appeal from a judgment sustaining a demurrer to a petition for writ of mandamus to compel the treasurer of Monroe county to pay, out of county funds in his hands as such treasurer, a warrant issued, as ordered by the commissioners' court of Monroe county, to Chanle Farnham for pauper allowance, "for her support and maintenance"; she having been theretofore "regularly placed on the pauper list for said county by the commissioners' court" thereof.

It is averred in the petition that the court of county commissioners have not provided a poorhouse for the maintenance of the poor of the county of Monroe, "but for many years past has provided for and maintained the poor of the county by issuing to them, from time to time, small sums of money which said court has ascertained to be barely sufficient to provide said paupers with the actual necessities of life; that the warrant issued to your petitioner is one regularly issued petitioner in accordance with said custom of the commissioners' court to provide for paupers *outside of a poorhouse*." (Italics supplied.)

It is also averred that the warrant in question "was, by your petitioner, duly and regularly presented to said D. D. Mims, as county treasurer, and its payment demanded; that the said D. D. Mims failed and refused to pay said warrant, or to register the same, stating that the said warrant was for a claim not authorized by law," and indorsed that reason for his refusal upon said warrant.

It does not appear from the petition that the provision sought to be made for Chanle Farnham by the proceeds of this warrant was with reference to an "emergency," within Code 1907, § 1607. The demurrer points this objection.

[1] The remedy here invoked is appropriate and available, if the warrant is founded upon or grows out of a claim authorized by law to be satisfied out of county funds. Wyker v. Francis, 120 Ala. 509, 24 South. 895. See Norwood v. Goldsmith, 168 Ala. 224, also pages 239, 240, 53 South. 84.

[2] The concrete question presented by the record is whether, in cases not "of emergency," county funds may be employed for the maintenance or support of a pauper *outside of a poorhouse*. It was ruled below that such a use of those funds was not authorized. Under the statutes in force when this warrant was ordered issued, that ruling must be affirmed. If the statutes on the subject had remained as they were when Henry v. Cohen, 66 Ala. 382, was decided, there would be no doubt of the correctness of the appellant's (petitioner's) contention. It was then held, in effect, that the commissioners' courts had committed to them a discretion in the application of the well-recognized power for the relief of paupers within their jurisdictions. By sections new to the subject in the Code of 1907 (chapter 37, pp. 710-714, of Pol. Code), this power was limited in unmistakable terms. Section 1607 provides: "The court of county commissioners, and in case of emergency, the commissioner of the district, may provide for the temporary relief of a pauper until he can be removed to the poor-house, not exceeding one month." As appears, a limit of one month is expressly fixed upon the maintenance of a pauper out-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

side of a poorhouse, and then only in cases of *emergency*. This intent of the statute is further confirmed by the provision of section 1803, whereby the 'commissioners' court are commanded to "prevent the poor from strolling from one district to another."

The custom alleged in this petition cannot, of course, avail to render wholly vain the limitation of the statute quoted. It was the evident purpose of the statutes to inhibit just the *custom* to which the pleading refers, and to restrict the support or maintenance of the paupers of a county, who have had or are entitled to settlement therein, at the county expense, to inmates of the poorhouse, except in cases of emergency, which cannot avail to justify the use of county funds for a period "exceeding one month." Nor can the failure of courts of county commissioners to provide poorhouses operate to avoid the limitation of the statute quoted. There may be force in the suggestion of counsel for appellant that paupers may be so few in number in a county that wisdom and economy would both approve their maintenance and support in the homes of friends or kindred therein, rather than the incurring by a county of a large and disproportionate expense in the purchase and maintenance of a poorhouse. However, such considerations can only be heard or heeded by the Legislature. This court cannot revise the decisions of that branch of the government upon such matters of pure policy. It may be, however, that the lawmakers conceived that the general good and the general economy of county administration would be the better conserved if pauper charges were segregated and congregated in the county almshouse; and that, from such a method, a surer application of the best benefits of county bounty to the unfortunate pauper would be obtainable. In so doing, maintenance and support is made certain by the supplying of shelter, food, etc., directly to the inmate; whereas the gift of money alone, to even the most deserving of county bounty, might prove of little actual benefit to the object, because of inadequate shelter or insufficient food secured by private contract or arrangement; or, perhaps, importunity might extract from the intended beneficiary's hand much, if not all, of the public bounty.

The judgment is affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

BARRY et al. v. STEPHENS et al.

(Supreme Court of Alabama. Jan. 16, 1912.)

1. EVIDENCE (§ 83*)—PRESUMPTIONS—OFFICIAL ACTS—SCHOOL LANDS—SALE—CERTIFICATE OF PURCHASE.

Under Code 1852, § 538, which required trustees of school lands to issue certificates to purchasers, it must be presumed, in the absence

of a contrary showing, and especially after a lapse of more than 50 years, that a certificate for particular land was issued as required by that section, since the law presumes that public officers do their duty.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

2. QUIETING TITLE (§ 23*)—WHO MAY SUE—POSSESSION.

A statutory bill to quiet title, can be maintained only by one in possession of the land, actual or constructive, and, independent of the statute, can be maintained only by one out of possession who has an equitable title not available at law.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 55, 56; Dec. Dig. § 23.*]

3. QUIETING TITLE (§ 23*) — POSSESSION — REMEDY AT LAW.

A bill does not lie to quiet title against a deed claimed to be a forgery, if complainants are out of possession, since they have an adequate remedy at law in ejectment.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 55, 56; Dec. Dig. § 23.*]

4. INJUNCTION (§ 118*)—BILL—SUFFICIENCY.

Under Code 1907, § 1804, which provides for a board of compromise as to school lands, a bill is insufficient as one to enjoin the board from issuing a patent to complainants' rival claimant if it does not show that the board will order such issuance, though it alleges that action by the board was invoked by complainants, and that the board is holding up the matter on a protest of their claimant and his claim that the patent should issue to him.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242; Dec. Dig. § 118.*]

Appeal from Chancery Court, Montgomery County; L. D. Gardner, Chancellor.

Bill by Kinnon Barry and others against James M. Stephens and others to quiet title of land and remove cloud from title. Decree for respondents, and complainants appeal. Affirmed.

It seems from the averments of the bill that in the year 1856 the township trustees of township 8, range 24, in Barbour county, Ala., sold certain school lands in all respects conformable to law, and that John R. Barry became the purchaser therefor, and was put in possession thereof, upon the execution by him of the four purchase-money notes with sureties; that Barry paid the first note, but failed to pay the other two, whereupon suit was entered and judgment recovered, and the judgment paid under execution, but that the last note has not been paid; that in 1874 Barry died, and left surviving him a widow, who has since died, and five children, all of whom are living, except Mahaley Brock, who has died since Barry, leaving six children. It is alleged that Nathan Minchew, one of the sureties, paid the judgment on the second and third purchase-money notes, and that he has since died, and that Mrs. Daniels, a daughter and the only heir of said Minchew, claims whatever equity her father had on account of having paid said note. The bill sets up an agreement between them and Mrs. Daniels as to an equi-

table division. It is then averred that about four years ago complainant sought by petition to have a patent issued to them for this land, which petition was addressed to the proper state officials, but before the hearing of the petition one James M. Stephens began the contest, which is now pending before the board; the said Stephens insisting that he is entitled to the patent, because said Barry conveyed the lands to one Blackmon, and the said Blackmon conveyed to Stephens, and put him in possession of the land, and that he has held possession of it since. These deeds are made exhibits to the bill. It is averred that Barry died about 1875, and that the deed purporting to have been made to Blackmon by him in March, 1890, is a forgery and utterly void. It is further alleged that they have offered to pay the balance of the purchase money, and they submit themselves to the jurisdiction of the court. The prayer is for a cancellation of the deed from Barry to Blackmon, for an injunction against Stephens to further contest their right, for a permanent injunction against the board, preventing them from issuing a patent to Stephens, and for a cancellation of a deed as quieting title.

H. L. Martin, for appellants. O. S. McDowell, Jr., and Peach & Thomas, for appellees.

ANDERSON, J. [1] The bill avers a purchase of the land involved by complainants' ancestor, John R. Barry, in the year 1856; that it was school land, and sold by the trustees under the statute, and that he executed the purchase-money notes with such sureties as required by law, and which said notes were accepted by the township trustees. Section 538 of the Code of 1852, provides: "The trustees, in the execution of the notes, must give to the purchaser a certificate of purchase, showing the quantity of land in acres, describing the lots purchased, and specifying the amount of the purchase money." The law presumes that public officers discharge their duty, nothing to the contrary appearing; and it must therefore be presumed that the trustees issued the certificate of purchase upon the acceptance by them of the notes, and this presumption is strengthened by the lapse of over 50 years since the transaction. Section 539 of the Code of 1852 declares the effect of the certificate to be a conditional fee title to the land, perfect against all the world, except the state, and subject only to revert to the state upon the happening of the contingencies enumerated in the statute. It has been held by this court that such a certificate gives the owner thereof the right to maintain ejectment for the land therein described. *Watson v. Prestwood*, 79 Ala. 416.

[2] A bill to quiet title under the statute can only be maintained by one in possession of the land, actual or constructive. Inde-

pendent of the statute, it can only be maintained by one out of possession who has only an equitable title not available at law.

[3, 4] The bill avers that the complainants are the legal owners of the land, as the deed held by Stephens from their father is charged to be a forgery, and therefore a nullity. If this be true, they, and not Stephens, have the legal title, and there is nothing in the bill to negative a plain and adequate remedy at law. If the Stephens deed is a forgery as charged, this fact can be shown in a court of law, and the complainants would be entitled to recover the land in an action of ejectment. If the complainants are out of possession and have the legal title as they assert, and which they can assert in a court of law, equity cannot be resorted to as a substitute. *Hardeman v. Donaghey*, 54 South. 172; *Davis v. Bingham*, 111 Ala. 292, 18 South. 660; *Morgan v. Lehman Durr & Co.*, 92 Ala. 440, 9 South. 314; *Echols v. Hubbard*, 90 Ala. 309, 7 South. 817. Indeed, counsel for appellants in his brief does not seriously insist that the bill has equity solely as a bill to remove the deed of Stephens as a cloud upon title, but insists that the bill has equity, independent of this phase of the case, and that if this be true the chancery court would then have jurisdiction to determine and settle all rights and controversies relating to the land. This could no doubt be done; but we are not prepared to agree that the bill contains equity in any aspect of the case. Section 1804 of the Code of 1907, provides for a board of compromise as to school lands, and it may be very questionable if said board can be enjoined from acting or compelled to act in matters involving a discretion given them by the statute. 28 Cyc. 2845. After the board ordered the issuance of the patent by the Secretary of State, it might be that the real owner of the land could prevent the issuance of same, though this may be a question of very serious doubt, as the issuance of a patent by the state to one, other than the purchaser or those holding rightfully under him, would not divest the title acquired by the certificate, unless, of course, the land had previously reverted to the state under the terms of the statute. *Watson v. Prestwood*, supra. Moreover, it is not every imaginary grievance or wrong that authorizes an injunction, and there is nothing in the present bill to indicate that the board will order the patent issued to Stephens.

The bill avers that action by the board was invoked at the instance of complainants, and that the board is holding up the matter, owing to a protest of Stephens and the insistence by him that said patent should be issued to him (the said Stephens); but it is nowhere charged that the board has or will order the patent issued to Stephens, instead of complainants. It may be that the board is properly waiting for the rival claimants under the purchaser, John R. Barry, the

common source of title, to settle the forgery vel non of the said deed in a court of law, before determining who is entitled to the patent. In the meantime, there can be no innocent purchaser from Stephens under the void deed, as distinguished from a voidable one, and especially during the lis pendens; so the complainants have not made out a case for equitable relief. The bill avers that the board is willing to issue the patent to complainants but for the contest of Stephens; so if the Stephens deed is a forgery, the complainants, being out of possession, should bring an action of ejectment and have it so declared; and there is nothing in the bill to show that the forgery cannot be shown as well in an action at law as in equity, and which would be rather a violent averment, if it existed, as the same rules of evidence exist in law as in equity, except as to the taking of testimony. The decree of the chancery court is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

SAVAGE v. STATE.

(Supreme Court of Alabama. Jan. 18, 1912.)

1. JURY (§ 116*)—MOTION TO QUASH VENIRE—SERVICE ON ACCUSED—NECESSITY.

A motion to quash a venire, because not served forthwith on accused, indicted for a capital offense, as required by Jury Law (Acts Sp. Sess. 1909, p. 819) § 82, held to have been properly denied, because not within the exception in section 29, declaring that no objection may be taken to any venire, except for fraud in drawing and summoning the jurors. (Affirmed by divided court.)

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 543; Dec. Dig. § 116.*]

2. JURY (§ 116*)—QUASHING VENIRE—MISTAKES IN NAMES OF JURORS.

Under Jury Law (Acts Sp. Sess. 1909, p. 819) § 32, providing that any mistake in the name of any juror drawn or summoned is not a ground to quash the venire, a venire containing the name "William S. Morgan" may not be quashed because "Seaborn Wilson Morgan" was the person summoned and appearing for service.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 543; Dec. Dig. § 116.*]

3. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

Where a witness for accused testified on his direct examination that he was the father of accused, a question, on cross-examination, as to whether he and accused's mother ever married was proper, as reflecting on the truth of the statement of the father.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 268.*]

4. CRIMINAL LAW (§ 782*)—INSTRUCTIONS—DEGREE OF PROOF.

An instruction that the jury must have not only justifying reasons for a conclusion of guilt, but such conclusion must press itself on the minds of the jury with such force that they are unable to find in the evidence any reason for a contrary conclusion, is properly refused, since a justified conclusion of guilt may be attained, though a part of the evidence, consider-

ed without reference to other evidence, may show a reason opposed to that of guilt.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 782.*]

5. HOMICIDE (§ 300*)—INSTRUCTIONS—IGNORING ISSUES.

An instruction that, if accused was the aggressor and the sole cause of the difficulty in which decedent was killed, but if he retreated, and was thereby placed apparently in such position that he could not escape without endangering his life or suffering serious bodily harm, he could kill decedent was properly refused, because premitting the essential element of good faith in the withdrawal from the difficulty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

6. CRIMINAL LAW (§ 807*)—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.

An instruction that flight, though a circumstance to be considered, is inconclusive, and it may not be evidence of guilt where there was any other reason for the flight than the sense of guilt, was properly refused, because argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1806, 1859, 1960; Dec. Dig. § 807.*]

7. CRIMINAL LAW (§ 829*)—REFUSAL OF INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

It is not error to refuse a requested charge covered in substance by the charge given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

8. CRIMINAL LAW (§ 811*)—INSTRUCTIONS—EMPHASIZING EVIDENCE.

An instruction that, if accused left the state under the advice of a friend, in whom he had confidence, flight of accused was not evidence of guilt was properly refused, because singling out a particular feature of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. § 811.*]

Appeal from Circuit Court, Wilcox County; B. M. Miller, Judge.

Frank Savage was convicted of murder, and he appeals. Affirmed.

The following charges were refused to the defendant: (8) "The court charges the jury that they must have not only justifying reasons for a conclusion of guilt—not only must they be able to say upon reason that the defendant is guilty—but this conclusion must press itself upon the minds of the jury with such convincing clearness and force that they are unable to find in the whole evidence any reason for a contrary conclusion." (19) "The court charges the jury that if the defendant was the aggressor, and the sole cause of the difficulty in which the deceased was killed, yet if you believe from the evidence that he retreated, or attempted to retreat, and was thereby placed apparently in such position as that he could not escape therefrom without endangering his life or suffering serious bodily harm, he had the right to use such force to repel this danger, even though he had to kill the deceased to do so." (27) "Flight of a defendant, al-

though a circumstance to be considered by the jury in connection with all the other evidence, is of a weak and inconclusive character. It may not be evidence of guilt at all, if it be shown that there was any other reason for the flight than that of a sense of guilt. Flight may proceed from an unwillingness to stand the public prosecution, or from fear of the result, from an inability to explain false appearances, or from the advice of friends to avoid public excitement; and if it proceeded from any one or more of these reasons, then flight is not evidence of guilt at all." (29) "If you believe from the evidence that the defendant left the state under the advice of a friend, in whom he had confidence, that it would be best for him, then the flight of the defendant may not be evidence of his guilt."

J. F. Barbour and Godbold & Van De Voort, for appellant. R. O. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

MCCLELLAN, J. The defendant was indicted for a capital offense. His trial was set for Thursday, November 10, 1910. The special venire for his trial was drawn on Friday, November 4, 1910, about 11 o'clock a. m., and a copy thereof, with the indictment, was ordered to be "forthwith" served upon the defendant. The service of the copy of the venire and of the indictment was had on Thursday, November 8, 1910, about 6 o'clock p. m.

[1] The defendant moved, in the court below, to quash the venire, upon the ground that service thereof was not effected "forthwith," as required by section 32 of the jury law of 1909 (Acts Sp. Sess. 1909, p. 319). The motion was properly overruled. In section 29 of the jury law, it is provided that: "No objection can be taken to any venire of jurors except for fraud in drawing and summoning the jurors." The objection stated does not fall within the exception of the quoted provision of the jury law.

[2] It is also provided, in section 32 of the jury law, that "any mistake in the name of any juror drawn or summoned is not sufficient ground to quash the venire or to continue the cause." Accordingly there was no ground for quashal of the venire, arising from the fact that the name "William S. Morgan" was on the venire served on the defendant; whereas, "Seaborn Wilson Morgan" was the person summoned and appearing for service on the trial of the defendant.

[3] There was no error in the allowance of this question, propounded by the solicitor on cross-examination of defendant's witness Rat Savage, "Were you and his mother ever married?" On his examination in chief, this witness had testified "that he was the father of the defendant." The question com-

plained of related, as is obvious, to the very matter, viz., paternity, which the defendant himself had introduced before the jury. While it does not appear that the state could be benefited by a refutation of the paternity which the witness had confessed on his examination in chief, yet it cannot be said that such want of benefit deprived the state of the right to reflect upon the truth of the former statement of fatherhood by showing that the witness and defendant's mother were never married.

[4] Charge 8 was well refused to defendant. It might be termed the assertion of a mere abstraction. However, one of its vices lies in the fact that it inveighs against a conclusion of guilt, to requisite certainty, if the jury find "In the whole evidence any reason" for a conclusion opposed to that of guilt. An entirely justified conclusion of guilt may be attained, notwithstanding a part of the evidence, considered without reference to other evidence, may show a reason opposed to that of guilt. We also think this charge was argumentative.

[5] Charge 19, refused to defendant, pretermitted, in hypothesis, the essential element of *good faith* in his withdrawal from the difficulty in which he was the aggressor (if so). Hughes' Case, 117 Ala. 25, 29, 23 South. 677, and Stillwell's Case, 107 Ala. 16, 19 South. 322, among others. If good faith was not required to characterize the withdrawal of the assailant, such an one might avail of that means to promote his own advantage to effect a wrongful purpose.

The affirmative charges 25 and 26, requested by defendant, could not, on the evidence, have been given.

[6, 7] There was no error in refusing charge 27, requested by defendant. It was argumentative. Besides, the benefit of the substance of this charge was accorded the defendant in given (for him) charge 28.

[8] Charge 29 singled out a particular feature of the evidence and sought to emphasize it. This alone justified its refusal.

No error appearing, the judgment is affirmed.

Affirmed. All the Justices, save DOWDELL, C. J., not sitting, concur in the affirmation.

SIMPSON and SOMERVILLE, JJ., concur in the entire opinion. ANDERSON, MAYFIELD, and SAYRE, JJ., concur in all of the opinion, except that to which the following of their views refers: That the failure to serve the venire "forthwith" was error not cured by section 29 of the jury law, but that it was error without injury, as the record shows that the copy of the venire was served at least two days before the trial.

WATTS v. MONTGOMERY TRACTION CO.
(Supreme Court of Alabama. Jan. 18, 1912.)

1. NEGLIGENCE (§ 6*)—VIOLATION OF ORDINANCE.

The violation of an ordinance is negligence per se, entitling the one proximately injured as a result thereof to recover damages.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 8; Dec. Dig. § 6.*]

2. NEGLIGENCE (§ 76*)—CONTRIBUTORY NEGLIGENCE—VIOLATION OF ORDINANCE.

The violation of an ordinance by plaintiff, if proximately contributing to the injury, may be contributory negligence, provided the ordinance was enacted for defendant's benefit, and not merely for the public generally, or for a class.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 104-107; Dec. Dig. § 76.*]

3. STREET RAILROADS (§ 99*)—OPERATION—INJURIES BY COLLISION—CONTRIBUTORY NEGLIGENCE—VIOLATION OF ORDINANCE.

An ordinance requiring vehicle drivers to keep to the right of the center of the street was not enacted for the benefit of street car companies, though their tracks be in the center of the street, so that a street car company, when sued for damage to an automobile by striking it, could not plead contributory negligence by the owner being in the center of the street, contrary to the ordinance.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 210-216; Dec. Dig. § 99.*]

4. STREET RAILROADS (§ 99*)—OPERATION—INJURIES BY COLLISION—CONTRIBUTORY NEGLIGENCE.

The driver of an automobile ahead of a street car was not guilty of contributory negligence in failing to signal the motorman to stop, unless he knew the car was approaching.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 210-216; Dec. Dig. § 99.*]

5. STREET RAILROADS (§ 113*)—OPERATION—INJURIES BY COLLISION—ACTIONS—EVIDENCE.

Where, in an action against a street car company for injuries by striking plaintiff's automobile, the evidence showed that the automobile was running astride the south rail of the track, which was 12 feet from the south curb, while the north rail was 15 feet from the north curb, so that the automobile was on the right-hand side of the center of the street, an ordinance requiring vehicle drivers to keep to the right of the center of the street was immaterial and irrelevant.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 230; Dec. Dig. § 113.*]

Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge.

Action by Edw. S. Watts against the Montgomery Traction Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The action was for damages to an automobile, caused by the automobile being struck by a car and demolished; the automobile at the time being run ahead of the car and in the same direction as the car.

Plea 8 is as follows: "Defendant says: That the accident occurred on one of the streets of the city of Montgomery, within the limits of said city. That at said time,

and for a long time, there had been an ordinance of the city of Montgomery in force and effect, namely, section 1093 of the City Code of Montgomery, reading as follows: 'Sec. 1093. Any person who willfully fails to keep to that side of the street which is to the right of the driver while driving any vehicle through the streets * * * must on conviction be fined not less than \$1.00 nor more than \$100.00.' That on the day and date of the alleged injuries of the said automobile the same was being driven by one Felder, who negligently and in violation of said ordinance failed to keep to that part of the street on his right, but drove the same along the middle of said street, and in that part of the same where defendant's tracks are located, so that defendant's car could not safely pass same without colliding therewith, and the negligence of said driver of said automobile and violation of said ordinance, to keep to the right of the street, contributed proximately to the injuries complained of in the complaint."

The fifth ground of demurrer was that the ordinance referred to was not passed, according to the averments of said plea, for the benefit of the defendant, or its employes engaged in the business of the defendant.

J. T. Letcher, for appellant. Ray Rushton and W. M. Williams, for appellee.

ANDERSON, J. [1] The decisions as to the legal effect of violating a statute or ordinance are not harmonious. In some cases it is held that such violation is not negligence per se, but that it is competent evidence of negligence, and may be sufficient to justify a jury in finding negligence in fact. 29 Cyc. 437, and cases cited in note. However, it is settled in Alabama, and we think it is the weight of authority, that a violation of a statute or an ordinance is negligence per se, and a person proximately injured thereby may recover for such injuries against the violator of the law. *Kansas City R. R. v. Filippo*, 138 Ala. 487, 35 South. 457; *Sloss-Sheffield Co. v. Sharp*, 156 Ala. 289, 47 South. 279; *Wise v. Morgan*, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548; *Parker v. Barnard*, 135 Mass. 116, 48 Am. Rep. 450; *Newcomb v. Boston Prot. Dpmt.*, 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; *Terre Haute R. R. v. Williams*, 172 Ill. 379, 50 N. E. 116, 64 Am. St. Rep. 44; *Rosse v. St. Paul R. R.*, 68 Minn. 216, 71 N. W. 20, 37 L. R. A. 591, 64 Am. St. Rep. 472.

[2] We are not cited to and have found no Alabama case where the violation of a statute or ordinance by the injured party was pleaded by the defendant by way of contributory negligence; yet we see no reason why such a violation, if proximately causing the injury complained of, cannot be set up as a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

defense to the simple negligence charged in the complaint. Such a defense has been approved, and we think properly so, in the cases of *Broschart v. Tuttle*, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33; *Weller v. Chicago R. R.*, 120 Mo. 635, 23 S. W. 1061. The statute or ordinance violated, however, must have been enacted for the benefit of the party who seeks to invoke its violation as distinguished from the public generally or a class to whom the ordinance necessarily applies. 29 Cyc. 438; *L. & N. R. Co. v. Murphree*, 129 Ala. 432, 29 South. 592; *Cen. of Ga. Rwy. v. Sturgis*, 149 Ala. 573, 43 South. 96.

[3] A municipality would no doubt have the right, under its police power, to regulate the travel upon its streets so as to prevent congestion and collision, and could thereby protect all persons using the streets, including street cars; but it is manifest that the ordinance in question was not intended for the protection of street railways, as the wording and meaning of same does not exclude vehicles from their tracks. The ordinance does not require the drivers of vehicles to keep off of the street railway tracks, but only requires them to keep on the side of the street to the right; that is, they must remain to the right of the center of the street. If they do this, they do not violate the ordinance, notwithstanding they may be upon the track of a street car line. It may be that most of the street car tracks are laid in the center of the street, and an ordinance requiring vehicles to stay to the right of the track, if there is space enough for them to do so, would no doubt be a reasonable one; but such is not the present ordinance, as it only requires the vehicle to be to the right of the center of the track. Again, there may be street car tracks laid within either side of the streets, and, if a driver kept to the right of the center of the street, he would not violate the ordinance, although he may drive upon or along the street car track. It is plain that the ordinance in question was not intended to keep vehicles off of street car tracks or for the protection of street car companies.

Plea 8, if not otherwise faulty, was subject to grounds 5, 11, and 12 of the plaintiff's demurrer, and the trial court erred in not sustaining same.

[4] The negligent failure of the plaintiff's agent, Felder, to holler, warn, or signal the defendant's motorman is a mere conclusion. There is nothing in the plea to indicate that Felder knew of the approach of the car, and he cannot be said to be guilty of negligence for failing to give a signal to stop the car unless he knew it was approaching.

[5] Aside from the infirmity of the eighth plea, the trial court erred in admitting the ordinance in evidence, over the objection of the plaintiff, as it was immaterial and irrelevant.

The undisputed evidence shows that the auto was on the right-hand side of the street. The automobile was astride the south rail of the track, and which said south rail was 12 feet from the south curb. The north rail was 15 feet from the north curb, and was therefore in the center of the street, and the auto was to the right of said north rail and was upon the right-hand side of the street. See testimony of Berry, page 16 of the record.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

COOPER et al. v. PARKER.

(Supreme Court of Alabama. Jan. 18, 1912.)

1. MORTGAGES (§ 459*) — FORECLOSURE — PLEADING—VARIANCE.

Where the mortgage recited an existing indebtedness due the mortgagee for money advanced for which the note was given, there was no variance because the complaint in a foreclosure suit alleged that the mortgage was given to secure an existing debt due the mortgagee, while the proof was that it was given to indemnify the mortgagee for loss resulting from signing a note as security for one of the mortgagors.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1843-1847; Dec. Dig. § 459.*]

2. PRINCIPAL AND SURETY (§ 183*)—PRINCIPAL'S LIABILITY—PAYMENT OF DEBT—NECESSITY.

A surety or guarantor cannot recover from the principal until he has paid the debt guaranteed, in absence of a contrary stipulation in the surety contract; but the parties may agree that the surety may proceed against the principal or against independent security given by him at any time irrespective of the surety's payment of the principal debt.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 539-544; Dec. Dig. § 183.*]

3. MORTGAGES (§ 581*) — FORECLOSURE — ATTORNEY'S FEE—FORECLOSURE IN CHANCERY.

A provision of a mortgage containing a power of sale, that the proceeds of a sale shall be applied to the expenses of the sale, and to the secured note, "together with reasonable attorney's fee for foreclosing this mortgage," did not authorize an attorney's fee upon foreclosure by a suit in chancery but only by sale under the power.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 211½, 1669-1679; Dec. Dig. § 581.*]

Appeal from Chancery Court, Coosa County; W. W. Whiteside, Chancellor.

Bill by James M. Parker against R. M. Cooper and others. From a decree for complainant, defendants appeal. Modified and affirmed.

The consideration clause of the mortgage is as follows: "And we, or either of us, agree to pay to the said James M. Parker, for any and all advances, in addition to the above amount of money, the said James M. Parker may make to us during the year 1907. And we hereby certify that said sum of mon-

ey has been obtained by us, and such contract for future advances has been made by us, bona fide for the purpose of making a crop during the year 1907, and that without such advances and such contract for future advances, it would not be in our power to procure the necessary teams, provisions, and farming implements with which to make a crop during the year 1907. And as far as this debt is concerned, and in consideration thereof, we jointly and severally expressly waive [here follows waiver of exemption].” The clause relating to foreclosure is in part as follows: “But, should said sum and said additional future advances not be paid when due, the said James M. Parker, his heirs, representatives, or assigns, shall have the right to take possession of said property herein conveyed, and he is hereby authorized to sell the same, both real and personal, at auction before the courthouse door of Elmore county, Alabama, to the highest bidder for cash, by giving ten days’ notice in writing of the time, place, and terms of sale of same, by posting one of said written notices at the courthouse door and three other public places in Elmore county. [Here follows authority to bid and to buy by the said Parker at such sale, together with authority to invest the purchaser or purchasers with the complete title.] And the proceeds of such sale to said Parker, his heirs or assigns, shall apply to the expenses of the same, and to the payment of said sum of \$330, and to the payment of such additional sum of money as the said James M. Parker may have advanced to us, or either of us, during the year 1907, with the interest thereon, together with reasonable attorney’s fees for foreclosing this mortgage, and the balance, if any, shall be paid to our heirs or assigns.”

George A. Sorrell, for appellants. Felix L. Smith, for appellee.

SOMERVILLE, J. This appeal is from a final decree of the chancery court for the foreclosure of a mortgage on land executed by appellants to appellee.

Error is imputed to the decree in three particulars: (1) Because of a variance between the allegations of the bill and the proof; the bill alleging that the security was given for a then existing debt due from the mortgagors to the mortgagee, when in fact it was given to indemnify the mortgagee against any loss that he might sustain by reason of his signing a note as security for R. M. Cooper, one of the mortgagors. (2) Because, when the bill to foreclose was filed by the mortgagee, he had not then paid the security debt, had suffered no loss, and was not entitled to enforce the security. (3) Because there was no stipulation in the mortgage authorizing the allowance of an attorney’s fee for foreclosing the mortgage by bill in chancery; a fee of \$50 being allowed by the chancellor in that behalf.

[1] 1. The mortgage contract, which is made an exhibit to the bill of complaint, recites an indebtedness of \$330 due from the mortgagors to the mortgagee for money advanced by him to them to make a crop, for which the note was given. The bill of complaint declares upon the mortgage and note according to their prima facie import and effect, and just as the parties themselves saw fit to deliberately frame and memorialize their agreement. To so describe the contract is surely in accordance with the rules of good pleading. It is true that the consideration as stated even in a written contract may, as between the parties, be inquired into, a different consideration may be shown, and the contract given effect accordingly. But proof of a different consideration which does not change the essential rights of the parties, nor destroy the right of redress, cannot be treated as a variance.

[2] 2. “A surety or guarantor cannot recover indemnity from the principal, or indemnitor, until he has been damnified; in other words, until he has paid the debt; unless there is a clause in the contract of indemnity which varies this general rule.” *Lane v. Westmoreland*, 79 Ala. 374. And again it is said: “The rights of the surety must be determined by the terms of the instrument which creates the indemnity. If the mortgage or other security is not given to secure the debt, or to provide a fund for its payment, but merely to save harmless from a contingent liability or loss, the contingency must happen, or the loss be sustained, before a right arises in favor of the creditor to the indemnity.” *Daniel v. Hunt*, 77 Ala. 569. It is to be noted that these statements of the rule, by their own express limitations, apply only to those cases in which the parties have not stipulated otherwise. It is competent for the parties to so frame their contract, either by the terms of the principal contract, or by a separate independent contract, as to authorize the surety to proceed against his principal, or against the independent security given by the principal to the surety, at any stated time, independently of the surety’s prior payment of the principal debt. Such we conceive to be the nature and purpose of the present mortgage security. Indeed, as between these parties, their idea seems to be to treat the note due to the bank as the debt solely of the surety, which he was to pay at all events, in consideration of which the surety accepted the obligation of his principal due and payable at a fixed time. But, if their purpose did not go so far as this, it is still impossible to escape the conclusion that this independent security was intended to provide a fund, out of which, after a stated time, the surety-mortgagee could satisfy the principal debt without first making the payment out of his own pocket.

The present case cannot be distinguished from the case of *Russell v. La Roque*, 11 Ala.

352, 354, where it was said: "It is frequently a matter of great doubt and difficulty what the true nature of an indemnity is; but the circumstance which influenced our judgment previously, and which has confirmed it on subsequent reflection, is the fact that the note executed as an indemnity was payable at a day certain, thus establishing very satisfactorily that the right of the surety to an action on the note was not to depend on his being compelled to pay the debt of his principal, as the time when that would happen was uncertain, if it happened at all, whilst the right to sue at a particular time was ascertained and depended on no contingency."

Hence, conceding that the complainant had not paid the principal debt at the time he filed this bill, he may nevertheless proceed to realize on the independent security given to him. In such a case, however, it seems clear that the mortgagor-principal would have an equity to have the fund so realized applied to the principal debt, if he still remained liable thereon.

[3] 3. The mortgage contains the usual power of sale, and provides that, upon said sale being made, the proceeds thereof shall be applied to the expenses of the sale, and to the \$330 note, etc., "together with reasonable attorney's fee for foreclosing this mortgage."

The provision here made is manifestly for an attorney's fee for foreclosing by sale under the power, and not by suit in chancery. Hence there was error in the allowance of an attorney's fee for this latter service. *Tompkins v. Drennen*, 95 Ala. 463, 466, 10 South. 638. The cases of *Bedell v. N. E. M. S. Co.*, 91 Ala. 325, 8 South. 494, and *Pollard v. A. F. L. & M. Co.*, 103 Ala. 289, 16 South. 801, by reason of the difference in the stipulations involved, are not in point, and so no question can arise here as to the necessity of a resort to a proceeding in chancery.

The decree of the chancellor will be modified by eliminating the fee allowed, and, as modified, will be affirmed. The costs of this appeal will be taxed in equal part against appellants and appellee.

Modified and affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

SNODGRASS v. SNODGRASS.

(Supreme Court of Alabama. Jan. 18, 1912.)

COURTS (§ 485*)—ADMINISTRATION OF ESTATE—TRANSFER OF CAUSE.

The heirs at law of a decedent whose personal property is amply sufficient to pay debts are interested in the administration of the estate so long as the widow's dower remains unassigned, since the personal representative is, under the statute, invested with important powers as to the realty and may apply to the probate court for the assignment of dower; and hence an heir at law may maintain a bill for

the removal of the administration from the probate into the chancery court and for the allotment of dower.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 485.*]

Appeal from Chancery Court, Jackson County; W. H. Simpson, Chancellor.

Action by W. E. Snodgrass against Eliza A. Snodgrass, individually and as administratrix, and others. From a judgment overruling a demurrer to the bill, Eliza A. Snodgrass, as administratrix, appeals. Affirmed.

Tally & Fricks and Virgil Bouldin, for appellant. Milo Moody and McCord, Roper, Inzer & Stephens, for appellee.

SOMERVILLE, J. The bill of complaint shows that N. H. Snodgrass died intestate and without lineal heirs, leaving real estate, some of which he owned jointly with complainant, who was his brother, and jointly also with other brothers; that the personal property of said decedent is ample for the payment of all his debts; that complainant and his brothers as heirs at law of deceased are entitled to his real estate, subject to the widow's claim of dower; and that Eliza Snodgrass, his widow, has duly qualified as the administratrix of his estate in the probate court, but has taken no steps towards administration. The bill prays for the removal of said administration into the chancery court, for the allotment of the widow's dower in said lands, and for the partition of the lands in specie among the joint owners, who, along with said administratrix both individually and in her representative capacity, are made parties to the proceeding. Mrs. Snodgrass, as administratrix, demurred to the bill on the grounds substantially that she is improperly joined as a party defendant, and that, as a bill to remove the administration into the chancery court, it is without equity because complainant shows no such interest in the administration and distribution of the estate as would entitle him to remove it from the probate court into chancery.

The argument in this behalf is founded on the following postulates:

(1) The widow, in the absence of lineal descendants, as here, is entitled to all the personal estate—is, in fact, the sole distributee.

(2) The personalty being sufficient to pay the debts, the real estate cannot be subjected to the claims of creditors.

(3) The heirs are interested only in the real estate, which is unincumbered by debts, and hence exempt from administration, and unaffected thereby.

(4) Where the administratrix need not and cannot resort to the real estate for the payment of debts, there is no duty to allot dower therein; and, at least in the absence of any attempt on her part to do so, the allotment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of dower is not an incident of the administration, and with it the estate in administration has no concern.

This argument is, we think, very clearly unsound, and opposed to the settled law of this state, as the following statement will show:

1. The personal representative of the husband's estate is by statute (section 3825, Code 1907) authorized to petition the court of probate for the assignment of dower. And this court has recently declared that "the assignment of dower and the allotment of homestead are both steps appropriately incident to the administration of the estates of decedents in the probate court." *Hamby v. Hamby*, 165 Ala. 171, 51 South. 732, 138 Am. St. Rep. 23. In that case the heirs of a decedent filed a bill in equity for the partition of the lands of the estate while administration was pending in the probate court, without praying for the removal of the administration into the court of equity. The ruling was that the heirs were not entitled to have partition pending the paramount right of the widow to quarantine, dower, or homestead; and that, without a removal of the administration from the probate court, that court had exclusive jurisdiction to proceed to a settlement of the estate, and the determination of incidental questions, including the assignment of dower and homestead. Hence the heirs at law, though their interest in the estate be confined to the decedent's real estate alone, have a vital interest in the administration of the estate so long as the widow's dower remains unassigned. It is a mistake to suppose that only distributees of the personalty or heirs to realty which is actually sought to be subjected to the payment of debts have the right to remove the administration into equity. *Hill v. Armistead*, 56 Ala. 118; *Bromberg v. Bates*, 98 Ala. 621, 626, 13 South. 557.

2. Under our statutes and decisions the administrator of a decedent's estate is invested with important powers with respect to the real property of his intestate. He "may claim and take possession, let to rent, or, in case of lands in the hands of a tenant, may give notice and claim rent past due, or to accrue, and may obtain an order to sell, when a statutory ground exists, and thus confer on the purchaser the right to the possession to the exclusion of the heir at law, all for the purposes of administration; (that) to these ends he may successfully prosecute an action of ejectment against an intruder, and may likewise prosecute or defend successfully an action for the possession against the heir at law himself; (that) a possession and control of the realty thus taken by the personal representative destroys or suspends the heir's right to the possession, and the rights of action which at common law descended with the land to him, as the possession may terminate in a sale and divestiture

of the title, or with a temporary use or letting to rent." *Calhoun v. Fletcher*, 63 Ala. 574, 580; *Griffith v. Rudisill*, 141 Ala. 200, 37 South. 83. It is true that these prerogatives exist only for the benefit of creditors, and should be exercised only in contemplation of an insufficiency of personal assets to satisfy their claims. *Clark v. Knox*, 70 Ala. 607, 622, 45 Am. Rep. 93. Nevertheless, the heirs at law cannot prevent their exercise, and, except as to an attempt to sell, must at least for a time yield to the personal representative when he elects to assert them. *Landford v. Dunklin*, 71 Ala. 594, 605.

These considerations alone show such an interest as would authorize an heir at law to procure the removal of the administration from the probate into the chancery court.

It results that the demurrer to the bill was without merit, and was properly overruled.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

CHANDLER v. KYLE et al.

(Supreme Court of Alabama. Jan. 30, 1912.)

1. MARSHALING ASSETS AND SECURITIES (§ 1*) —RIGHT.

The right to marshal securities, being a pure equity, is never applied to work injustice, and is confined to cases where two or more persons are creditors of the same debtor, and have successive demands upon the same property.

[Ed. Note.—For other cases, see *Marshaling Assets and Securities*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. MARSHALING ASSETS AND SECURITIES (§ 2*) —RIGHT TO EXONERATION.

Where one of two joint debtors is equitably entitled to have the whole debt discharged by the other to his own exoneration, his equity may be enforced by, and for the benefit of, his creditors.

[Ed. Note.—For other cases, see *Marshaling Assets and Securities*, Cent. Dig. § 2; Dec. Dig. § 2.*]

3. PRINCIPAL AND SURETY (§ 15*)—EXISTENCE OF RELATIONSHIP.

Where a firm executed a mortgage on property belonging to the firm and on the individual property of one of the partners to secure a firm debt, the partner owning the individual property was not a surety as to the other partner, but a joint principal, though the firm gave such individual owner a certificate that the debt secured by the mortgage was a firm debt, and that the individual property was merely used as collateral, and that the firm would protect him from loss.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 34; Dec. Dig. § 15.*]

Appeal from City Court of Gadsden; John H. Disque, Judge.

Suit by William Chandler against T. S. Kyle and others. From a decree sustaining demurrers to the bill, complainant appeals. Affirmed.

George D. Motley, for appellant. O. R. Hood, for appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

SOMERVILLE, J. The bill was filed by a junior mortgagee against a senior mortgagee for the purpose of marshaling securities, and a temporary injunction was issued forbidding the respondent from proceeding with the foreclosure of his mortgage as to the mortgagor's homestead, which was a part of the security in each of the mortgages. The main prayer of the bill, is that the respondent be required to first sell a certain livery stable lot, a part of his security and not included in complainant's mortgage, before resorting to the property common to both mortgages.

Demurrers to the bill on various grounds filed by the respondent Kyle, and also a motion to dissolve the injunction for want of equity in the bill, were sustained, and the appeal is from this decree.

The material facts are as follows: J. M. Sullivan and L. W. Bramlett were engaged in the livery business under the firm name of Sullivan & Bramlett, and this firm, being indebted in the sum of \$7,000 and interest, secured by a mortgage on their livery stable lot and some individual property of Bramlett's borrowed \$7,500 from Amos E. Goodhue for the purpose of paying off said firm debt, and the money was so applied. To secure the payment of this loan, J. M. Sullivan and wife, and L. W. Bramlett and wife, executed a joint note and mortgage to the lender. This mortgage included the said livery stable lot and also the homestead lot of Bramlett, and contained the following recital: "The note mentioned herein and this mortgage are given to secure a loan of money made by the said Amos E. Goodhue to the said J. M. Sullivan and L. W. Bramlett. The livery stable lot described above is owned jointly by the said J. M. Sullivan and L. W. Bramlett, and the other property is owned individually by the said L. W. Bramlett, but it is intended that all the property herein conveyed shall secure the whole indebtedness." At the time of giving the mortgage to secure the original debt of \$7,000 which was signed by L. W. Bramlett, a certificate was given to said Bramlett by the firm of Sullivan & Bramlett that the debt was a firm debt; that the individual property of Bramlett was merely used as collateral security; and that the said firm would protect him from all loss by reason of thus using his property. The bill also alleges that Bramlett is insolvent and unable to pay complainant's debt; that the other property in complainant's mortgage, a boiler and engine, is insufficient to pay said debt; and that the livery stable lot is sufficient to pay respondent's debt in full without resorting to the Bramlett homestead, the allegation being, on information and belief, that said stable is worth \$12,000. T. S. Kyle, the respondent, became the owner of the Goodhue mortgage by assignment, and was proceeding to sell the Bramlett homestead thereunder when this bill was filed on July 1, 1910. J.

M. Sullivan is joined as a codefendant to the bill, but L. W. Bramlett, the common debtor, is not made a party.

[1] The right to marshal securities is a pure equity, the nature and extent of which has been clearly defined by this court. It is never applied so as to work injustice or inequality, and is confined to cases where two or more persons are creditors of the same debtor, and have successive demands upon the same property, the one prior in right having other securities. *Robinson v. Lehman*, 72 Ala. 401, 404. In the case cited, directly pertinent to the facts of this case, the court approved the following statement of the law: "We have gone this length: If A. has a right to go upon two funds, and B. upon one, having both the same debtor, and the funds are the property of the same person, A. shall take payment from that fund to which he can resort exclusively, so that both may be paid. But it was never said that, if I have a demand against A. and B., that a creditor of B. shall compel me to go against A., without more. If I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded in some equity, giving B., for his own sake, as if he were surety, etc., a right to compel me to seek payment of A. It must be established that it is just and equitable that A. ought to pay in the first instance, or there is no equity to compel a man to go against A., who has resort to both funds." Per Lord Eldon, in *Ex parte Kendal*, 17 Vesey, 520. A full discussion of the law of marshaling will be found in the note to *Aldrich v. Cooper*, 2 Wh. & Tud. Leading Cases in Equity (4th Am. Ed.) 228-238, and a statement of this principle on pages 273-277, where the authorities are cited.

This rule is not denied by appellant, but his theory seems to be that on the facts of this case his debtor, Bramlett, is entitled to have J. M. Sullivan, or the firm of Sullivan & Bramlett, pay off the Kyle debt; and that through Bramlett, or by reason of his relation to the debt, appellant has acquired the asserted right to marshal the securities.

[2] Where one of two joint debtors is equitably entitled to demand that the whole debt shall be discharged by the other to the exoneration of himself, the equity may be enforced by and for the benefit of his separate creditors. In such case their equity is precisely that of the debtor, and is worked out through it alone. *Lloyd v. Galbraith*, 32 Pa. 108; *Gearhart v. Jordan*, 11 Pa. 325; *Neff v. Miller*, 8 Pa. 347; *Ex Parte Kendal*, supra.

[3] A year or more before the filing of the instant suit L. W. Bramlett filed his bill against Kyle to enjoin the very foreclosure proceeding here dealt with, and to compel Kyle to proceed against the joint property of Sullivan & Bramlett, for the exoneration of Bramlett's homestead. On appeal to this

court it was held, on the identical facts here presented, that Bramlett was not as to Sullivan a surety merely, but a joint principal; the result not being influenced by the indemnity agreement from Bramlett & Sullivan to Bramlett on the occasion of creating the first indebtedness of \$7,000. We need not here repeat the reasoning upon which that conclusion was founded. Suffice it to say that that decision is decisive of the question here, and defeats the claim of Bramlett's suretyship. *Bramlett v. Kyle et al.*, 168 Ala. 325, 52 South. 926. And with the claim of suretyship must fall also the attendant equities of subrogation, marshaling, and exoneration.

It results that the bill is without equity, and complainant is not entitled to any relief against the respondent with respect to the matters shown. The decree of the chancellor is therefore affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

COOPER et al. v. SLAUGHTER.

(Supreme Court of Alabama. Jan. 18, 1912.)

1. PRINCIPAL AND AGENT (§ 189*)—TRESPASS—COMPLAINT—SUFFICIENCY.

Allegations that defendants committed trespass through their agents, servants, or employees are sufficient under counts, either for common-law trespass, or for the statutory penalty for cutting trees, since what one does by another he does himself.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 713; Dec. Dig. § 189.*]

2. PLEADING (§ 205*)—DEMURRER—GENERAL DEMURRER—SUFFICIENCY.

A complaint alleged in one count a common-law cause of action for trespass and in another count a statutory cause of action for a penalty against the defendants for causing K. and A. to cut trees on plaintiff's property. The defendants demurred, on the grounds that these counts did not allege any facts to show defendants' liability for any trespass by K. or A. *Held*, that the demurrer was general, and could not be considered.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 491-510; Dec. Dig. § 205.*]

3. TRIAL (§ 81*)—RECEPTION OF EVIDENCE—CONDITIONAL OBJECTION—SUFFICIENCY.

When a party objects to a question, unless other facts are shown, this is a conditional objection, and it is not error to overrule it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 193; Dec. Dig. § 81.*]

4. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTIONS—DISCRETION OF COURT.

The permission of leading questions in the examination of witnesses is within the sound discretion of the trial court.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 795; Dec. Dig. § 240.*]

5. TRIAL (§ 82*)—RECEPTION OF EVIDENCE—REBUTTAL—DISCRETION OF COURT.

The acceptance or rejection of evidence not strictly in rebuttal is within the sound discretion of the trial court.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 148-150; Dec. Dig. § 82.*]

6. TRIAL (§ 83*)—RECEPTION OF EVIDENCE—OBJECTIONS—STATEMENT OF GROUNDS.

The statement of one or more grounds of objection to the admission of evidence is a waiver of all other grounds not stated.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 193-210; Dec. Dig. § 83.*]

7. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Overruling a valid objection to a question not answered by witness, or answered favorably to the party objecting, is not prejudicial error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4158, 4159; Dec. Dig. § 1048.*]

8. BOUNDARIES (§ 46*)—AGREEMENTS—CONSIDERATION—MUTUALITY.

In an action for trespass between adjoining landowners, an agreement between defendant and S., as agent for plaintiff, signed by defendant and "S., Agent," by which the parties agreed that each should employ a surveyor, who should jointly locate the boundary line, and that they should abide by the line so established, was introduced in evidence, over defendants' objection that it was not shown to be binding on plaintiff, and hence was not binding on defendants, and that it was without consideration. Plaintiff had testified to the authority of her agent, and that she had ratified this agreement. *Held* no error, since plaintiff's testimony established that the agreement was binding on her, and the mutual promises constituted a sufficient consideration.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 46.*]

9. BOUNDARIES (§ 46*)—AGREEMENTS—SUBMISSION—NECESSITY OF WRITING.

The common-law submission to arbitration of a disputed boundary need not be in writing, and may be made in writing by an agent having only parol authority.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 215; Dec. Dig. § 46.*]

10. ADVERSE POSSESSION (§ 85*)—CHARACTER OF POSSESSION—EVIDENCE—AGREEMENT BETWEEN PARTIES.

The submission to arbitration of a boundary line is competent evidence to show the character of the possession of the disputed strip, although no certificate of the award of the arbitrators has been made, and when executed by an actual survey is also competent, as bearing on the location of the true boundary.

[Ed. Note.—For other cases, see *Adverse Possession*, Dec. Dig. § 85.*]

11. APPEAL AND ERROR (§ 204*)—REVIEW—NECESSITY OF OBJECTION AND EXCEPTION.

An objection to the admission in evidence of a paper, on the ground that it has not been identified, cannot be considered on appeal, where it was not taken in the court below.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.*]

12. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR.

In an action involving a boundary dispute, a map, purporting to have been made by two surveyors, chosen by the respective parties to establish the boundary line, was received in evidence, over objection that it was not made under an agreement which was binding on the party objecting. An apparently binding agreement was in evidence. One of the surveyors had already testified. *Held* that, although the

map added nothing to the surveyor's testimony, its admission was at most harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1060.*]

13. BOUNDARIES (§ 36*)—EVIDENCE—MAPS.

The objection to such evidence was not good, in view of the apparently binding agreement already in evidence; and hence was properly overruled.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 166; Dec. Dig. § 36.*]

14. EVIDENCE (§ 471*)—OPINIONS—CONCLUSIONS OR FACTS—POSSESSION.

It is not error to overrule an objection to a question asked a witness as to who was in actual possession of certain land, since possession is a fact to which a witness may testify.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

15. BOUNDARIES (§ 35*)—EVIDENCE—ACTS OF POSSESSION AND OWNERSHIP.

In an action involving a disputed boundary, it was not error to permit a party to show an instance in which her agent objected to the presence on the disputed strip of a person who had purchased from the opposite party, since it bore on the question of possession and control.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 35.*]

16. EVIDENCE (§ 274*)—DECLARATIONS AS TO BOUNDARIES—CHARACTER OF POSSESSION.

In an action for trespass involving the location of a boundary line, cross-examination of a defendant as to acts and declarations of a codefendant concerning the location of the boundary, and cross-examination of defendants' witnesses relative to the same matters, was proper, as bearing on the character of the codefendant's possession.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1121-1134; Dec. Dig. § 274.* Boundaries, Cent. Dig. § 156.]

17. BOUNDARIES (§ 35*)—EVIDENCE—AGREEMENTS.

In an action for trespass involving a disputed boundary line, where there was evidence of an agreement apparently binding the parties to appoint surveyors and abide by their survey, it was not error to charge that, if the jury believed that the defendant made an agreement with plaintiff to have the line ascertained by a survey, the jury might consider the agreement, in connection with the other evidence, to determine whether defendants' possession of the disputed strip had been adverse.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 163, 164; Dec. Dig. § 35.*]

18. BOUNDARIES (§ 41*)—AGREEMENT OF PARTIES — INSTRUCTION — "DEEMED" — "ACQUIESCE."

A charge that, if the jury believed that a boundary line, the location of which was involved in an action, was in dispute, and that the adjoining owners caused it to be established and acquiesced in the line as established, the plaintiff would be deemed the owner of all lands up to such line was a correct statement of the law; the word "deemed" being equivalent to "presumed," and the word "acquiesce" not necessarily meaning only momentary acquiescence.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 205-207; Dec. Dig. § 41.*]

For other definitions, see Words and Phrases, vol. 1, pp. 110-112; vol. 2, pp. 1924-1926.]

19. ADVERSE POSSESSION (§ 65*)—HOSTILE POSSESSION—DISPUTED BOUNDARY.

Where two adjoining owners claim to a certain line, believing it to be the true boundary line, and intending to claim only to the true line, and it afterwards develops that the line to which they claim is not the true line, their holding is not adverse.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 365-370; Dec. Dig. § 65.*]

20. ADVERSE POSSESSION (§ 116*)—DISPUTED BOUNDARIES—ACTUAL POSSESSION—INSTRUCTIONS.

In an action for trespass involving a disputed boundary line, defendants' answer, in separate pleas, alleged that they were the owners, and were in adverse possession. It was admitted by the parties in open court that the defendants were the owners of section 45, and that the plaintiff was the owner of section 46. Held, that an instruction that if the disputed strip was in section 46 the jury could not find the defendants to have been in adverse possession, unless such possession was actual, was proper, since the plea of ownership to section 46 was refuted by the admission of defendants' ownership of section 45, and it was incumbent upon defendants to prove their pleas of adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 66; Dec. Dig. § 116.*]

21. APPEAL AND ERROR (§ 1066*)—INSTRUCTIONS—HARMLESS ERROR—MATTERS NOT IN ISSUE.

In an action wherein the complaint alleged both a common-law trespass and a statutory cause of action for a penalty for trespass by cutting trees on plaintiff's land, and in which the parties, by admission in open court, limited the issues to the question of title, a charge, relating only to the question of possession, if erroneous, was harmless, especially where the jury, by their verdict, disregarded the common-law cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

22. APPEAL AND ERROR (§ 216*)—INSTRUCTIONS—OBJECTION BELOW—SUFFICIENCY.

A charge which is not erroneous, if construed in a certain way, is not reversible error, although it would be erroneous if construed in another way, where the party complaining of the instruction did not ask for an explanatory charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 628, 630-641; Dec. Dig. § 216.*]

Appeal from Circuit Court, Washington County; Samuel B. Browne, Judge.

Action by Mary E. Slaughter against J. M. Cooper and another in trespass and for the statutory penalty for cutting trees. Judgment for plaintiff, and defendants appeal. Affirmed.

The pleadings are sufficiently noted in the opinion. The following are the assignments of error referred to in the opinion: (5) In overruling defendants' objection to the following question, put to the witness Mary E. Slaughter, in the management of certain lands in this county. (6) "Did you send Mr. Slaughter here to Mobile, * * * and to take what steps as was necessary to adjust that dispute?" (7) To Bill King: "Did

you ever cut any pine trees?" (8) To the same witness: "As a matter of fact, did not Mr. Slaughter tell you that the line was a great way up?" (9) Set out in opinion. (10) The map. (12) Question to E. M. Slaughter: "Did you ever take any steps to keep trespassers off this disputed zone?" (15) To witness Pelham: "You are the owner of some adjacent land south of section 45, land that adjoins section 45 on the south?" (16) To the witness Coates: "Did you ever hear of Capt. Cooper claiming some land on the south end of section 45, in the town of St. Stephens?" (18) To Mrs. Cooper: "Have you ever claimed that the south boundary line of section 45, as you now claim it, was incorrect?" (19) To the same witness: "Did you, or Capt. Cooper, so far as you know, go to Mobile for the purpose of employing a lawyer to reclaim the property that was given to you on the south part of section 45?" (20) To the witness Turner: "When was that, Mr. Turner; about when?" (21) Same witness: "Did Mrs. Cooper know of your employment?" (22) To the same witness: "Mr. Turner, did you ever hear anything of an old line Mr. Cooper claims as having been recognized for a number of years?" (24) Same witness: "Now, don't you remember exactly when it was; that is, to the best of your judgment, how long it has been?" (25) To the witness Williams: "Did Capt. Cooper ever tell you that you must pay him rent for the place on which you are living?"

The following charges were given for the plaintiff: (1) "If the jury believe from the evidence that the defendant J. M. Cooper made an agreement with the plaintiff to have the line dividing the northern portion of section 45 and the southern portion of section 46, township 7, range 1 west, ascertained by a survey, the jury may look to such an agreement, in connection with all the other evidence, in determining whether the possession of the defendants has been adverse or not." (3) "The court charges the jury that if two adjacent landowners claim up to a certain line, believing it to be the true line, and intending to claim only to the true line, wherever the true line may be, and it afterwards develops that the line to which they claim is not the true line, then their holding is not adverse." (2) "The court charges the jury that if they believe from the evidence that the boundary line in question was in dispute, and that the adjoining owners caused said line to be established, and that they acquiesced in said line, then the plaintiff would be deemed to be the owner of all lands north of the line so established, lying in section 46, township 7, range 1 west." (4) "If you believe from the evidence that the strip of land in question is in section 46, township 7, range 1 west, Washington county, Ala., then you cannot find that the defendants, or either of them, was in the adverse possession, unless you are reasonably satisfied from the evi-

dence that such possession was actual." (5) "The court charges the jury that, before you can find for the defendant under pleas numbered 2, 3, and 5, you must be reasonably satisfied from the evidence that the defendants were in possession of all of section 46, township 7, range 1 west, in Washington county, Ala."

Fitts & Leigh and Gordon & Eddington, for appellants. Turner, Wilson & Tucker, for appellee.

SOMERVILLE, J. The complaint is in six counts, of which the first, third, and fifth are framed under the statute to recover the penalty for willfully and knowingly cutting five pine trees, the property of plaintiff on section 46, township 7 N., range 1 W., Washington county, Ala. The first count charges the cutting to the defendants; the second charges it to the defendants through their agents, servants, or employés; and the fifth charges that defendants caused one Bill King and one Lev Anderson to do the cutting. The second, fourth, and sixth counts are in common-law trespass, with the same variations noted, respectively, as to the first, third, and fifth counts.

[1, 2] Defendants demurred to the third and fourth counts collectively, and also to the fifth and sixth counts collectively, on the grounds (1) that they "do not allege that said parties were acting within the scope of their authority;" and (2) that they "do not allege any facts to show defendants liable for any trespass by Bill King or Lev Anderson." The demurrers were overruled, and in this there was no error. Had the third and fourth counts averred simply that the agents or servants of defendants willfully and knowingly cut the trees, or trespassed on the land, the first ground of the demurrer would doubtless have been well taken. But the averments are that *defendants* did those acts through their agents or servants. This was sufficient; for, "Qui facit per alium, facit per se." For the same reason, this ground of demurrer is still more patently bad as applied to the fifth and sixth counts. The second ground is general, and could not, for that reason, be considered.

With respect to those assignments of error based on the rulings of the trial court on the evidence, the following principles are settled:

[3] (1) When a party objects to a question, *unless* other facts are shown, this is but a conditional objection, and for overruling it the trial court cannot be put in error.

[4, 5] (2) The permission of leading questions, and the acceptance or rejection of evidence not strictly in rebuttal, are within the sound discretion of the trial court.

[6] (3) The statement of one or more grounds of objection is a waiver of all other grounds not stated.

[7] (4) Overruling a valid objection to a question not responded to by the witness, or

else answered favorably to the objector, is not prejudicial error.

One or another of these principles will condemn the fifth, sixth, seventh, eighth, ninth, tenth, twelfth, fifteenth, sixteenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-fourth, and twenty-fifth assignments of error.

[8] The ninth assignment relates to the admission in evidence of a written agreement, purporting to be between J. M. Cooper, one of the defendants, and E. M. Slaughter, "as agent for Mrs. M. E. Slaughter," the plaintiff, and purporting to be signed by "J. M. Cooper" and "E. M. Slaughter, Agent." The substance of the agreement was that, to settle an existing dispute between them as to the boundary between sections 45 and 46, and to establish a correct line, each party should employ a surveyor who should jointly locate said line, and that they should abide by the line thus established, and that all disputes as to former lines should be thereby settled. The objections to its introduction were, in substance, that it was not shown to be binding on the plaintiff; and hence was not binding on the defendants, and was without any expressed considerations. The answer to these objections is (1) that the plaintiff had already testified to the full authority of her agent, E. M. Slaughter, to represent her in the adjustment of the dispute, and that she had ratified this agreement; and (2) the mutual promise to abide by the result was a sufficient consideration for the agreement.

[9, 10] The agreement was evidently designed as a common-law submission for arbitration and award; and, the issue being merely a disputed boundary, no writing was necessary. *Shaw v. State*, 125 Ala. 80, 28 South. 390. Hence, though the agreement was in fact in writing, it could be made, on behalf of the principals, by their authorized agents without any written authority. Had this agreement been fully executed by the certification by the arbitrators of the line established by them, it seems that this would have been conclusive of the whole dispute, and would have settled the issues of this case in favor of the plaintiff, operating by way of estoppel against the defendants' contentions. *Shaw v. State*, 125 Ala. 80, 28 South. 390; *Moore v. Helms*, 74 Ala. 368; *Burrus v. Meadors*, 90 Ala. 140, 7 South. 469. A copy of a paper, purporting to be the certificate of the arbitrators as to the line established by them, is incorporated in the transcript, and marked "Exhibit C." But it nowhere appears that the certificate was introduced in evidence; and hence we cannot consider it here for any purpose. Nevertheless the agreement was in any case competent as an admission by Cooper to show the character of Cooper's claim to the disputed strip, and whether his asserted possession was or had been with the intention

of claiming it absolutely, regardless of the true boundary, or only in case it lay within his true boundary, and was a part of his section 45. For this was one of the decisive issues in the case as framed by the pleadings. It was also, when executed by an actual survey and location, as was the case here, competent to show the location of the true boundary, and might be strongly persuasive, if not conclusive, upon that issue. And, we may add, as long as it was acquiesced in, it would be presumed to be the true boundary.

[11] It is now argued that the paper in question was not identified by any witness. This objection, if valid, was not made in the court below, and cannot be here considered.

[12, 13] The tenth assignment relates to a map of section 45 and its environments, purporting to be made by the two surveyors chosen to establish the disputed line. It may, perhaps, be conceded that this map threw no light on the issues before the jury, or at least added nothing of value to the testimony of Nichol, one of the surveyors. If so, its admission was harmless to the defendants. However, the only objection made to its introduction was that "it was made under an agreement which is not binding on the defendant." The objection was not good, in view of the fact that an apparently binding agreement was actually in evidence; and other grounds of objection, if any there were, were waived.

[14] Possession is a collective fact to which a witness may testify; hence there was no error in overruling defendants' objection to the question to E. M. Slaughter, "Who was in actual possession of section 46," etc.? *Woodstock v. Roberts*, 87 Ala. 436, 6 South. 349; *Carl v. State*, 125 Ala. 89, 28 South. 509. Moreover, the witness had already stated that the plaintiff was in possession, and this question was only cumulative.

[15] Plaintiff was allowed to show a particular instance in which her agent objected to the presence on the disputed strip of an alleged trespasser who had purchased from Cooper, followed by an agreement permitting him to remain. Defendants' general objection to the question was overruled. As an act of possession and control, the facts stated were relevant and competent under the issues as framed. Defendants' motion to exclude the evidence, on the ground that plaintiff had not made out a prima facie case, was properly overruled.

[16] The acts and declarations of J. M. Cooper, one of the defendants, with respect to the boundary between sections 45 and 46 and its proper location, were clearly relevant, as bearing upon the character of his possession of the disputed strip, and the intent with which it was held by him. Hence plaintiff was properly allowed, on cross-examination, to ask Cooper's wife, his code-

fendant, if Cooper had hired a surveyor "to run out his holdings." And also to ask defendants' witness Turner, who had surveyed section 45 at the instance of J. M. Cooper, as to the latter's statements made and instructions given to him at the time in regard to the running of the lines. These considerations dispose of the eleventh, thirteenth, fourteenth, seventeenth, and twenty-third assignments.

Besides the general issue, the defendants pleaded specifically (2) "that they are the owners of the property described in the complaint;" (3) "that they have been in open, notorious, peaceable, adverse, and hostile possession of said property for a period of over ten years;" (4) "that there has been no timber cut, as described in said complaint, beyond a boundary line acquiesced in by plaintiff and defendants as the true dividing line for a period of many years;" (5) "that they have been in adverse possession of the property described in the complaint, under color of title, for a period of over 10 years." The bill of exceptions contains this recital: "It is admitted in open court that, for the purpose of this trial, the plaintiff admits that the defendant is the owner of section 45, township 7, range 1 W.; and the defendant admits that the plaintiff is the owner of section 46, township 7, range 1 W.; that section 46 lies north of section 45; that the land in dispute, or the line in dispute, is the line dividing and is the south boundary line of 46 and north boundary of 45; the plaintiff contending that the timber in controversy was cut on 46, and the defendant contending that it was cut on 45."

This admission being conclusive as to the facts recited, the only remaining issue for the jury to determine, under counts 1, 3, and 5 for statutory damages, was whether the trees in question were willfully and knowingly cut north of the line that properly divides sections 45 and 46. If cut to the north plaintiff was entitled to recover, and if cut to the south the defendants were entitled to a verdict, on the undisputed evidence. If it conceded by appellants that the verdict of the jury was for statutory damages only, and not for common-law trespass. Indeed, the fact is sufficiently evident, since the verdict was for \$50 (for five trees, at \$10 each), and only \$10 was claimed for the trespass.

Exception is taken to the giving of five written charges at the instance of plaintiff, which, for convenience, we number consecutively.

[17] Charge 1 asserts a correct proposition of law, and giving it was not erroneous on any theory of the case. Walker v. Wyman, 157 Ala. 478, 47 South. 1011, and cases cited.

[18] Charge 2 asserts a correct proposition of law; for, if a disputed boundary be established by the agreement of the parties, in

which they acquiesce, then each is presumed *prima facie* to own up to the line on his side. "Deemed," as used in this charge, is clearly the equivalent of "presumed"; nor does "acquiesce" mean necessarily *only for a moment*. If these terms had any tendency to mislead in these respects, an explanatory charge should have been requested. Moreover, the charge limits the presumption of ownership to land lying in section 46—a fact conclusively admitted by the admission recited above.

[19] Charge 3 asserts a correct proposition of law; there being no evidence that defendants had any color of title to any part of section 46.

[20] Charge 4 is not erroneous, for the following reasons: (1) The plea of ownership set up in plea to the whole of section 46 described in the complaint is conclusively refuted by the admission referred to above. (2) If this admission leaves any vitality in pleas 3 and 5, and we think it does not as to the statutory counts, it was nevertheless incumbent upon defendants to prove the pleas as framed, and this, on the undisputed evidence, they did not even pretend to do.

[21, 22] Charge 5, whether right or wrong, as it related only to possession, cannot furnish a predicate for reversible error; for that issue was, by the formal admission of defendants, eliminated from consideration under the statutory counts, and by the verdict of the jury the trespass counts were disregarded. However, we think the charge is a correct statement of the law if by "disputed possession" is meant—as may well be the case—a visibly contested possession. And, although the words *may* mean only a *verbally* disputed possession, such a meaning will not be imputed for the purpose of putting the trial court in error. Defendants should have asked for an explanatory charge, if they feared the misleading tendency of the language used.

We find no prejudicial error in the record, and the judgment is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

STATE v. IDE COTTON MILLS.

(Supreme Court of Alabama. Jan. 18, 1912.)

1. TAXATION (§§ 452, 495*)—ASSESSMENT—APPEAL—REPEAL OF STATUTE—RIGHT OF STATE.

Code 1907, § 2252, authorizing tax commissioners and taxpayers to appeal to the circuit court from an order of a county commissioners' court, was repealed by Act March 31, 1911 (Acts 1911, pp. 159-191), authorizing an appeal by taxpayers; and hence the state cannot appeal from an order of a county commissioners' court, fixing the value of property for taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 806, 807, 889; Dec. Dig. §§ 452, 495.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 57 SO.—31

2. TAXATION (§ 452*)—ASSESSMENT—APPEAL—LEGISLATIVE POWER.

The Legislature can authorize an appeal by taxpayers from assessment and deny the right to the state.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 806-807; Dec. Dig. § 452.*]

Appeal from Circuit Court, Calhoun County; Hugh D. Merrill, Judge.

Tax assessment proceeding by the State of Alabama against the Ide Cotton Mills. From a judgment of the circuit court, dismissing the State's appeal from a decision of the commissioners' court, the State appeals. Affirmed.

R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State. Willett & Willett, for appellee.

MAYFIELD, J. [1] The sole question presented for decision by this appeal is whether or not the state, under the existing statutes, can take or prosecute an appeal from an order or decree of the county commissioners' court, fixing the value of property for taxation.

The county tax commissioner for Calhoun county, at the July term of the commissioners' court for that county, reported to the court that the taxes of the Ide Cotton Mills were assessed on \$260,000 valuation, and recommended a raise of the assessed value to the amount of \$411,000. The taxpayer, being cited, appeared, and the hearing was continued by the court until September 4, 1911, when a hearing was had and a "judgment rendered, fixing the value at \$260,000"; the court thus declining to make any raise in the assessment.

On the same date (September 4, 1911), the state of Alabama applied for and obtained an appeal to the circuit court of Calhoun county. This appeal to the circuit court came on for hearing on the 4th day of November, 1911, and the taxpayer, the appellee, moved to dismiss the appeal, which motion was granted and the appeal dismissed by the circuit court and from that judgment of dismissal the state takes this appeal.

Under the statutes as they appear in the Code of 1907, there is no doubt that both the state and the taxpayer are given the right of appeal from an assessment by the court of county commissioners to the circuit court, or a court of like jurisdiction. The statutes expressly so provide. Section 2252 of the Code reads as follows: "2252. Appeals.—Tax commissioners and tax-payers may appeal within thirty days to the circuit court, or court of like jurisdiction, from the order of the board." This section, however, is a mere codification of a part of an act amending the general revenue bill of 1903. This section, as thus written, was construed to this effect in the case of *State v. Bley*, 162 Ala. 239, 50 South. 263.

It is a matter of common knowledge that a new revenue bill, and more or less amendments thereto, are passed at nearly every session of the Legislature. As has been more than once remarked by this court, it is to be regretted that it seems impossible to maintain any permanency in the revenue and tax laws of the state. When they have been codified, they have in nearly every instance been materially changed before the Code could be printed.

The last general revision of the revenue laws was by act of March 31, 1911 (Acts 1911, pp. 159-191). A large part of this act dealt with the same subject of taxation and assessments which was theretofore regulated by article 10 of chapter 45 of the Code, which particular article relates to the "Tax Commissioner," which is under the chapter "Taxation." Section 2252 of the Code, above quoted, was a part of that article and chapter so revised by the general revenue bill of 1911. The part of the last act, relating to appeals in cases like the one under consideration, reads as follows: "36C. From any final assessment of tangible or intangible property for taxes, fixed by any officers, board or tribunal charged with the duty of assessing tangible or intangible property for taxes, or with the duty of revising or reviewing assessments of property for taxes, the owner in case the property lies entirely within one county, may appeal to the circuit court or any court of like jurisdiction in which the property lies, and in case the property lies in more than one county, the owner may appeal to the circuit court or any other court of like jurisdiction in any county in which any of the property lies. All such appeals may be taken within thirty days after the date of the assessment or after the date of the final decision of the officer, board or tribunal. * * * From the judgment of the trial court, either party may appeal to the Supreme Court within thirty days from the rendition of the judgment."

It thus appears that section 2252 of the Code was repealed or substituted by the above-quoted provision. It also appears that no appeal is now authorized, by the state or by its agencies, from orders and judgments of courts of county commissioners as to assessments; but that an appeal from such orders or judgments is allowed to the taxpayer. It further appears, however, that an appeal is allowed to both parties to the Supreme Court from judgments or orders in the circuit courts in such tax proceedings. It follows that the state's appeal to this court was authorized, but that its appeal to the circuit court was not authorized, and that the circuit court properly dismissed it, on motion.

[2] The right of appeal in such proceedings is a right conferred by statute, and must be exercised in the mode and within the time

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

prescribed by the statute. It is perfectly competent for the Legislature to authorize an appeal by the taxpayer and to deny the right to the state. The right of appeal is denied to the state, but allowed to the citizen, in most all criminal proceedings and in some quasi criminal proceedings; and we know of no reason which will prevent the Legislature from allowing it to one party and denying it to another, in a proceeding like this.

The original act of 1903 (Acts 1903, § 1, p. 295), out of which section 2252 of the Code was made, authorized an appeal or review from the assessment by the state, but not by the taxpayer, and it was, on account of this discrimination and of other objections, assailed by a taxpayer, Bley. This court in that case (State v. Bley, 162 Ala. 239, 50 South. 263) held that the statute was valid, notwithstanding it allowed an appeal to the state, or to its agencies, but denied such appeal to the taxpayer.

The effect of the codification was to authorize the appeal by both parties; but the subsequent Legislature of 1911 saw fit to change it by allowing the taxpayer to appeal from the orders or judgments in the commissioners' courts, and denying, by failure to provide, an appeal therefrom by the state. The wisdom or the policy of these various changes, allowing the right of appeal to one party and denying it to the other, is a question for the consideration of the Legislature, and not one for the courts.

This change of the law having been wrought by a change of the revenue laws of the state, and by the passage of the general revenue bill, it is therefore relieved of some questions which might otherwise arise as to the sufficiency of the title of the bill to authorize this particular provision. This for the reason that "general revenue bills" are excepted from the operation of section 45 of the Constitution, touching the requirements as to the titles of bills.

It follows that the trial court properly dismissed the appeal, and its action in so doing is hereby affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

ELAM et al. v. A. P. BREWER LUMBER CO. et al.

(Supreme Court of Alabama. Jan. 11, 1912.)

1. EVIDENCE (§ 314*)—HEARSAY EVIDENCE.

Where, in a suit by a creditor of a husband to set aside, as fraudulent, a deed to his wife of real estate purchased and paid for by him, there was evidence that \$600 was paid to the vendor as a first payment, evidence of the father of the husband and executor of the wife, since deceased, that she gave him \$500 to keep for her, and that he returned the money and loaned her \$100 to make the first payment, was

not objectionable as hearsay, though he was not present when the money was paid to the vendor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1168-1173; Dec. Dig. § 314.*]

2. EVIDENCE (§ 314*)—HEARSAY EVIDENCE.

Evidence as to how the wife earned the money alleged to have been paid to the vendor, and evidence of a third person obtaining a loan for her to make a payment on the land, was not objectionable as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1168-1173; Dec. Dig. § 314.*]

8. EVIDENCE (§ 314*)—HEARSAY EVIDENCE.

The testimony of a witness that he knew the time the wife bought the land was not objectionable as hearsay, but was admissible to fix the date.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1168-1173; Dec. Dig. § 314.*]

4. FRAUDULENT CONVEYANCES (§ 290*)—TRANSACTIONS BETWEEN HUSBAND AND WIFE—EVIDENCE—ADMISSIBILITY.

In a suit by a creditor of a husband to set aside as fraudulent a deed to his wife of real estate purchased and paid for by him, but conveyed to her pursuant to his directions, the testimony of a witness that about the time that the land was bought the wife told him she would like to get a place, and that she had some money to make a payment, was admissible to show that the wife was contemplating purchasing the land at the time it was purchased.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 826, 839; Dec. Dig. § 290.*]

5. FRAUDULENT CONVEYANCES (§ 104*)—TRANSACTIONS BETWEEN HUSBAND AND WIFE.

Where the money paid for land, the legal title to which was taken in the name of the wife, was the money of the husband, and the wife was a mere dummy used to defraud future or existing creditors of the husband, the conveyance at the suit of a creditor of the husband must be set aside.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 337-344; Dec. Dig. § 104.*]

6. FRAUDULENT CONVEYANCES (§ 38*)—NATURE OF TRANSFER.

A creditor may reach funds fraudulently attempted to be placed beyond the reach of creditors and invested in land before it becomes a bona fide homestead.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 54, 55; Dec. Dig. § 38.*]

Simpson, J., dissenting in part.

Appeal from Chancery Court, Bibb County; Thomas H. Smith, Chancellor.

Suit by the A. P. Brewer Lumber Company and another against L. T. Elam and another. From a decree for plaintiffs, defendants appeal. Affirmed.

W. H. Wright and W. W. Quarles, for appellants. Lavender & Thompson, for appellees.

SIMPSON, J. The bill in this case is filed by the appellees to set aside, as fraudulent, a deed made by W. H. Cooper and wife to Nancy J. Elam, who was the wife of L. T. Elam, on the ground that the property in question was bought by said L. T. Elam, paid

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for with his money and the conveyance directed by him to be made to his said wife, for the purpose of hindering, delaying, or defrauding his creditors.

The defense set up is that although L. T. Elam (the husband) negotiated the original transaction for the purchase of the land in 1904 for \$1,800, of which \$600 was paid in cash, at the time of the purchase, and although, at that time, he said nothing to Cooper about his acting for his wife, yet he was purchasing for his wife, made the first payment of \$600 with money belonging to his wife; that all subsequent payments were made by the wife out of her own moneys, and the deed finally made to her, under his instructions. There was no writing at the time of the original purchase. Subsequently Cooper made out a title bond in the name of L. T. Elam, who testifies that he refused to receive the same because not made to his wife. There is a conflict between his testimony and that of another witness as to whether such a conversation took place, but the evidence shows that said title bond was never delivered to him, according to the testimony of respondents, and the vendor, Cooper, says that he delivered it either to L. T. Elam or to said witness. At the time of the second payment, in October, 1905, L. T. Elam instructed the vendor to make the deed to his wife—Nancy J. Elam—and a deed to her was drawn up, signed, and acknowledged on January 4, 1906, but was not delivered until the time of the last payment in March, 1907. The indebtedness to the complainants accrued after the 4th day of January, 1906, but before the final delivery of the deed in 1907, and the evidence shows that in 1904, and until after January 4, 1906, said W. T. Elam was not indebted to any one, except that on the 20th day of July, 1904, said L. T. Elam, as one of the sureties for Simmons Lumber Company, signed a replevy bond, in the case of Simmons Lumber Co. v. A. P. Brewer Lumber Co., one of the complainants in this suit which was afterwards forfeited.

[1-4] A. L. Elam, the father of L. T. Elam, who is also the executor of Nancy J. Elam, who has died since the commencement of this suit, testified that said Nancy J. Elam paid for the property; that she gave him \$500 to keep for her in 1902; that she had \$100 when she was married; that she had at least \$250 realized from cotton raised by her on the place in controversy; that she also sold chickens and eggs; that the cotton was ginned at his gin, and he paid her the money for same; that he loaned her \$100 to make out the \$600 for the first payment; that he borrowed \$600 from George Mitchell, he and Nancy J. Elam signing the note, to make the second payment, and that he subsequently repaid the money to George Mitchell; that he furnished \$200 and Albert Elam \$400 to said Nancy J. Elam to make the third and last payment; that the deed to Nancy J. Elam was delivered to him by Cooper for

her; that at that time J. L. Elam was "on the scout," "a fugitive from justice," on account of certain indictments against him for the illegal sale of whisky; that the last payment, including interest, was paid in latter part of 1906, or early in 1907; that Nancy J. Elam built the house on the place, with money derived from her rents, a few months after the place was bought; that he was not present when any of the payments were actually made, except as to \$215 or \$220 interest which he paid, when the deed was delivered; that at the time this property was bought said L. T. Elam owned also a storehouse, and about 220 acres of other land, with a sawmill on it, and a good deal of personal property; and that L. T. Elam conveyed that property to his wife about the time the deed to the property in question was delivered. George W. Mitchell, a brother-in-law of A. L. Elam, corroborated his statement as to borrowing the money from Mitchell to make payment on the land, and as to the repayment of the money by said A. L. Elam. J. W. Logan testified that, about the time that Nancy J. Elam bought the land in question, she told him she would like to get a place in that locality, and that she had some money to make a payment on it. L. T. Elam testified that his wife bought the land from Cooper; that not a dollar of the purchase money was paid by him; that he made the trade with Cooper for her; that she had some money when he married her; that she had cotton patches every year; that his father furnished to her a little of the money; that she and his father borrowed the money to make the second payment from George Mitchell; that he made the payments to Cooper for his wife, with her money, except the last payment; that he did not owe anything at the time the trade was made in 1904, nor at the time the deed was acknowledged in 1906; that his wife had borrowed \$400 or \$500 after the first payment, which money and also the \$600 they got from George Mitchell was placed to his account at the bank and he checked it out to make the payments, and the same is true as to the money furnished by his father and brother to make the last payment; that he did not have anything to do with the interest payment; that the other land which he conveyed to his wife was subject to a mortgage which was afterwards foreclosed; that his bankrupt proceedings are still pending. W. A. Elam, a brother of L. T. Elam, testified that he knew that Nancy J. Elam had money of her own; that he was present when she delivered \$500 to his father to keep for her, also when his father returned the money to her, and she said she wished to make payment on the land she had bought from Cooper, that he let her have \$400 to make the last payment; that Lem was "on the scout" at that time; that Nancy J. Elam was an industrious, business woman, and Lem was careless and drinking.

No attempt is made to impeach any of the witnesses on the part of the respondents nor to controvert any of the facts testified to by them, except the single fact that the bond for title was made by Mr. Ellison and offered by him to L. T. Elam, the complainants relying upon the general fact that L. T. Elam said nothing about his wife when he made the first negotiation for the purchase of the land, that he was the active agent in making the first and second payments, and that he was engaged in a hazardous business which would suggest a desire to protect himself against creditors, and the fact that the witnesses were parties connected by blood or marriage with L. T. Elam or his said wife. The only objections made to the testimony of A. L. Elam are that it is hearsay, and the witness was not present when the money was actually paid to Cooper. While there may be some hearsay statements in his testimony, yet it is not hearsay that she gave him the \$500 to keep for her, that he returned the money and loaned her \$100 for the purpose of making the first payment at the time when other evidence shows that it was actually paid, nor are the facts as to how she made the money hearsay, nor is the testimony of Mitchell hearsay, as it was a part of the transaction of borrowing the money from him and tends to corroborate the testimony of A. L. Elam.

As to the testimony of J. W. Logan, the motion was to exclude his entire testimony in chief. It certainly was not hearsay that he knew about the time she bought the land, as that is a matter that may always be proved in this way for the purpose of fixing a date, and the conversation which he had with Nancy J. Elam was admissible as a circumstance tending to show that she was contemplating purchasing the land at the time it was purchased. His statement on cross-examination that he does not know who bought the land does not show that he did not know what he testified about, but only that he does not know what is the legal result of the transaction, which is a question of law to be determined by the court.

[5, 6] The majority of the court, consisting of ANDERSON, McCLELLAN, MAYFIELD, SAYRE, and SOMERVILLE, JJ., are of the opinion, as expressed by Justice ANDERSON, that the decree of the chancery court must be affirmed. They think that the reasonable inference to be drawn from the evidence is that the money paid for the land was the husband's, and that the wife was a mere dummy or "man of straw," used for the purpose of deceiving and defrauding the creditors of the husband—future, as well as existing ones. They are also aware of the rule that creditors cannot complain of a disposition by a debtor of exempt property—that is, property not subject to their claims—but do not think that the bill proceeds upon the theory of set-

ting aside a conveyance of exempt property by the debtor, as it seeks to reach funds, or the proceeds of same, fraudulently attempted to be placed beyond the reach of creditors and invested in land before it became a bona fide homestead. Consequently the decree of the court must be affirmed.

The writer expresses his opinion in dissent as follows:

There are certain general principles that are settled, to wit: When a voluntary conveyance is attacked by a creditor existing at the time of the conveyance, no proof of actual fraud is needed, as the deed is void as to existing creditors. When a voluntary conveyance is made it is valid as to subsequent creditors, unless fraud in fact be shown, and the burden is on the complainant to show it, and as the donee has paid no consideration, it is not necessary to connect him with the fraud. *Seals v. Robinson*, 75 Ala. 364, 369, 370; *Allen et al. v. Caldwell, Ward & Co.*, 149 Ala. 293, 297, 298, 42 South. 855. When a conveyance is attacked by creditors who were such at the time of the execution of the conveyance, the burden is upon the vendee to prove that the conveyance was supported by a valid, valuable consideration. *Walton, Whaun & Co. v. Atkinson & Co. et al.*, 84 Ala. 592, 4 South. 681. Transactions between husband and wife are closely scrutinized, and, as to existing creditors, a deed made by a vendor to the wife under instructions by the husband is presumed to have been paid for by the husband, thus placing upon the wife the burden of proving an adequate consideration; yet, as to subsequent creditors, the burden is on the creditor to show either that there was no consideration, or that the deed was made for the purpose of hindering, delaying, or defrauding creditors. *Walton, Whaun & Co. v. Atkinson & Co. et al.*, *supra*; *Bangs, Bard & Co. v. Edwards*, 88 Ala. 382, 6 South. 764; *Watts et al. v. Burgess & Co.*, 181 Ala. 333, 337, 30 South. 868; *Silvey & Co. v. Vernon and Wife*, 153 Ala. 570, 45 South. 68, 127 Am. St. Rep. 69. In a suit to set aside a conveyance as fraudulent against creditors, if the payment of a valuable consideration is shown, the burden is on the complainant to show a fraudulent intent and that it was known to the grantee. *Allen et al. v. Riddle*, 141 Ala. 621, 626, 37 South. 680, and cases cited; *Chandler Bros. v. Higgins*, 156 Ala. 511, 515, 47 South. 284.

Under our statutes, as they have existed since 1886, the earnings of the wife belong to her separate estate, and, if the husband has converted the same, he can convey property to her in payment or reimbursement of the same, just as he could to any other creditor, and lands purchased by her earnings cannot be subjected to the husband's debts, though the conveyance was executed after the accrual of the debts. *Carter v. Worthington & Smith*, 82 Ala. 334, 2 South. 516,

60 Am. Rep. 738. In the case of Bangs, Bard & Co. v. Edwards, supra, a conveyance made by a third party to the wife, at the instance of the husband, was sustained against creditors on the testimony of the husband and wife that she had lent the proceeds of her earnings to her husband until she could purchase a house and lot, and that the husband had paid for the land purchased in merchandise from his store. 88 Ala. 386, 387, 6 South. 764. In the case of Wing v. Roswald, 74 Ala. 346, 349, a conveyance to the wife was sustained against creditors on the testimony of the husband and wife and the wife's father; this court saying: "It is true that we find some contradictions in the details of appellees' evidence as to dates and perhaps amounts; but the essential facts of the case are not shaken to such an extent as to authorize us to stamp them as a sheer fabrication, having their origin in the wicked motive of perjury on the part of the husband, the wife, and the wife's father."

In the present case it cannot make any difference when the deed was actually delivered. The real transaction was when the husband directed the title to be made to his wife. As said in the case of Carter v. Worthington & Smith, supra: "The controlling test would be, Was the consideration paid to the grantors the property of the wife?" 82 Ala. 337, 2 South. 517, 60 Am. Rep. 738. In fact, even if the purchase had been made by the husband and nothing said about the wife, if, in fact, the property was paid for by her funds, not only could the husband have conveyed it to her in payment of the debt, but he could have been forced to do so. Whether the burden of proof was on the one or the other, in the absence of evidence to the contrary, we cannot presume that the testimony of the respondents is a fabrication, and accordingly we hold that under the evidence the property in question was paid for with the money of Nancy J. Elam, and the deed to her was valid. In addition to what has been said, the evidence in this case shows that the land in question was a homestead, and that at the time of its purchase it was worth only \$1,800; and while there is evidence tending to show that, after the said Nancy J. Elam, had placed a house upon it, to wit, when the testimony in this case was taken, the property was worth \$4,000 or \$5,000, yet, if it was a homestead worth only \$1,800 at the time the husband directed the title to be conveyed to his wife, it would not matter who paid the purchase money.

Affirmed.

ANDERSON, McCLELLAN, MAYFIELD, SAYRE, and SOMERVILLE, JJ., concur. SIMPSON, J., dissents. DOWDELL, C. J., not sitting.

BRUE v. McMILLAN.

(Supreme Court of Alabama. Jan. 18, 1912.)

1. EXCEPTIONS, BILL OF (§ 32*)—SIGNING—AUTHORITY OF JUDGE—PLACE.

Since, under Act July 6, 1907 (Acts 1907, p. 562), the judge of the law and equity court of Mobile has and exercises all the jurisdiction and powers which are exercised by the judges of the circuit court, and under Code 1907, § 3300, may be appointed to sit on the circuit bench in any county in the state, such judge had authority to sign a bill of exceptions while temporarily outside of Mobile county.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 37-41; Dec. Dig. § 32;* Judges, Cent. Dig. § 144.]

2. EVIDENCE (§ 330*)—RETROACTIVE STATUTE—DOCUMENTARY EVIDENCE—CURATIVE ACTS.

Defendant offered as evidence of title a patent, dated February 20, 1872, purporting to have been executed by L., Governor, by C., secretary, and containing certain recitals of payment for the lands as swamp lands, and a conveyance thereof by the Governor. Plaintiff objected, on the ground that the patent had not been executed by the Governor, and was not sealed with the great seal of the state. The court took the objections under advisement, and proceeded with the hearing. Before the objection had been ruled on, Act April 4, 1911 (Acts 1911, p. 192) was passed, authorizing the introduction in evidence of documents executed prior to February 12, 1879, by the Governor in person, or in his name by his secretary, purporting to convey state lands, but ineffective as conveyances, and declaring that certified copies of the record of any such documents which had been recorded for more than 20 years should be admissible. Held that, though the objection was well founded when taken, the court was bound to apply the law as it existed at the time the ruling was made, and the defects having been cured by the statute, which went into effect from the moment of its approval, the objection was properly overruled.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1283; Dec. Dig. § 839.*]

3. EVIDENCE (§ 383*)—RECITALS IN PATENT—EFFECT.

Recitals in a state patent to swamp land that there had been deposited in the office of the Secretary of State a certificate of the receiver of the swamp and overflowed lands of Alabama, in and for the district of Mobile, whereby it appeared that full payment for the land had been made by the patentee according to Act February 8, 1861 (Laws 1861, p. 12), were of no consequence to the fact of payment in a subsequent action to quiet title.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 383.*]

4. EVIDENCE (§ 342*)—LOCATION OF LAND—COPY OF MAP.

In a suit to quiet title, a certified copy of the map on file in the office of the state land agent, the original bearing date in 1871, was admissible to locate the land.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1302-1314; Dec. Dig. § 342.*]

5. APPEAL AND ERROR (§ 1051*)—EVIDENCE—PREJUDICE.

Since, by the express provisions of Act April 4, 1911 (Acts 1911, p. 192), the patent to swamp land executed by the Governor, by his secretary, on February 20, 1872, was prima facie evidence of title, where such a patent

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was introduced to show title in defendant, and plaintiff did not rely on defendant's inability to prove payment of the purchase price of the land to the state, he was not prejudiced by the introduction of certified copies of entries in the books kept by the State Treasurer, to show payments of the price of the land in question by the patentee.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1051.*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action between T. E. Brue and Thomas M. McMillan. Judgment for the latter, and the former appeals. Affirmed.

Rich & Hamilton, for appellant. R. P. Roach, for appellee.

SAYRE, J. [1] The judge of the law and equity court of Mobile, a court exercising jurisdiction in Mobile county only, signed the bill of exceptions in this case while in Clarke county, and this fact gives appellee occasion for a motion to strike. In *Rainey v. Ridgeway*, 151 Ala. 532, 43 South. 843, decided at a time when, under the statute, judges might extend the time for signing bills of exception, the bill was stricken, because the judge of probate made the order extending the time for a bill while absent from his county; this on the ground that the judicial power of probate judges is limited to the territory of the counties in which they are elected. On the other hand, it was held, in *Ex parte Nelson*, 62 Ala. 376, that a circuit judge might validate a bill of exceptions while in a circuit different from that in which the trial was had; this for the reason that his jurisdiction is co-extensive with the state. Circuit judges have the same official authority and power in one county as in another. The judge of the law and equity court of Mobile has and exercises all the jurisdiction and the powers which are exercised by judges of the circuit court. Act of August 6, 1907 (Sess. Acts 1907, p. 562). He may, when deemed expedient by him and the circuit judge, or when directed by the Governor in writing, sit upon the circuit bench in any county in this state. Code, § 3300. He had, therefore, authority to sign the bill of exceptions when and where he did, and the motion to strike must be overruled.

[2] Objections taken and elaborately argued against the constitutional validity of the act of February 12, 1879, entitled "An act to further regulate the securing, preservation and sales of the swamp and overflowed lands of the state" (Acts 1878-79, p. 198), and the act of April 4, 1911, entitled "An act to authorize the introduction in evidence of documents executed prior to February 12th, 1879, by the Governor in person or in his name by his secretary, purporting to convey any of the state's lands, but ineffective as conveyances, and certified copies of the rec-

ord of any such documents which have been recorded for as much as twenty years, and to prescribe the probative effect of such documents and copies." (Gen. Acts 1911, p. 192), have been recently considered at length by this court, as to the first-named act, in *Jordan v. McLure Lumber Co.*, 54 South. 415; as to the second, in *Brannan v. Henry*, 57 South. 967. We find no occasion for a repetition of what was said in those cases.

[3] This case, like those to which we have just referred, involved the title to a part of what were the swamp and overflowed lands patented to the state by the government of the United States. The trial was by the court; no jury having been demanded. Evidence was offered by the parties during the 28th and 29th days of March, 1911. Defendant offered as evidence of title a patent of date February 20, 1872, purporting to convey the state's title to the Mobile & Ohio Railroad Company, as assignee of James Dunbar. This patent purported to have been executed by Robt. B. Lindsay, Governor of Alabama, by W. V. Chardavoynne, secretary, and recited that there had been deposited in the office of the Secretary of State a certificate of the receiver of the swamp and overflowed lands of Alabama, in and for the district of Mobile, whereby it appeared that full payment for the land had been made by James Dunbar according to the act of February 8, 1861 (Laws 1861, p. 12). To this patent and its recitals, the plaintiff (appellant) objected, on the ground that the patent had not been executed by the Governor; nor was it sealed with the great seal of the state, as required by the Constitution. To the recitals, the objection was taken that there was no authority in law for the Governor's secretary, by whom the Governor's name had been signed to the patent, to bind the state, or any one, by the statement of the facts recited. The court took these objections under advisement, and proceeded with the hearing. On April 7th next, the court announced that plaintiff's objections were overruled, and rendered judgment for the defendant. To this ruling and to the judgment, plaintiff reserved exceptions. In the meantime, the act of April 4, 1911, had been approved. When the objection was taken to the patent as evidence of title, it was well grounded in law and fact. As color of title, in connection with acts of possession and ownership, it was at all times admissible, and when the ruling was announced the objection to the patent as a muniment of title had been removed by the statute. As was held in *Brannan v. Henry*, supra, under the act of 1879, the patent of 1872 became in effect a transfer of the state's original title, undisputed in this case, upon condition that the purchase money had been paid, and, under the act of 1911, it became in effect a deed subject to be defeated on proof that the purchase money had not been

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

paid. For reasons stated in that case, the curative effect of those statutes and the rule of evidence enacted by them were operative in this case. The statute of 1911 became effective from the moment of its approval. The ruling must be judged on its merits as of the time it was made. The trial court properly overruled plaintiff's objection to the patent for want of proper execution. The recitals of the patent were of no consequence in this case as evidence of the fact of payment. Their presence in the patent, purporting to have been issued by the Governor, or his secretary, was taken by the state as sufficient reason for the ratification and confirmation sub modo of the patent as a conveyance of the state's title. Plaintiff was not affected by them, but by the state's conveyance of title, which it had power to make on any consideration deemed proper. The statute of 1911 was based upon the assumption of fact, morally and legally justifiable, that the patent of 1872 spoke the truth of the transaction to which it related.

[4] A certified copy of a map on file in the office of the state land agent, the original bearing date in 1871, was introduced in evidence for the purpose, perhaps, of locating the land in controversy. In this there was no error: *Barker v. Mobile Electric Co.*, 55 South. 364.

[5] Certified copies of entries in the books kept by the State Treasurer, going to show payments for swamp and overflowed lands, and notations in the map book in the office of the state land agent, made on the page opposite to the map, and going to show a sale of the land in controversy to James Dunbar, were admitted for the purpose, no doubt, of showing a sale to said Dunbar and payment of the purchase money into the treasury of the state. Defendant showed a complete, unbroken chain of title, undenied in fact, though its effect in law was controverted, reaching back to the Mobile & Ohio Railroad Company, assignee of Dunbar. There was no effort on the part of the plaintiff to show that Dunbar had not in fact paid the purchase money. Plaintiff's reliance was upon the defendant's inability to prove payment. If, for any reason, there was error in the admission of the certificates and the notations from the map book, it was harmless; for, under the statute of 1911, the patent became prima facie evidence of title in the defendant. There being no attempt to defeat the title thus shown by the production of evidence that the purchase money had not in fact been paid into the state treasury, this patent became conclusive of the case. Defendant's right and title thereunder was not affected by subsequent grants to the plaintiff. *Bates v. Herron*, 35 Ala. 117; *Tapia v. Williams*, 54 South. 613.

There were objections to the several links in the chain of title by which the defendant

connected himself with the Mobile & Ohio Railroad Company. These objections were based upon the proposition that the state's patent to that company was ineffectual as a conveyance of title. This contention has been disposed of by what has been here said, and by what may be found in *Brannan v. Henry*, supra.

We find no error in the record; the judgment is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

MCOLLELLAN, J. (concurring). On the appeal in *Brannan v. Henry*, 57 South. 967, I have attached my view of an expression therein used, which recurs, in substance, in the above opinion, with respect to the effect of the Acts of 1879 and of 1911. Reference is therefore made to that appeal.

VAUGHAN et al. v. PALMORE.

(Supreme Court of Alabama. Jan. 11, 1912.)

1. QUIETING TITLE (§ 35*)—PLEADING—ALLEGATIONS OF OWNERSHIP.

Under Code 1907, § 5443, which provides that, when any person is in peaceable possession of lands, actual or constructive, claiming ownership, and his title is denied by any other person who claims or is reputed to own the same, and there is no pending suit to test the validity of such title or claim, such person in possession may maintain a suit to quiet title, and section 5544, which provides that the bill must allege the possession and ownership of the complainant, an allegation that the complainant was in the peaceable possession of the land, claiming the same in his own right, without setting out the evidence or the facts constituting the evidence necessary to confer title to the land, is sufficient, nor is it necessary to show ownership in fee or other absolute ownership.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 73, 74; Dec. Dig. § 35.*]

2. QUIETING TITLE (§ 35*)—PLEADING—ALLEGATION OF OWNERSHIP.

Where complainant by his amended bill in a suit to quiet title unnecessarily alleged that he was the owner, such allegation was without detriment to defendant.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 73, 74; Dec. Dig. § 35.*]

3. QUIETING TITLE (§ 1*)—NATURE AND PURPOSE—REMEDY.

The purpose of a suit to quiet title by one in peaceable possession of land, claiming to own it in his own right, is to ascertain what title, claim, interest, or incumbrance the defendant has, and how and by what interest his title is derived, and not to ascertain the title of complainant; and if defendant desires to test the complainant's title or claim, he must do so by a cross-bill.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

4. QUIETING TITLE (§ 44*)—EVIDENCE—BURDEN OF PROOF—OWNERSHIP.

Where complainant in a suit to quiet title has unnecessarily alleged in terms that he was the owner of the land, he has the burden of proving it if it be denied by the defendant's answer.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 89; Dec. Dig. § 44.*]

5. QUIETING TITLE (§ 19*)—NATURE OF REMEDY—STATUTORY PROVISIONS.

Code 1907, §§ 5443-5449, relating to suits to quiet title, is highly remedial, and a statute of repose, and should be liberally construed.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 48; Dec. Dig. § 19.*]

Appeal from City Court of Montgomery; William H. Thomas, Judge.

Suit to quiet title by James Palmore against Frank Vaughan and others. Demurrer to bill overruled, and defendants appeal. Affirmed.

Steiner, Crum & Well, for appellants. Stakely & Vardaman, for appellee.

MAYFIELD, J. [1] The bill in this case is filed under chapter 127 of the Code, §§ 5443-5449, inclusive, to quiet title and determine claims to certain lands described in the bill. The respondents demurred to the bill upon the ground that it failed to allege that the complainant was the owner of the land at the time of the filing of the bill. The trial court overruled the demurrer, and respondents appeal.

It is not at all necessary for a bill filed under this chapter of the Code to allege, in terms, that the complainant is the owner of the lands the title to which is sought to be quieted. In fact, the statute provides that when any person "is in peaceable possession of lands, whether actual or constructive, claiming to own the same," and his title thereto is denied or disputed, or any other person claims, or is reputed to own the same, and no suit is pending to test the validity of such title, claim, incumbrance, etc., such person so in possession may maintain a suit under that chapter of the Code.

It is true that section 5444 of the Code provides that the bill must allege the possession and ownership of the complainant, but not in terms. The allegation that the complainant was in the peaceable possession of the land, claiming the same in his own right, would be sufficient. The possession and claim of ownership being alleged, and nothing further appearing, the ownership would be presumed. It is not at all necessary that the complaint should set out the evidence, or the facts constituting the evidence, necessary to confer title to the lands in question; nor is it necessary to show ownership in fee or other absolute ownership.

[2] But the original bill in this case alleged in terms that the complainant was in the "peaceable possession of the land," and the amended bill alleged in terms that he was the "owner." While the amended bill did attempt to describe the source and claim of the complainant's title, it was wholly unnecessary, and could be of no possible detriment to the respondents, though it might entail unnecessary burdens of proof on the part of the complainant to support such averments.

[3] If the complainant be in the peaceable possession of the land, claiming to own it in his own right, and the land is also claimed by the respondent, but no suit is pending to test the validity of the claim, this gives the complainant the right to test the validity of the respondent's claim or title. The purpose of the original bill is to ascertain what title, claim, interest, and incumbrance the respondent has, and not that of the complainant, and how and by what interest his title is derived. If the respondent desires to so test the complainant's title or claim, he must do so by a cross-bill.

As was said by this court in the case of *Adler v. Sullivan*, 115 Ala. 582, 22 South. 87, though a bill sets out the source of the complainant's title and possession, and thus serves to give notice to the respondent of the title and possession on which the complainant relies, in opposition to any claim or title that the respondent may assert in his answer, yet the source and character of such title or possession is not necessary to the equity of the bill. In that case, as in this, the respondent objected to the bill because the allegations as to the tax title of the complainant showed an invalid claim under such tax title, and therefore no right or title to, or possession of, the land. But such contention was held to be not availing, on demurrer to the bill, in a suit under this statute. The averment of the bill in this case, as in the case of *Adler v. Sullivan*, supra, contains all that is necessary to state a good cause of action; and the mere fact that the complainant has assumed the duty or burden (which the statute does not enjoin upon him) of alleging the source of his title or possession does not render the bill demurrable; nor can any possible injury result to the respondents from such allegation.

[4] It is an unnecessary burden which the complainant has assumed, but one which he may be required to prove if it be denied by the answer of the respondents. As was said in the *Adler Case*, supra, the purpose of the statute is to compel the determination of claims to real estate, etc., and to require the respondent to disclose his claim. The defendant is required to specify and set forth the estate, interest, or incumbrance so claimed; but the statute makes no such requirement as to the complainant. The statute also directs that the court shall determine, finally settle, and adjudge whether "the defendant has any estate, interest, right or incumbrance upon said lands or any part thereof; and what it is, and upon what part of the land the same exists." So it is the defendant's title, claim, and right that is to be inquired into, and not that of the complainant.

Our statute upon this subject is a substantial copy of the New Jersey statute, which was held by the courts of that state

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

to be intended to relieve those persons whose situation afforded them no opportunity to test the hostile claim of third persons by a direct proceeding in ejectment or by other usual modes. That is, if a party is in possession, claiming the land as his own, and the land is claimed by other persons who deny and dispute the title of the party thus in possession, he, of course, cannot maintain ejectment to test their claim or title. The statute in question was intended to enable him, under such conditions, to test the title, right, or claim of the persons who were out of possession, but who were attempting to assert and claim some right, title, or interest in the land.

[5] The statute is highly beneficial and remedial in its nature, and, as was said by the Supreme Court of New Jersey, should be liberally construed. It is a statute of repose. It deprives the respondent of no right. He may try his claim in a court of law if he desires, for this statute only allows the complainant to compel him to try it in a court of equity when he has failed to try it in a court of law.

There was no error in overruling the demurrer, and the decree of the lower court is affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

CRUM v. WESTCOTT et al.

(Supreme Court of Alabama. Jan. 30, 1912.)

1. WILLS (§ 476*)—CODICIL—CONSTRUCTION. A will and a codicil should be construed together, to ascertain testator's intention in making disposition of his property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 997; Dec. Dig. § 476.*]

2. WILLS (§ 476*)—CODICIL—CONSTRUCTION. The first item of a will directed division of testator's estate as directed by the statutes governing intestacy, subject to the following item, which gave his grandson a "child's part," to be managed by trustees during his minority. A codicil revoked the second item, and directed that "in lieu thereof" the grandson should receive \$5,000, to be held in trust during his minority by the same trustees. Held that, taken together, the will and the codicil require distribution of the property according to the statutes, except that the grandson receives \$5,000, to be held as directed by the codicil.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 476.*]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Bill by Samuel H. Westcott and others to remove an administration of an estate into the probate court and to construe a will. From a decree construing the will, B. P. Crum, the guardian of the minor, appeals. Affirmed.

The will is as follows:

"Item One. After my just debts are paid, my estate shall be divided as directed by the

statutes of Alabama in case of intestacy subject to the provisions of item two hereof.

"Item Two. If my grandson, Charles G. Abercrombie, Jr., shall survive me, he shall take a child's part, to be delivered and paid to my sons, S. H. and W. B. Westcott, as trustees for him during minority. The said trustees shall have power to use and dispose of the trust estate or any part thereof as may seem proper to them in the support and maintenance of my grandson. If either of my said sons shall die or refuse to accept this trust, the other or survivor shall receive the trust estate and execute the trust herein provided for. If my said grandson shall die before reaching the age of twenty-one years, and without children, his part shall revert to my estate."

The other parts of the will have reference to the appointment of executors, etc., and it was executed June 9, 1902.

The codicil thereto was signed May 21, 1908, and so far as here applicable is as follows:

"Item One. I hereby revoke item two in said will above referred to, and, in lieu thereof, I hereby give to my said grandson, Charles G. Abercrombie, Jr., the sum of \$5,000.00 in cash, to be paid out of any money belonging to my estate by my executors named in said will, to be loaned out at interest, or invested in real estate for the use of my said grandson until he shall become of legal age."

Then follows a direction as to the management of this money by the trustees and its delivery to the beneficiary on his arriving at the age of 21 years.

B. P. Crum, pro se. Ray Rushton and W. M. Williams, for appellees.

SIMPSON, J. The bill in this case was filed by the appellees, praying for the removal of the estate of William D. Westcott from the probate into the Montgomery city court, in equity, and for the construction of the will of said William D. Westcott. The estate was removed into said city court, and the only question for determination, on this appeal, is the construction of said will and codicil (which will be copied by the reporter in the statement of this case).

[1] Without resorting to the testimony of witnesses, which was received in the lower court, it is proper to examine both the original will and the codicil, so as to arrive at the intention of the testator.

[2] Item 2 of the original will provides that the grandson of the testator should "take a child's part," which was to be managed by the trustees named for him. The codicil revokes said item 2, and states distinctly that "*in lieu thereof*" said grandson should receive \$5,000 in cash, which was to be held, managed, etc., for him, during mi-

nority, by the same trustees. In other words, the \$5,000 was to be in lieu of the child's part which had been provided by item 2 of the original will. To hold otherwise would be to hold that "*in lieu of*" means *in addition to*.

It is true that, if item 2 had been merely revoked, said grandson would be entitled to a child's part under the provisions of item 1; but the will and codicil must be construed together, in order to ascertain the intention of the testator, and when item 1 provides that his estate shall be distributed according to the statutes, subject to the provisions of item 2, the codicil takes the place of item 2, and the meaning is clear that the property is to be distributed according to the statutes of Alabama, except that said grandson, Charles G. Abercrombie, in place of receiving a "child's part," shall receive only the \$5,000, and the property, after the payment of that amount and the debts, shall be distributed among the other heirs, share and share alike, to wit, Samuel H. Westcott, William B. Westcott, and Annie M. Cobbs.

The decree of the court is affirmed.

Affirmed. All the Justices concur, save SAYRE, J., not sitting.

Ex parte SPIVEY et al.

(Supreme Court of Alabama. Jan. 9, 1912.)

1. BAIL (§ 42*)—CRIMINAL PROSECUTION—RIGHT OF ACCUSED.

Where accused, under an indictment charging murder in the first degree, has been found guilty of murder in the second degree only, that conviction operates as an acquittal of the greater crime, and entitles him to admission to bail.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 42.*]

2. CRIMINAL LAW (§ 281*)—DEMURRER—EFFECT.

The state's demurrer to the plea of accused confesses the truth of the allegations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 652; Dec. Dig. § 281.*]

3. CRIMINAL LAW (§ 193½*)—FORMER JEOPARDY—WHAT CONSTITUTES.

Where accused, under an indictment charging murder in the first degree, was convicted of murder in the second degree only, that conviction operates as a bar to a further prosecution for murder in the first degree, though the conviction be reversed for error in sustaining a demurrer to accused's plea that the indictment was not drawn in the presence of the officers designated by law, for the judgment of conviction was not invalid, but was in full force until reversed; Code 1907, § 7160, providing for holding defendant to answer another indictment for the same offense, operating only when the judgment is arrested or indictment quashed on account of defects therein, or because not found by a grand jury regularly organized.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 366, 387, 389, 394; Dec. Dig. § 193½.*]

Certified Questions from Court of Appeals.

Petition by Hollan Spivey and others to be allowed bail. From a decree refusing bail, petitioners appealed to the Court of Appeals, which certified questions to the Supreme Court. Questions answered.

Foster, Samford & Carroll and Ball & Samford, for appellants. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

SIMPSON, J. This is an appeal from the decision of the chancellor on a petition to be allowed bail. The petitioners were indicted for murder in the first degree, and convicted of murder in the second degree. An appeal was taken to this court; the sole question being whether the court erred in sustaining the demurrer to a plea that the grand jury which found the indictment was not drawn "in the presence of the officers designated by law." This court reversed the case on the ground that said plea was good and that the demurrer should have been overruled. *Spivey v. State*, 57 South. 493.

[1] No oral evidence was offered before the chancellor; the claim of the petitioners being that the record showed that the petitioners had been tried on an indictment charging murder in the first degree, and had been found guilty of murder in the second degree, which, under our decisions, operated as an acquittal of the crime of murder in the first degree, and entitled the petitioners to bail. It is familiar law that, in order to sustain a defense of former jeopardy, or former acquittal or conviction, it is necessary that the former proceedings had been upon a valid indictment, on which a conviction could have been legally had. 12 Cyc. 261, 265.

[2] While it is true that in this case no issue was taken upon the facts alleged in the plea, yet the defendants asserted the truth of those facts, the state, by demurring to the plea, confessed the truth of the allegations, and this court reversed the case, holding that the facts alleged, if true, established the insufficiency of the indictment, and, as a result, the judgment of conviction against the petitioners has been annulled. There are authorities to the effect that a party, having obtained the reversal of the judgment of conviction by setting up the invalidity of an indictment, cannot be allowed to secure a further benefit, by claiming that the judgment of conviction was valid, so as to entitle him to bail. He is estopped from asserting that the judgment of conviction was valid. 12 Cyc. p. 266b; *Joy v. State*, 14 Ind. 139, 152; *People v. Meakim*, 61 Hun, 327, 329-330, 15 N. Y. Supp. 917; *United States v. Jones* (C. C.) 31 Fed. 725, 728; *State v. Meekins*, 41 La. Ann. 543, 6 South. 822, 823.

It will be noticed, in connection with what will be further said, that this refers only to

the judgment of *conviction*. In our case of *Weston v. State*, 63 Ala. 155, 157, the cause was called for trial, and after a jury had been impaneled, and a witness sworn and examined, it was found that there had been such irregularity in the selection of the grand jury as would cause a reversal of the judgment after verdict against the defendant, and the judge stopped the case, quashed the indictment, and ordered the case to be submitted to another grand jury. On the second trial this court held that the defendant had not been in jeopardy, saying: "A defendant is never in jeopardy, when the indictment against him is so invalid that a judgment upon it would be annulled on appeal, no matter what may be the stage of the prosecution, when, *for that reason*, it is quashed." (Italics supplied.)

In the case of *Berry v. State*, 65 Ala. 117, 122, two persons, B. and H., were jointly indicted for murder. H. was acquitted, and B. found guilty of murder in the second degree. B. appealed, and the case was reversed on account of the failure to organize the jury according to law, though no objection was raised to it in the court below on that account, and this court held that the verdict and judgment operated as a bar to another prosecution of H. and as a bar to the prosecution of B. for murder in the first degree. The court held that the defect was an error or irregularity rendering the judgment subject to be arrested on motion or reversed on appeal, but that the judgment was not void, but was in full force until avoided in the proper manner. The court does "not doubt that, if an acquittal is obtained, because of the insufficiency of an indictment—and it may be insufficient, because found by a grand jury irregularly impaneled—that the judgment will not bar a subsequent prosecution. But," says the court, "we are considering a different case—a judgment of acquittal, rendered upon a full hearing of evidence before a jury, in the record of which errors intervened, which did not enter into or affect that judgment; errors which, not affecting it, were thereafter incapable of correction, and into which no inquiry could be made. For the state could not, because of them, move in arrest of judgment, or prosecute a writ of error. Of them the parties acquitted could not be heard to complain, for they wrought to them no injury. * * * The real and only inquiry is whether the judgment of acquittal is void, because, if an adverse judgment had been rendered, that judgment could have been arrested or reversed by the appellants, for a latent irregularity in the proceedings, available only to them, which did not enter into or produce the judgment, and which neither they nor the state could invoke, to avoid it, in any direct proceeding. Does it not result

that the state, by mere indirection, mere evasion, * * * escapes from the obligation of a judgment, which directly it cannot assail, if the inquiry should be answered affirmatively?" The court goes on to show that, while this court was bound to reverse the judgment of *conviction*, yet "the judgment of acquittal of H. was not and could not be inquired into; for he was not a party to the writ of error, and from that judgment a writ of error would not lie. Nor would it lie from the judgment acquitting B. of murder in the first degree." The court also says that, if the irregularity had been brought to the attention of the court below, "it could have been only in reference to the judgment of conviction against B., and not in reference to so much of the verdict as acquitted him of murder in the first degree. * * * These verdicts were beyond the reach of vacation by any tribunal." The court concluded that H. was entitled to his discharge, and that B. could not again be tried for murder in the first degree.

[3] It is true that the reasoning by Chief Justice Brickell in that case seems somewhat technical, yet it has long stood as the decision of this court; and, following the same reasoning, it cannot be said that the judgment of *acquittal* of murder in the first degree, in the present case, was based on the informality in the organization of the grand jury, although the judgment of conviction was subject to reversal by reason of said informality. The statute provides for holding a defendant to answer another indictment for the same offense only when *judgment is arrested, or indictment quashed*, on account of defects therein, or because not found by a grand jury regularly organized, etc. Code 1907, § 7160. The indictment was not quashed in this case, but the defendants were put to trial on the facts, and the jury acquitted them of murder in the first degree, not on account of the defect in the indictment, but on the merits of the case; so that, in addition to the technical reasons, the spirit of the law is complied with by the expression of a jury on their guilt or innocence of the crime of murder in the first degree.

It may be said that the judgment was an entirety, and that the reversal of it on account of the irregularity abrogated the entire judgment, both as to conviction and acquittal; but this has not been the theory upon which this court has acted, for it has always held that a conviction of a lesser degree of homicide was an acquittal of the higher degree, and that, although the judgment was reversed, the defendant could not again be tried for the higher degree.

It results that the petitioners are entitled to bail as matter of right. All the Justices concur.

Ex parte SPIVEY et al.

(Court of Appeals of Alabama. Jan. 9, 1912.)

Appeal from Order of Chancellor of Southeastern Chancery Division.

Petition by Hollan Spivey and others to be allowed bail. From an order of Chancellor L. D. Gardner denying bail, petitioners appeal. Reversed and remanded, with directions.

Foster, Samford & Carroll and Ball & Samford, for appellants. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PER CURIAM. The question of the petitioners' right to bail was, under the statute, certified to the Supreme Court of Alabama, and on the authority of the opinion of that court on the certification (*Ex parte Hollan Spivey et al.*, 57 South. 491, present term) the order of the chancellor of the Southeastern chancery division denying petitioners bail is reversed, and the prayer of petitioners granted. It is further ordered that the chancellor make an order admitting the defendants to bail upon giving bond conditioned and payable as provided by law.

Reversed and remanded.

DAVIS v. STATE.

(Court of Appeals of Alabama. Jan. 11, 1912.)

ROBBERY (§ 20*)—INDICTMENT—PROOF—VARIANCE.

A variance between an indictment, alleging the felonious and forcible taking of 15 silver dollars from the person of prosecutor, and the proof of the taking of 8 silver dollars and silver fractional coins, aggregating \$15.90, is not fatal; for, though the statute requires that the denominations and number of coins shall be stated in the indictment, it is only necessary to constitute the offense that the proof should show the taking of any of the coins described in the indictment.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 27; Dec. Dig. § 20.*]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Clisby Davis was convicted of crime, and appeals. Affirmed.

R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. While the defendant was confined in jail with several other persons, one of the prisoners so confined (John Pugh by name), was robbed by his fellow prisoners, and he (Pugh) charged the commission of the offense to the defendant and one Morris Brown, who were jointly indicted, charged with having robbed Pugh. The indictment charged that Brown and Davis "feloniously took 15 silver dollars," etc., the property of Pugh, from his person and against his will, etc. Upon arraignment the defendant Davis demanded a severance, which the court granted, and this appeal is from the proceedings in the trial of Davis alone.

The prosecuting witness, Pugh, testified on the trial that he had known the defendant Davis for many years; that he was in the county jail with him and other prisoners on the morning of May 23, 1911, when, about 3 o'clock in the morning, Davis and Brown came into the cell in which he was confined, caught hold of him, held and choked him, and then threw him up against the wall in the corridor, and forcibly took from his person \$15.90. The witness further testified that the defendant Davis took the money from his pocket while he was being held by both Brown and the defendant, and that the money forcibly taken from him consisted of eight silver dollars, and the balance "was made up of nickels, dimes, quarters, and halves." The state introduced corroborating evidence, showing by one of the guards and a trusty at the jail that they heard the noise or scuffle and Pugh calling for help, and found Pugh with his clothes torn, and that he complained of having been robbed; and that they found the money hidden in the toilet closet. The defendant introduced no evidence, but requested the general charge.

The indictment alleges the felonious and forcible taking of 15 silver dollars from the person of one John Pugh; the proof shows the taking of but 8 silver dollars and certain silver coins of small fractional denominations, aggregating \$15.90. While the law requires the denominations and numbers of coins to be stated in the indictment, it is not equally strict in its requisition of proof. It is only necessary, to constitute the offense and authorize a verdict of guilty, that the proof should show the taking of any of the coins described in the indictment under the circumstances alleged. *State v. Murphy*, 6 Ala. 845. The specific pecuniary value is not the main element or the ingredient of the offense. *Newsome v. State*, 107 Ala. 133, 18 South. 206; *Jackson v. State*, 69 Ala. 249.

If the defendant is shown to have forcibly taken 8 of the coins described in the indictment from the person alleged, and under the circumstances designated, this would not constitute a variance. In other words, if it is shown by the evidence that the defendant feloniously and forcibly took from the person of John Pugh 8 silver dollars, and not 15 silver dollars, he would not be entitled to an acquittal, the proof being sufficient to constitute the offense; and the court correctly refused the general charge requested by the defendant. *Martin v. State*, 125 Ala. 64, 71, 28 South. 92; *Bates v. State*, 152 Ala. 77, 44 South. 695.

The rulings on the evidence are free from error prejudicial to the defendant, and the case will be affirmed.

Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**CENTRAL OF GEORGIA RY. CO. v.
STEVERSON.**

(Court of Appeals of Alabama. Nov. 16, 1911.
On Application for Rehearing, Jan. 30,
1912.)

**1. NUISANCE (§ 50*) — DAMAGES — WILLFUL-
NESS.**

There was no willful or wanton misconduct, so as to authorize more than actual damages, where a calf, being killed on defendant's right of way, was there, within 120 feet of plaintiff's residence, buried by the section foreman, but so near the surface that a dog a week later unearthed it, causing annoyance to plaintiff from the odor and the buzzards and green flies attracted there, though the station agent, told of it on Thursday evening, said he would have it attended to, and, having done nothing about it in the meantime, was again told of it Friday evening, and then said he had forgotten it, but would have it attended to, and was told by plaintiff he could have till the next day to do it, and though the section foreman, spoken to by plaintiff about it on Sunday, nothing in the meantime having been done, at first said he would do nothing more about it till he received orders, he later saying he would attend to it, and doing so the next day.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 118-127; Dec. Dig. § 50.*]

**2. DAMAGES (§ 62*)—DUTY TO MINIMIZE—
NUISANCES.**

Though plaintiff owed no duty to defendant of abating the nuisance from a disinterred calf on its right of way within 120 feet of plaintiff's residence, he did owe it the duty of minimizing the damages, knowing that from the continued neglect of defendant's servants to abate it he was likely to receive, or was actually receiving, annoyance and inconvenience.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119-132; Dec. Dig. § 62.*]

3. NUISANCE (§ 50*)—DAMAGES—AMOUNT.

A verdict of \$250 for annoyance and inconvenience to plaintiff from the nuisance of a disinterred calf on defendant's right of way within 120 feet of plaintiff's residence, which defendant allowed to remain for three days after notice, but which plaintiff could have abated at an expense of \$1, is excessive.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 50.*]

On Application for Rehearing.

**4. JURY (§ 37*) — DUE PROCESS — RIGHT TO
JURY TRIAL—REDUCTION OF DAMAGES.**

The act of April 21, 1911 (Laws 1911, p. 587), merely authorizing the appellate courts, in case of award of excessive damages, to reduce the verdict with the consent of both parties, instead of reversing and remanding for new trial, offends no provision of the Constitution touching the right of trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 220; Dec. Dig. § 37.*]

Appeal from Circuit Court, Clay County;
John Pelham, Judge.

Action by J. M. Steversson against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed on condition of remission of damages.

Lackey & Bridges and George P. Harrison, for appellant. Riddle, Ellis, Riddle & Pruett, for appellee.

DE GRAFFENRIED, J. The appellee brought a suit against the appellant for \$5,000 damages for creating and maintaining a nuisance near his premises, which caused annoyance and inconvenience to him and his family in his home. There were two counts to the complaint. The first count charged that the nuisance was created through the negligence of appellant, its agents or servants. The second count charged that the nuisance and the damages therefrom resulting were due to the wanton, willful, or malicious misconduct of appellant, its agents or servants.

The facts are that the appellant owns and operates a railroad; that appellee's home is situated about 120 feet, in the town of Hollins, from its right of way; that on or about the 2d of June a train of the appellant struck a calf, and badly crippled it, on its right of way immediately in front of appellee's home. Shortly afterwards the section foreman of appellant found the calf in this condition and killed it and had it buried on the right of way of the appellant at the place where it was killed. There was dispute in the testimony as to the depth of the grave in which the calf was buried and as to the amount of dirt that was placed over the calf at the time it was buried.

[1] There was nothing in the burial of the calf, however, from which willful or wanton misconduct could be inferred. The worst that could reasonably be deduced from the place and manner of the burial was that appellant, its agents or servants, were negligent in the selection of the place or in the manner of the burial of the calf. The fact that the calf was buried negatives any idea that it was the purpose of appellant, its agents or servants, to cause injury to appellee.

About a week after the calf was buried, a dog made a hole in the grave and exposed a part of its carcass. The grave being thus broken into, unpleasant odors arose therefrom and, as some of the testimony tends to show, not only caused inconvenience on that account to appellee and his family in the enjoyment of their home, but also attracted buzzards and green flies, which added to appellee's annoyance.

As appellee resided within 120 feet of the grave, he was, naturally, the first person, or one of the first, to discover this condition, and he seems to have discovered it on Thursday about a week after the burial of the calf. On that night he saw the town marshal and also the depot agent. Appellant's office was closed, and the agent was on his way home. The agent told him that he would have the cause of trouble removed. Nothing was done by appellant on the next day, and on Friday evening appellee again saw the agent, and the agent told him that he had forgotten the matter, but would have it attended to. Appellee then told the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

agent that he would give him until the next day within which to do so. Nothing was done on the following day, but on Sunday the section foreman was notified of the situation and, taking the testimony most strongly in favor of the appellee, the section foreman, when first informed of it, said that he "had buried it once, and that he was not going to have anything to do with it unless he received orders to do so," but, later in the day, stated that he would attend to it, and, on the next day, the damage to the grave was properly repaired and the nuisance abated.

We are unable, as we have already said, from the facts to find any evidence upon which a jury could lawfully deduce wilful misconduct on the part of appellant, its agents or servants. It is true that the evidence tends to show that appellant's train and employes, including the members of its section gang, constantly passed and repassed the grave during the period covered by this litigation, and that they were neglectful of their duty to keep the right of way in proper condition; but there is nothing indicating that any act or omission of theirs was wilfully or wantonly done. It is true that the section foreman manifested some impatience when informed, on Sunday, of the condition of the grave; but it is also true that during that same day he stated that he would have the damage repaired, and on the next day it was repaired.

"Where there is no malice connected with the wrong complained of, or such gross negligence or oppression or fraud as amounts to malice, the compensation or amount of damages should be confined to the actual injury and its immediate effect." *Wilkinson v. Searcy*, 76 Ala. 176.

[2] The court in its oral charge to the jury charged the jury as follows: "A man cannot sit idly by and suffer an injury which, by the exercise of ordinary care and reasonable diligence, he can prevent, and speculate on the damages he may be able to recover."

In the present case, appellee's annoyance was, taking the facts in the case in their most unfavorable light against appellant, caused by the negligent manner in which a calf was buried in front of his house. A modicum of good temper and a small amount of labor on the part of appellee would have prevented all annoyance to appellee, and, under the law, it was the duty of appellee to have retained his temper and expended the labor necessary to have prevented the annoyance. It is evident that by the expenditure of less than a dollar the appellee, who was not a helpless woman, but a *man*, could have abated this nuisance, and thus saved himself the annoyance to which he was thereby subjected. He stated in his testimony that one reason why he did not cover up the calf was "that he did not want the job." This may be true; but the law, nev-

ertheless, required that he should, as the court properly charged the jury in this case, have exercised ordinary diligence and care in preventing the injury to himself and family. On this subject, the law is but the application of that golden rule of conduct which requires that we shall so do unto others as we would have them, in like circumstances, do unto us. The appellee knew that by the neglect of the servants of appellant he was likely to receive, or was actually receiving, annoyance and inconvenience, and it was his duty to appellant to have minimized the damage by abating the nuisance if, by the exercise of ordinary care, he could have done so, and thus saved appellant the damage resulting therefrom.

The rulings of the court in the trial of the cause on the pleadings and on the evidence were in accordance with law, and in its charge to the jury it correctly stated the law as applied to the facts of the case.

[3] In awarding the \$250 to appellee as his damages in the case, the jury, taking into consideration the situation of the parties, their duties to each other under the law, and the fact that appellee, by the exercise of ordinary care, could have prevented most, if not all, of the annoyance which he suffered by reason of the negligence of appellant's servants, allowed appellee a sum largely in excess of the amount to which he was justly entitled.

Taking into consideration the circumstances surrounding the parties and the fact that the nuisance could have been abated by the expenditure by appellee of a small amount of money, we are of opinion that, in this case, the sum of \$50 is amply sufficient to cover any damages which appellee is, under the facts in this case, entitled to recover of appellant and, unless the appellee shall, within 30 days from this date, remit \$200 of the damages allowed to him by the jury, this cause will be reversed and remanded.

PELHAM, J., not sitting.

On Application for Rehearing.

DE GRAFFENRIED, J. [4] The act of the Legislature entitled an act to regulate proceedings in the Supreme Court or Court of Appeals in cases which, in the opinion of the court, should be reversed because the judgment of the lower court is excessive and there is, in the opinion of the Supreme Court or Court of Appeals, no other ground of reversal, approved April 21, 1911 (Laws 1911, p. 587), is, upon this application for a rehearing, attacked upon the ground that it is unconstitutional. We therefore deem it proper to add to the opinion already on file in this case this supplemental opinion.

The act above referred to simply authorizes the Supreme Court and Court of Appeals to notify the appellee, in a case where the court is of the opinion that the judgment of

the court below is excessive and that it should be reversed on that account, the amount which it deems in excess of the just and proper amount of recovery, and to require the appellee, within a stated time, to remit such amount upon the penalty of a reversal. If the appellee accepts the reduction, then, if the appellant consents thereto, the judgment of the court below is affirmed. If the appellee refuses to accept the reduction, or if he accepts the reduction and the appellant refuses to consent thereto, the judgment is reversed.

There is nothing in the state or federal Constitution affecting the common-law right of a trial court to set aside the verdict of a jury when it is excessive. In fact, the power of the trial judge to set aside the verdict of a jury when not justified by the evidence has been so long recognized as essential to the proper administration of justice that it, in truth, forms an essential part of the right of trial by jury itself. To use the language of the Supreme Court of the United States: "Under these statutes, as at common law, the court, upon the hearing of a motion for a new trial, may, in the exercise of its judicial discretion, either absolutely deny the motion or grant a new trial generally, or that it may order that a new trial be had unless the plaintiff elects to remit a certain part of the verdict, and that, if he does so remit, judgment be entered for the rest." *Kennon v. Gilmer*, 131 U. S. 23, 30, 9 Sup. Ct. 696, 33 L. Ed. 110.

"It is a right incidental to all courts invested with the jurisdiction to hear and determine causes, to grant new trials so as to promote justice. An order for this purpose may be either absolute or unqualified, or may be conditional, and impose upon the party asking it the performance of some act, or to prevent a new trial it may require the party against whom the motion is made to renounce, at his election, some advantage he has gained." *Collier, C. J., in Stephenson v. Mansony*, 4 Ala. 317.

The power of a trial court to set aside, upon a proper motion for a new trial, the verdict of a jury because the verdict was excessive, is undoubted. From the judgment of the trial court upon such motion an appeal undoubtedly lies to the Supreme Court or to the Court of Appeals. The power to review such judgment is undoubtedly vested in these courts, and when the bill of exceptions shows that the judgment of the lower court was wrong, and that it should have granted the appellant a new trial because of the excessive verdict of the jury, the Supreme Court or the Court of Appeals not only has the power,

but it is the duty of such court, to reverse the judgment of the lower court. The statute under consideration simply provides that, in such a case, the Supreme Court and Court of Appeals, with the consent of both the appellant and the appellee, may reduce the judgment to an amount which the members of the court may deem right and just under all the facts and circumstances of the case. If the appellant and the appellee do not consent to the reduction, the judgment of the trial court is reversed and the cause remanded for a new trial. If they do consent to the reduction, the judgment as reduced is affirmed.

The above, in plain English, is all that the act under consideration does or undertakes to do, and it in no way offends any constitutional provision touching the right of trial by jury. *Kennon v. Gilmer*, 131 U. S. 23, 30, 9 Sup. Ct. 696, 33 L. Ed. 110.

2. Undoubtedly there was no duty resting upon the appellee to abate the nuisance complained of, and, properly considered, there is nothing in our opinion on file in this case indicating a contrary view. But, as was said by us in the opinion on file, although there is no law requiring a party suffering from the effects of a nuisance to abate it, yet he will not be heard to complain if, with ordinary care and diligence, he could have avoided the injury. "A party is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it, if he do not himself use common and ordinary caution to be in the right." *Stone, C. J., in Crommelin v. Cox*, 30 Ala. 318, 68 Am. Dec. 120. "Because a water power was obstructed, it does not follow that a mill run thereby should be allowed to stand idle or do only a fourth of its ordinary work. * * * Where a person sustains an injury from a wrongdoer, it is the duty of the person to make a reasonable effort to limit the effects of the injury. And this is so even though it may be necessary for the injured person to expend money for such purpose." *Decorah Woolen Mill Co. v. Greer*, 49 Iowa, 491; *Walrath v. Redfield*, 11 Barb. (N. Y.) 368.

It has been held that the burial of a dead animal near another's dwelling is a specific nuisance. *Louisville, etc., R. Co. v. Bolton* (Ky.) 88 S. W. 498; *Jarvis v. St. Louis, etc., R. Co.*, 26 Mo. App. 253.

The appellee owed no duty to appellant to abate the nuisance complained of in his complaint by disinterring and removing the carcass of the calf, but he did owe it the duty of minimizing his injury.

Application for rehearing overruled.

LEVENS v. STATE.

(Court of Appeals of Alabama. Jan. 9, 1912.)

1. EXECUTION (§ 142*)—LEVY—AMOUNT OF PROPERTY TAKEN.

In determining the amount of property to be levied on to satisfy an execution, the officer is left to exercise his own judgment; but it is his duty to take property sufficient to satisfy the execution, allowing for reasonable and probable depreciation of the property at a forced sale, though he should not make the levy so unreasonable and excessive as to bear on its face the appearance of oppression and unnecessary rigor.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 359-383; Dec. Dig. § 142.*]

2. EXECUTION (§ 459*)—WRONGFUL EXECUTION—EXCESSIVE LEVY—LIABILITY OF OFFICER.

An officer making an excessive levy is liable to the defendant in execution for the damages suffered by him by reason thereof in an action of trespass on the case.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1384; Dec. Dig. § 459.*]

3. HOMICIDE (§ 181*)—ASSAULT WITH INTENT TO KILL—EVIDENCE—PROVOCATION.

In a prosecution for assault with intent to kill during a difficulty arising from the attempt of officers to arrest defendant because he would not permit them to levy on certain property, evidence that, before they undertook to levy upon that property, the officers had already levied upon more than enough property to satisfy the writ, was admissible as bearing upon the questions of oppression and provocation.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 383-385; Dec. Dig. § 181.*]

4. HOMICIDE (§ 96*)—ASSAULT WITH INTENT TO KILL—RESISTANCE OF ARREST.

Where the owner of flour exempt from levy under Code 1907, § 4237, notified officers attempting to levy upon it that they had already levied on all his other breadstuff, he had the right to resist an arrest attempted because of his refusal to allow them to levy upon the flour.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 124-127; Dec. Dig. § 96.*]

5. HOMICIDE (§ 96*)—ASSAULT WITH INTENT TO KILL—SELF-DEFENSE—PROVOCATION.

Where defendant, in a prosecution for assault with intent to kill, had resisted arrest, attempted because he would not allow officers to levy upon exempt flour, after notifying them that they had already levied on all his other breadstuff, he was not the provoker of the difficulty following the attempted arrest.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 124-127; Dec. Dig. § 96.*]

6. HOMICIDE (§ 96*)—ASSAULT WITH INTENT TO KILL—SELF-DEFENSE.

Every one has the right to defend his person and property against unlawful violence and may employ as much force as is necessary therefor; but, if he employs more force than necessary, he thereby becomes a trespasser.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 124-127; Dec. Dig. § 96.*]

7. HOMICIDE (§ 193*)—ASSAULT WITH INTENT TO KILL—ADMISSIBILITY OF EVIDENCE.

Defendant, in a prosecution for an assault with intent to kill, had resisted a levy upon his property, and, in resisting an arrest attempted on that account, had armed himself with a gun with which he afterwards shot at the officers. Held, that evidence as to whether the officers were armed when they came on

defendant's premises and where they carried such arms was competent as tending to explain why the defendant armed himself at the time of the threatened arrest.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 416; Dec. Dig. § 193.*]

Appeal from Circuit Court, Cullman County; D. W. Speake, Judge.

Jake Levens was convicted of assault and battery, and he appeals. Reversed and remanded.

W. E. Fort, W. T. L. Cofer, M. F. Parker, and E. C. Burke, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. The defendant was indicted for assault with intent to murder, was tried by a jury, by their verdict found guilty of assault and battery, and from the judgment of the court pronounced on that verdict appeals.

It appears that a writ of attachment was sued out by some one against the estate of the defendant and was placed in the hands of one Bryson, a deputy sheriff, to be levied upon property of the defendant. The writ of attachment was not introduced in evidence, and we do not know by what officer or for the collection of what sum it was issued, or before what court it was made returnable. It was treated on the trial in the court below as a valid writ authorizing a levy upon property of the defendant, and we will so treat it.

The attempt by the above-named officer and his assistants to levy the above writ upon certain flour on the porch of the residence of the defendant was resisted by the defendant; the officers, or some of them, attempted to arrest the defendant on that account; and the difficulty in which the defendant made the assault for which this indictment was found was thereby precipitated. The writ had previously been, without objection on the part of the defendant, levied upon a certain lot of the defendant in the town of Cullman and also upon the contents of his store, barn, and blacksmith shop. The evidence tends to show that the defendant had on his porch certainly one, and possibly two, barrels of flour, and that he also had some flour in his dining room or kitchen. The evidence is in some confusion as to the exact amount of all of this flour, but the defendant's testimony tends to show that there was not on his porch and in his dining room or kitchen exceeding two barrels. The evidence without dispute shows that, when the officers came to seize the flour on the porch, the defendant told them that they had already levied on "fiftyfold" more than was necessary to satisfy the attachment, and that he did not intend to allow them to take the "last bite of bread from his family"; that one of the officers then attempted to seize

the defendant, saying that he was going to arrest him; that the defendant thereupon possessed himself of a gun; and that immediately afterwards several shots were fired, three by the defendant, and probably six or seven by at least two of the officers. The evidence without dispute shows that at least two of the officers were armed when they went to the defendant's porch to levy on the flour; but the evidence is in sharp dispute as to whether the defendant or some of the officers fired the first shot, and there was also a sharp conflict in the evidence as to whether the defendant was in his house or retreating from it when he first fired. The evidence without dispute shows that the defendant left his home during the difficulty, and that he did not return until the next afternoon. The difficulty occurred about or after dark, and the defendant had a wife and six children, all of whom were at home when the shooting took place.

[1] "In determining the amount of property to be levied on to satisfy an execution, the officer is left to exercise his own judgment, free from constraint or control of either plaintiff or defendant; but it is his duty to take property sufficient to satisfy the execution, allowing for reasonable and probable depreciation of the property at a forced sale, but he should not make the levy so unreasonable and excessive as to bear on its face the appearance of oppression and unnecessary rigor." Governor v. Powell, 9 Ala. 83; Griffin v. Ganaway, 8 Ala. 625; Thompson v. Jones, 84 Ala. 279, 4 South. 169; 17 Cyc. 1112, § 8.

[2] An officer making an excessive levy is liable to the defendant in execution for the damages suffered by him by reason thereof in an action of trespass on the case. Thompson v. Jones, 84 Ala. 279, 4 South. 169.

[3] 1. One of the important questions in this case was whether the defendant was free from fault in bringing on the difficulty which resulted in the assault for which he was indicted. The difficulty occurred, confessedly, because the officers, or some of them, attempted to arrest the defendant because he would not permit them to levy on the flour on his porch. If, before they undertook to levy upon the flour, the officers had already levied upon largely more than enough property to satisfy the writ, the defendant should have been allowed to show this by evidence. This evidence, if such existed, would have aided the jury in determining the quo animo of the officers in attempting to make the additional levy and in attempting to arrest or in threatening to arrest the defendant. In other words, it would have shed some light on the question as to whether the officers were acting in good faith or were oppressing the defendant "with unnecessary rigor," when they attempted to seize the flour and arrest the de-

fendant, and whether they did not, themselves, provoke the difficulty.

2. Under the provisions of section 4237 of the Code, no levy of an execution or attachment can be lawfully made upon certain specific articles belonging to the defendant in such execution or attachment, and among such articles "meat not exceeding one hundred pounds, lard not exceeding fifty pounds, meal and flour not exceeding ten bushels" are expressly mentioned. There was some evidence in this case from which the jury were authorized to infer that the defendant had been guilty of hiding out some of his property which was subject to levy and sale. Some of his property evidently bought to be placed in his store and sold by him as a merchant was in his barn and in his blacksmith shop. Of this condition the evidence tends to show the officers were apprised by the defendant when they went upon his premises; but these conditions were matters to be considered by the jury in determining whether the flour on defendant's porch and in his kitchen was, as claimed by him when the officers undertook to levy on it, all of the flour belonging to the defendant which had not already been levied upon when the officers undertook to levy on the flour upon the porch. There is no evidence in the record tending to show that the defendant had any meal, and if the flour on defendant's porch and in his dining room or kitchen was all of the flour that he had left, and if that flour did not exceed 10 bushels and constituted all of the breadstuff left to him (and there was evidence tending to show this), then that flour was, so far as this record shows, exempt to the defendant.

[4, 5] If that flour was exempt, then the defendant had the right, if he informed the officers that it was all that had been left to him, to say to them that they could not levy upon it, to resist such levy, and to resist his arrest if an arrest was attempted on that account. In other words, if the defendant resisted arrest because the officers attempted to arrest him *solely* because he would not allow them to levy an attachment upon property which the law exempted to him from such levy, and the defendant had given the officers notice that they had already levied on all his other breadstuffs, then the defendant was, under the law, not the provoker of the difficulty, whether such officers had already levied upon more than sufficient property to satisfy the attachment or not. "We do not think there is, in law or in reason, any substantial distinction between the levy of an attachment or an execution on the property of a stranger, or the levy upon articles exempt by law from levy and sale, after the sheriff had been warned of the fact that they are exempt. * * * It was the intention of the Legislature that these articles of prime necessity for the comfort of

the family should be kept inviolate for its use, and it would, in a great measure, defeat the object of the law, if the defendant was required to submit to such a levy, and seek redress against the officer by action." *State v. Johnson*, 12 Ala. 840, 46 Am. Dec. 283; *Henderson v. State*, 105 Ala. 139, 16 South. 927.

[6] "It is a settled principle of our law that every one has the right to defend his person and property against unlawful violence and may employ as much force as is necessary to prevent its invasion, but if he employs more force than becomes necessary he becomes a trespasser." *Henderson v. State*, supra; *State v. Johnson*, supra.

"When such a trespass is threatened or committed, the party sought to be arrested has no right to kill, unless the unlawful act, when properly and lawfully resisted by him, is persisted in by the trespasser until it ultimately results either in an actual necessity on the part of the party sought to be arrested to kill in order to prevent to himself great bodily harm, or the appearances are such as to engender the reasonable belief of the existence of such necessity." *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282; *Noles v. State*, 26 Ala. 31, 62 Am. Dec. 711.

[7] While the evidence showed that at least two of the officers were armed when the difficulty occurred, and that they shot at the defendant, nevertheless the court refused to allow the officers to answer questions propounded to them by the defendant asking them if they were not armed when they came on his premises, where they carried such arms, etc. The defendant, in resisting the seizure of the flour and in resisting the arrest, armed himself with a gun, which he afterwards used in the difficulty, and we think that the above evidence which the defendant sought to introduce was at least competent because it tended to explain why the defendant procured his gun at the time of the threatened arrest.

The rulings of the trial court on the admission of the evidence in this case were in some material particulars inconsistent with the views above expressed.

There are a number of questions presented by the record which we do not discuss. They may not arise on the next trial, and we do not deem it necessary to consider them.

Reversed and remanded.

JOHNSON v. STATE.

(Court of Appeals of Alabama. Jan. 11, 1912.)

1. INTOXICATING LIQUORS (§ 231*)—WRONGFUL SALE—EVIDENCE—INTOXICATING EFFECT.

In a prosecution for wrongful sale of intoxicating liquors, the state's witness may tes-

tify as to the intoxicating effect of the liquor purchased.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 291; Dec. Dig. § 231.*]

2. CRIMINAL LAW (§ 1086*)—APPEAL—RECORD—REQUEST TO CHARGE.

Unless the record on appeal affirmatively shows that the charges requested and refused were in writing, as required by Code 1907, § 5364, the trial court will not be put in error for their refusal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2767; Dec. Dig. § 1086.*]

3. CRIMINAL LAW (§ 859*)—TRIAL—READING TESTIMONY TO JURY.

It was not improper for the court to allow the official stenographer at the jury's request to read over to them the evidence of one of the witnesses to refresh the jury's memory with reference thereto.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2064; Dec. Dig. § 859.*]

4. COSTS (§ 322*)—CRIMINAL PROSECUTIONS—IMPRISONMENT.

Where a person convicted of an offense is sentenced to work out the costs, he should be credited at the rate of \$.75 per day.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 1206; Dec. Dig. § 322.*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Lee Johnson was convicted of violating the prohibition law, and he appeals. Corrected and affirmed.

The prosecuting witness testified that he bought four bottles of liquid, which in his best judgment was lager beer; that he drank the four bottles in about 30 minutes; and the solicitor asked him if he could feel any stimulating effects therefrom. The defendant objected to this question, and moved the court to exclude the answer, which was: "Yes, sir; it intoxicated me. I was fully intoxicated, and these four bottles were the only things that I had had to drink that was intoxicating that day."

R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. The defendant was convicted of a violation of the prohibition law. Section 7352 of the Code of 1907.

[1] The state's witness was properly allowed to testify to the intoxicating effect of the liquor purchased. *Marks v. State*, 159 Ala. 71, 48 South. 864, 133 Am. St. Rep. 20; *Brantley v. State*, 91 Ala. 47, 8 South. 816; *Carl v. State*, 87 Ala. 17, 6 South. 118, 4 L. R. A. 380; *Knowles v. State*, 80 Ala. 9.

[2] The charges set out in the record as refused are not shown to have been asked in writing or to have been separately asked or refused. The only statement in reference to the charges is as follows: "Here the defendant asked the following charges, which were refused by the court." Following this statement in the bill of exceptions six charges are set out, but are not shown to have been in writing. Charges moved for must

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

be in writing (Code, § 5364), and, unless the record affirmatively shows that the charges asked were in writing, the trial court will not be put in error for their refusal. *Henderson v. State*, 137 Ala. 83, 34 South. 828; *Foxworth v. Brown*, 114 Ala. 299, 21 South. 413; *Bellinger v. State*, 92 Ala. 86, 9 South. 399; *Walker v. State*, 91 Ala. 76, 9 South. 87; *Ricketts v. B. S. Ry. Co.*, 85 Ala. 600, 5 South. 353; *Wheless v. Rhodes*, 70 Ala. 419; *Crosby v. Hutchinson*, 53 Ala. 5.

[3] It was not improper for the court to allow the official stenographer at the request of the jury to read over to them the evidence of one of the witnesses as taken by the reporter to refresh the memory of the jury as to what had been testified to by the witness. The objection and exception to the court's allowing this to be done is shown by the bill of exceptions as having been taken after the court had permitted it.

[4] The judgment entry shows the defendant was sentenced to work out the costs at the rate of 40 cents per day, when the rate should have been 75 cents per day, and the judgment will be here corrected in that respect, and, as so corrected, the case will be affirmed. *Dowling v. City of Troy*, 1 Ala. App. 508, 56 South. 118; *Johnson v. State*, 94 Ala. 35, 10 South. 667; *Vaughan v. State*, 83 Ala. 55, 3 South. 530; *Miller v. State*, 77 Ala. 41; *Bradley v. State*, 69 Ala. 318.

Corrected and affirmed.

LOWER v. STATE.

(Court of Appeals of Alabama. Jan. 16, 1912.)

STATUTES (§ 8½*)—APPLICATION FOR LOCAL LAW—PUBLICATION—CONSTITUTIONAL PROVISIONS.

Const. 1901, § 106, provides that notice of intention to apply to the Legislature for a local law shall be published at least once a week for four consecutive weeks in some newspaper published in such county or counties to be affected by the law prior to the introduction of the bill. At the time of the adoption of this provision, Code 1907, § 5184, provided that, when notice is required to be given for a specified number of weeks, if the publication is for four weeks, the first insertion must be at least 24 days before such day. *Held*, that it was a fair inference that the constitutional provision was adopted in conformity to the provision of section 5184, and hence, where the first insertion of a notice of an intent to apply for a local law was at least 24 days prior to the introduction of the bill, the notice was sufficient, though four full weeks did not intervene.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 6; Dec. Dig. § 8½.*]

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

Earnest Lower was convicted of an offense, and he appeals. Affirmed.

Roscoe Chamblee, for appellant. R. C. Brickell, Atty. Gen., W. L. Martin, Asst. Atty. Gen., and A. Leo Oberdorfer, for the State.

WALKER, P. J. It is contended in behalf of the appellant that the act of the Legislature purporting to establish the Birmingham court of common pleas (Loc. Acts Ala. 1911, p. 371) is unconstitutional because of a failure to give the notice of intention to apply therefor, as required by section 106 of the Constitution; and that, therefore, the charge upon which the appellant was tried, which was sworn to before H. B. Abernathy, as the judge of that court, was without legal validity, and was subject to the demurrer to it suggesting that objection. The specific ground of the objection urged is that the proof of publication of notice, which accompanied the introduction on March 22, 1911, of the bill for the creation of that court, in stating that the publication was made in a named newspaper published in Jefferson county "once a week for four consecutive weeks, on, to wit, February 24, March 3, 10, and 17, 1911," failed to show a compliance with the requirement that such notice "be published at least once a week for four consecutive weeks * * * prior to the introduction of the bill." The contention is that to constitute a compliance with this requirement of the Constitution four weeks must intervene between the date of the first publication of the notice and the introduction of the bill.

It may be presumed that in framing that provision the makers of the Constitution had in mind the then existing state of the law as to the matter of the construction to be placed upon such a provision. The situation was that, in the absence of a statute governing the matter, a requirement that legal notice be published for a given number of weeks was in some jurisdictions held to be complied with by publishing it in that number of successive weeks, though the first publication be less than that number of full weeks prior to the act of which the notice is given; while in other jurisdictions it was held that the number of weeks stated must intervene between the date of the first publication and the performance of the act referred to in the notice. *Olcott v. Robinson*, 21 N. Y. 150, 78 Am. Dec. 126; 29 Cyc. 1121; 87 Cent. Dig. tit. "Notice," § 29. In other words, there was a conflict in the decisions in different jurisdictions where there was no statutory definition or provision bearing on the question. But in Alabama at that time there was in force a section of the Code which bore the heading, "Publication for a specified number of weeks or days defined;" and which provided that, "when the notice is required to be given for a specified number of weeks, it must be given by consecutive weekly insertions for the number of weeks so specified; and when the notice is of a proceeding to be had or of an act to be done on a specified day, if the publication be for one week, the insertion must be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

not less than six days before such day; if for two weeks, the first insertion must be at least twelve days before such day; if for three weeks, the first insertion must be at least eighteen days before such day; if for four weeks, the first insertion must be at least twenty-four days before such day," etc. Code of 1896, § 3043, now section 5184 of Code of 1907. By that enactment the Legislature took cognizance of the doubts as to the meaning of such requirements as to giving notice which were suggested by the conflicting views on the subject prevailing in different jurisdictions in which there was an absence of statutory definitions governing the question, and removed such doubts by defining the meaning of terms in common use in making provision for the giving of notices.

Of course, the makers of the Constitution were not controlled by the provisions of that statute, and, if they had made it manifest that the language they used was to have a meaning different from that given by the statute to the same language when used in a similar connection, the statutory definition of the terms would have to be disregarded. But, when language is found in the Constitution the meaning of which when used in the general laws of the state for purposes analogous to that for which it is used in the Constitution has been specifically defined by a general statute then in force, it may at least be said that, in the absence of any indication in the Constitution of a different purpose, such a constitutional provision should be construed with reference to the provisions of a general statute of the state having a bearing upon the meaning of terms employed in it, rather than with reference to the views of the courts on questions arising as to the meaning of such terms in the absence of a statute governing the determination of such questions, especially when it is found that the views on such questions which have prevailed in different courts are much at variance. In other words, the fact that there was in force at the time of the making of the Constitution a legislative construction of terms in common use in statutes making provision for the giving of notices furnishes a basis for a presumption that those terms when used in the Constitution were intended to have the meaning which had been given to them by that legislative construction; there being nothing in the Constitution to rebut this presumption. *Moog v. Randolph*, 77 Ala. 597, 606; *Mayor v. State*, 15 Md. 376, 74 Am. Dec. 572. In view of the probability that the framers of the Constitution in using the language which is brought into question had in mind the fact that the Legislature had by a general law defined the meaning of practically identical language when employed in analogous connections, we are of opinion that it is a fair inference that the requirement of section 106 of the Con-

stitution that notice of an intention to apply to the Legislature for a local law shall "be published at least once a week for four consecutive weeks in some newspaper published in such county or counties * * * prior to the introduction of the bill" is complied with by four successive weekly publications of the required notice, the first insertion being at least 24 days prior to the introduction of the bill, as provided by section 5184 of the Code in case of a similar provision for notice when prescribed by a general law. The decision in the case of *Ex parte Black*, 144 Ala. 1, 40 South. 133, furnishes some support for this conclusion. Certainly it cannot be said that the Legislature, in treating as sufficient the proof of publication of notice which is brought into question in this case, so clearly and unmistakably disregarded the requirement of the Constitution on the subject as to justify the court in deciding that its attempt to enact the local law which is assailed was wholly without effect.

Affirmed.

HOLLINGSWORTH v. STATE.

(Court of Appeals of Alabama. Jan. 16, 1912.
Rehearing Denied Jan. 30, 1912.)

INTOXICATING LIQUORS (§ 238*)—OFFENSES—ILLEGAL SALES—EVIDENCE—IDENTITY OF ACCUSED—QUESTION FOR JURY.

Where, on a trial for selling intoxicating liquor, the person who bought liquor testified that to the best of his recollection accused with whom he had no acquaintance was the one who sold the liquor, but that he could not say positively that he was the man, there was positive evidence of the identity of accused as the guilty person sufficient for submission to the jury.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 324-330; Dec. Dig. § 238.*]

Appeal from City Court of Anniston; A. H. Alston, Judge.

Emmett Hollingsworth was convicted of crime, and he appeals. Affirmed.

P. F. Wharton, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. The only question presented by the record is whether the bill of exceptions shows that the evidence sufficiently identified the defendant as the party who sold liquor to one of the witnesses for the state on a certain occasion to have justified the court in submitting the question of guilt vel non to the jury.

The man who bought the liquor says in one part of his testimony: "Looking at the defendant now, I cannot say positively that he is the man I got the whisky from. It was in the dark. I could not say that he is the man or that he is not the man." In

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

another place he says: "My best recollection is he is the man. He was pointed out to me and was nearly in the door at the time." And in another place he says: "To the best of my judgment, I could not say positively that the defendant is the man Sam Davis pointed out to me. He had his back to me. I could not say positively that the defendant is the man I got the liquor from—to the best of my judgment and recollection."

While the above witness was not willing to testify positively that the defendant was the man who sold him the liquor, nevertheless he did testify that to the best of his recollection the defendant was the man. The evidence of the above witness rises above mere conjecture or suspicion. It assumes the dignity of the positive testimony of a witness who from the fact that he had no acquaintance with the defendant and had only seen him when he bought whisky from him on one occasion in the dark was unwilling to positively say that he was the man, but was willing to testify that, to the best of his recollection, he was the man. This witness having testified that, to the best of his recollection, the defendant was the man who had sold him the liquor, it was the duty of the court to submit, under the evidence in this case, the question of the defendant's guilt vel non to the jury. *Kemp v. State*, 89 Ala. 52, 7 South. 418; *Paden v. Bellenger*, 87 Ala. 575, 6 South. 351; *Griffin v. State*, 76 Ala. 29.

There is no error in the record. The judgment of the court below is affirmed.

Affirmed.

GARNER v. STATE.

(Court of Appeals of Alabama. Jan. 18, 1912.)

1. INDICTMENT AND INFORMATION (§ 185*)—SUFFICIENCY—CONVICTION OF OTHER OFFENSE.

One can be convicted only of the offense for which he is indicted.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 526; Dec. Dig. § 185.*]

2. INTOXICATING LIQUORS (§ 239*)—ILLEGAL SALE—INSTRUCTIONS—CONFORMITY TO ISSUES.

Defendant was indicted for manufacturing, selling, offering for sale, giving away, furnishing, or otherwise disposing of spirituous liquors, and the evidence for the prosecution was that he personally sold whisky to the state's witness. Defendant's evidence denied the sale, and showed that he had previously leased the room, where the sale was charged to have been made, to another party, who ran a soft-drink stand. The evidence was in conflict whether defendant was ever behind the counter, or otherwise ever indicated any interest in the business. *Held*, that a charge that if liquor was kept there, and defendant rented it, knowing that liquor was kept there for sale, he would be guilty, even though no sale was made, was prejudicially misleading.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 331-347; Dec. Dig. § 239.*]

Appeal from City Court of Anniston; A. H. Alston, Judge.

Jack Garner was convicted of a violation of the prohibition law, and he appeals. Reversed and remanded.

Knox, Acker, Dixon & Blackmon, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. [1] No proposition is more familiar than that a man cannot be indicted for an offense, and under that indictment suffer a conviction of an offense not named in the indictment. A man cannot be indicted for the larceny of a horse, and under that indictment be convicted of the larceny of a mule. In the present case the defendant was indicted for manufacturing, selling, offering for sale, giving away, furnishing at a public place, or otherwise disposing of spirituous, vinous, or malt liquors. While the language of the indictment was broad, it did not contain an averment that the defendant did "let or suffer a person, firm, or corporation to use any premises which he owned or controlled for the illegal sale or manufacture, or other unlawful disposition, of spirituous, vinous, or malt liquors," which is made a misdemeanor under the provisions of section 1 of an act entitled "An act to further suppress the evils of intemperance," etc., approved August 25, 1909. General and Local Acts Special Session 1909, p. 63.

On the trial the state offered evidence tending to show that within the period covered by the indictment the defendant, in violation of law, had sold intoxicating liquor to one W. H. Smith. Smith testified that he bought the liquor from the defendant in a certain room, in which the evidence showed, without conflict, that there was kept a soft-drink stand, and that the liquor was sold to him by the defendant during the business hours of the day. Smith testified further than when he bought the liquor he was accompanied by Ralph Mackay, saying on that subject: "I got it at the old Peerless Saloon building, corner of Tenth and Market streets, in Anniston. Mr. Garner was behind the counter. We asked him to give us a couple of drinks of rye whisky if he had it. He put a couple of glasses on the counter, and got out a bottle of whisky, and poured two drinks into the glasses. I took a drink of that, and my cousin, Mackay, drank the other glass." The defendant, on the other hand, testified not only that he did not sell the liquor as claimed by Smith, but that at the time referred to he had leased the room in which the liquor is claimed to have been sold to another man, who was at the time referred to keeping there a soft-drink stand. The other evidence in the case was in conflict as to whether the defendant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

after the time he claimed to have leased the room to the alleged keeper of the soft-drink stand, was ever behind the counter in that room, or did any act in there indicating that he was the proprietor of the business conducted there, or in any way interested in it.

[2] The above being the condition of the indictment and the evidence, the court, in its oral charge to the jury, among other things, said: "I charge you that if there was liquor kept there, in that place, and the defendant rented it to this man, and knew that liquor was kept there for sale, although there had been no sale made, that he would be guilty as charged in the indictment." There was some evidence in the case from which the jury might have inferred that liquor was kept for sale in said room, without regard to the question as to whether the defendant sold the liquor on the particular occasion or not. In fact, the court, in its oral charge, in effect, so instructed the jury. It is therefore evident that the above-quoted part of the oral charge of the court, to which the defendant duly and legally reserved an exception, was not only erroneous, but was misleading, and may have resulted in injury to the defendant. It is therefore evident that the judgment of conviction in this case must be reversed, and the cause remanded for a new trial.

Reversed and remanded,

WILSON v. STATE.

(Court of Appeals of Alabama. Jan. 18, 1912.)

1. INTOXICATING LIQUORS (§ 236*)—ILLEGAL SALE—EVIDENCE—"BEER."

The term "beer" being presumed to refer to a malt liquor, a charge of illegally selling malt liquors is supported by evidence of the sale of beer, although the specific kind of beer is not shown.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

For other definitions, see Words and Phrases, vol. 1, pp. 731-734; vol. 8, p. 7588.]

2. CRIMINAL LAW (§ 807*)—INSTRUCTIONS—ARGUMENTATIVE.

A requested instruction on the presumption of innocence, which included the statement that this presumption "is not an idle figure of speech," etc., was in part argumentative, and properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. § 807.*]

3. CRIMINAL LAW (§ 809*)—INSTRUCTIONS—MISLEADING.

An instruction that if, after considering the entire evidence, the jury cannot say whether to convict or acquit the defendant, they must find him not guilty, was misleading.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1961-1967; Dec. Dig. § 809.*]

4. INTOXICATING LIQUORS (§ 239*)—PROSECUTION—INSTRUCTION—EVIDENCE.

In a prosecution for selling beer in violation of the prohibition law, an instruction that,

unless the jury were satisfied from the evidence beyond a reasonable doubt that the defendant and another intended a sale of the beer testified to, then they must acquit the defendant, was properly refused, where there was some evidence to prove a gift of beer by the defendant.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 331-347; Dec. Dig. § 239.*]

5. COSTS (§ 322*)—CRIMINAL CASES—IMPRISONMENT FOR NONPAYMENT—TIME.

In a prosecution for the illegal sale of intoxicating liquors, a sentence to imprisonment in default of payment of costs at the rate of 40 cents a day, instead of 75 cents, was improper.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1202-1206; Dec. Dig. § 322.*]

Appeal from Circuit Court, St. Clair County; J. E. Blackwood, Judge.

A. A. Wilson was convicted of violating the prohibition law, and he appeals. Corrected and affirmed.

The following charges were refused to the defendant: (B) "The court charges the jury that the law presumes every man innocent until his guilt is shown, and the minds of the jury are satisfied from the evidence to a moral certainty. And this presumption of innocence is not an idle figure of speech, * * * but follows the defendant at all stages of the trial, until the guilt of the defendant is shown to the satisfaction of the jury." (S) "The court charges the jury that if, after considering the entire evidence, they cannot say whether to convict or acquit the defendant, then they must find the defendant not guilty." (I) "The court charges the jury that, unless they are satisfied from the evidence beyond all reasonable doubt that Wilson and Cowan intended a sale of the beer testified to, then they must acquit the defendant." (C) "The court charges the jury that there is no evidence in this case as to what kind of beer the state witness got or bought from the defendant, and that the jury have no right to presume or guess that the bottle of beer which the state witness may have got from the defendant was malt liquor."

M. M. & Victor Smith, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. [1] A charge that the defendant "did sell, offer for sale, keep for sale or otherwise dispose of spirituous, vinous or malt liquors, contrary to law," is supported by evidence of a sale by the defendant of a bottle of beer, though the evidence does not specifically disclose what kind of beer it was. In the case of Watson v. State, 55 Ala. 158, it was decided that the court will take judicial notice of the fact that "lager beer" is a malt liquor; it being said in the opinion: "Courts cannot profess ignorance of the meaning of words of popular

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

use, and about the signification of which no intelligent member of the community would hesitate." In common usage, when the general term "beer" is used by a person in calling for a beverage, a malt liquor is understood as being referred to, and, when any other kind of beer is meant, some prefix or qualifying term is added to indicate the kind referred to. The weight of authority is to the effect that, when a witness testified to the sale or giving away of beer under circumstances which make such disposition of a prohibited liquor unlawful, the prima facie inference is that the thing referred to was a malt liquor, and the court may properly take judicial notice of the inference thus arising from the use of the word "beer" in its primary and general sense. *Myers v. State*, 93 Ind. 251; *United States v. Ducourneau* (C. C.) 54 Fed. 138; *Joyce on Intoxicating Liquors*, § 21; *Woollen & Thornton on Intoxicating Liquors*, § 34; *Black on Intoxicating Liquors*, § 17. It follows that the court was not in error in refusing to give charge C, or the general affirmative charge in his favor, requested by the defendant.

[2] Charge B, refused to the defendant, was in part argumentative, and its refusal was not error.

[3] Refused charge S was not free from a misleading tendency, which justified its refusal. *Kirby v. State*, 151 Ala. 66, 44 South. 38; *Hill v. State*, 156 Ala. 3, 46 South. 864.

[4] Charge I was properly refused, as there was some tendency in the evidence to prove a gift of the beer by the defendant.

[5] The defendant should have been sentenced for the costs at the rate of 75 cents a day, instead of at the rate of 40 cents a day. In that respect the judgment will be corrected here; and, as thus corrected, it is affirmed.

Corrected and affirmed.

KIRKWOOD v. STATE.

(Court of Appeals of Alabama. Jan. 11, 1912.)

1. GRAND JURY (§ 12*)—SUMMONING—STATUTES.

Where 15 persons on the venire for the grand jury were summoned, and all appeared, but one was excused, the action of the court in directing the sheriff to summon two qualified citizens, instead of commanding him to summon from the qualified citizens twice the number of persons required to complete the grand jury, as required by Code 1896, § 5023, did not invalidate the grand jury composed of 15 qualified jurors and completed after the sheriff had summoned two persons.

[Ed. Note.—For other cases, see *Grand Jury*, Cent. Dig. §§ 30-32; Dec. Dig. § 12.*]

2. INDICTMENT AND INFORMATION (§ 137*)—QUASHING INDICTMENT—GROUNDS.

Under Code 1896, § 5269, providing that no objection may be taken to an indictment on the ground that the grand jurors were not legally drawn or summoned, etc., an objection to an indictment may not be taken on the ground

that the court in ordering the sheriff to summon grand jurors did not use the language of section 5023.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 481; Dec. Dig. § 137.*]

3. HOMICIDE (§ 174*)—EVIDENCE—SUBSEQUENT CONDUCT OF ACCUSED.

The state may show that accused, after killing decedent, resisted arrest and shot an eyewitness attempting to arrest him, and that immediately after the second shooting he fled from the scene.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 359-371; Dec. Dig. § 174.*]

4. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.

Evidence relevant to the crime charged is not inadmissible, though it proves accused's guilt of another offense.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

5. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

Where the evidence was conflicting, the refusal to charge that, if there was one fact proved which was inconsistent with the guilt of accused, there was a reasonable doubt, necessitating an acquittal, was reversible error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. § 789.*]

Appeal from Circuit Court, Winston County; G. O. Chennault, Special Judge.

Will Kirkwood was convicted of murder in the second degree, and he appeals. Reversed and remanded.

The matters not sufficiently appearing from the opinion are as follows: Charge requested by and refused to the defendant: (23) "I charge you, gentlemen of the jury, that if there is one single fact proved to the satisfaction of the jury which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit him." Charge 38 is in almost the exact language.

James J. Ray, for appellant. R. G. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. [1] The minutes of the court in reference to the organization of the grand jury which found the indictment against the defendant, after reciting the facts of the issuance to the sheriff of a venire facias commanding him to summon 15 named persons to serve as grand jurors, that all of them were served and appeared, and that one of them was excused by the court, further recited that: "The court ordered the sheriff to select two names of two qualified citizens of said county. The names were placed in a hat and drawn out by the clerk, and read by the court, to wit, M. L. Aaron. Then the court ascertained that all the persons summoned and answering to their names were householders and freeholders of Winston county, and all possessed the legal qualifications to serve as grand jurors at the pres-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

ent term of this court, and were of sufficient number to constitute a grand jury. The said persons were impaneled into a grand jury according to law." It is urged that the order made by the court on the reduction below 15 of the number of those who appeared was not in conformity with the requirement of the statute then in force (Code of 1896, § 5023); that, in such an event, "the court must cause an order to be entered on the minutes, commanding the sheriff to summon from the qualified citizens of the county twice the number required to complete the grand jury, which order the sheriff must forthwith execute"; and that the effect of such non-conformity was to invalidate the indictment. While the form of the order was that the sheriff "select two names of two qualified citizens," instead of "commanding the sheriff to summon from the qualified citizens of the county twice the number of persons required to complete the grand jury," it sufficiently appears from the succeeding recitals of the minute entry that it had the same effect as an order made in strict conformity with the requirement of the statute, as the recitals show that the sheriff executed the order by summoning from the qualified citizens of the county twice the number of persons required to complete the grand jury. Where the order as made, and as it was understood and executed by the sheriff, was the equivalent of the order required by the statute, it is no objection to its validity that the words of the statute were not followed in framing it. *Yancy v. State*, 63 Ala. 141. Under the statute, the allowance of the excuse of one of the 15 persons in attendance in obedience to the summons gave the court the right to order the sheriff to summon two qualified citizens to complete the grand jury. The order made accomplished the result contemplated by the statute. So far as that order of the court was concerned, it had no invalidating effect upon the grand jury in reference to which it was made, nor upon an indictment returned by that body.

[2] As to the further objection to the indictment, suggested in the motion to quash and also in the plea in abatement, having reference to the method pursued in completing the grand jury, it was one that was not available under the statute limiting the grounds upon which objection can be taken to a grand jury because of the manner of its formation. Code of 1896, § 5269. The court was not in error in its disposition of the objections made to the indictment. *Billingslea v. State*, 68 Ala. 486; *Cross v. State*, 63 Ala. 40; *Clemons v. State*, 167 Ala. 20, 52 South. 467; *Hall v. State*, 134 Ala. 90, 32 South. 750.

[3] It is insisted that the court was in error in admitting, over the defendant's objections, testimony in reference to his shooting one Will Stevens after he had shot the

deceased. Some of the testimony in this connection tended to show that the defendant shot Stevens when the latter, who was the mayor of the town in which the killing under investigation had just taken place and an eyewitness of that occurrence, was undertaking to arrest him, and that immediately after this second shooting he fled from the scene. It was competent for the state to prove that the defendant, after killing the deceased, resisted or avoided arrest, and that he fled, and evidence of such incriminating conduct on the part of the defendant could not properly be excluded because it might also tend to show the commission by him of another and distinct offense.

[4] Evidence which is relevant to the charge under investigation is not rendered inadmissible because it may also tend to prove the defendant guilty of another criminal offense. *Ray v. State*, 126 Ala. 9, 28 South. 634; 12 Cyc. 407.

[5] Exceptions were reserved to parts of the charge given by the court at its own instance, and also to its refusal to give certain written charges requested by the defendant. Plainly a number of these rulings were not such as to constitute grounds of reversal. A review in detail of those rulings is not deemed necessary for the guidance of the court on another trial. The principal result of such a review would be a mere reference to familiar rules governing in such matters. In its rulings, however, the court did not succeed in avoiding reversible error. Charges 23 and 38 requested by the defendant each state substantially the same proposition, and it has been held that that proposition is one which should be given in charge to the jury when requested by a defendant in a criminal case in which the evidence is in conflict. *Walker v. State*, 153 Ala. 31, 45 South. 640; *Simmons v. State*, 158 Ala. 8, 48 South. 606. That proposition should have been given in charge when duly requested. The refusal to give it was reversible error. Some of the other refused charges may not have been subject to such legal objection as to require their refusal, but the manner in which they were framed was of questionable propriety, to say the least, and the questions sought to be raised by them may not be presented in the same way on another trial.

Reversed and remanded.

MAXWELL v. STATE.

(Court of Appeals of Alabama. Jan. 18, 1912.)

1. CRIMINAL LAW (§ 844*)—TRIAL—INSTRUCTIONS—EXCEPTIONS—REQUISITES.

An exception to a part of an oral charge fails, unless the entire part is faulty as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2025; Dec. Dig. § 844.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. CRIMINAL LAW (§ 844*)—INSTRUCTIONS—EXCEPTIONS—SUFFICIENCY.

An instruction that the fact that witnesses testified that a witness was not a man of good character, and that they would not believe him on oath, because he did not pay his debts, does not justify the jury in disregarding his testimony until they have considered all of the testimony, and that the fact that a man may not pay his debts is not conclusive that he is a man of bad character, but the question whether he has sworn falsely is for the jury, is not defective as a whole, though a part of it may violate Code 1907, § 5362, prohibiting a court on its own motion, from charging on the effect of evidence, so that an exception to the charge as a whole is not well taken.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2025; Dec. Dig. § 844.*]

Appeal from City Court of Anniston; A. H. Alston, Judge.

John Maxwell was convicted of selling intoxicating liquor, and he appeals. Affirmed.

The following is part of the oral charge excepted to: "The fact that the three witnesses have come upon the stand and sworn that the witness Mason was not a man of good character, two swearing that they would not believe him upon his oath, and the other saying that he could not swear that, does not justify you in setting aside the testimony of the witness Mason until you have considered all of it in connection with all of the testimony that has been offered. Now, where do your considerations upon that line commence? It commences with the testimony that was offered to impeach him. What was the motive? And what was necessary, now, to impeach a man so that the jury would be justified in setting aside this testimony and not believing what he said? These witnesses testified for you that this man had not paid his debts; that he owed some debts around here. Well, I charge you that the fact that a man may not have paid his debts would not be proof conclusive that he was a man of bad character. The question for you to determine is whether or not he has sworn falsely in this case."

T. C. Sensabaugh, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. [1] When an exception is taken to a part of the oral charge of a court, then, unless the entire part of the charge to which the exception is taken is faulty as a whole, the exception fails. Lacey v. State, 154 Ala. 65, 45 South. 680.

[2] One sentence in the part of the oral charge to which an exception was taken may be subject to criticism, and it may be, as claimed by counsel for the defendant, that it is vicious because it violates that provision of the Code (section 5362) which prohibits a court, ex mero motu, from charging the jury upon the effect of the evidence.

White v. State, 111 Ala. 92, 21 South. 330. The other parts of that portion of the oral charge to which the exception was taken were not subject to that or any other objection. The objection of the defendant to the oral charge of the court was, therefore, not well taken.

There is no error in the record, and the judgment of the court below is affirmed.

Affirmed.

TICE v. STATE.

(Court of Appeals of Alabama. Dec. 19, 1911. Rehearing Denied Jan. 30, 1912.)

1. INTOXICATING LIQUORS (§ 238*)—CRIMINAL PROSECUTION—EVIDENCE.

In a prosecution for manufacturing liquor, evidence held sufficient to go to the jury on the question of the defendant's guilt.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 324-330; Dec. Dig. § 238.*]

2. CRIMINAL LAW (§ 741*)—TRIAL—EVIDENCE—PROVINCE OF JURY.

If the tendency of the evidence in a criminal prosecution at all supports the charge made, or permits inferences to be drawn by the jury in support of the charge, the question as to its sufficiency is for the jury, unless it palpably fails to make a prima facie case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1718; Dec. Dig. § 741.*]

3. CRIMINAL LAW (§ 693*)—TRIAL—EVIDENCE—OBJECTIONS—TIME TO MAKE.

Whether a question to a defendant in a prosecution for manufacturing intoxicating liquors, as to whether he knew how to make liquor, exceeded the latitude allowed on cross-examination cannot be inquired into, where no objection thereto was taken until after the question was answered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1630; Dec. Dig. § 693.*]

4. CRIMINAL LAW (§ 1086*)—APPEAL AND ERROR—BILL OF EXCEPTIONS—SUFFICIENCY.

Exceptions to an oral charge in a criminal prosecution, though set out in a bill of exceptions, are not available on review, where it is not shown that the exceptions were reserved, pending the trial, or before the jury retired.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1086.*]

Appeal from Circuit Court, Marion County; C. P. Almon, Judge.

Jordon Tice was convicted of manufacturing spirituous, vinous, malt, or alcoholic liquors, and appeals. Affirmed.

E. B. & K. V. Fite, and A. F. Fite, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. Appellant was tried for manufacturing spirituous, vinous, malt, or alcoholic liquors, and appeals from the judgment of conviction.

[1] The witness examined on behalf of the state testified that he saw the defendant and two other parties at a still, located about one-half to three-quarters of a mile from

defendant's house, that "looked like" it had been in operation for some time; that there was a 10-gallon keg sitting at the still, and 3 or 4 barrels in the hollow nearby. The witness further testified that when he came up and joined the three parties at the still the defendant "seemed to be at work"; that he heard a noise like taking rocks from around the still before he saw the defendant; and that he thought there was a fire there; that the defendant, when he walked up, said: "We have plenty of whisky; come up and take a drink." The state introduced no other witness, and this witness stated, in the course of his examination, that he would not be certain that the defendant was working at the still; that he saw him do no work; and that his hands appeared to be clean. The defendant moved the court to exclude the evidence and direct a verdict, as the evidence was not sufficient to support a verdict of guilty and judgment of conviction. The defendant's motion to exclude the evidence was overruled by the court. There was sufficient evidence from which the inferences necessary to a finding of the defendant's guilt could be drawn by the jury.

[2] Unless the evidence palpably fails to make out a *prima facie* case, its weakness is a question, not for the court, but for the jury, and if its tendencies at all support the charge made, or afford inferences to be drawn by the jury in support of the charge, it is properly left to the jury to determine. *Way v. State*, 155 Ala. 52, 46 South. 273. The evidence that defendant was found at a still, located within three-quarters of a mile of his home, that showed signs of having been recently in operation, and that he spoke of and offered to dispose of the whisky as having an interest in it, and "seemed to be at work," are sufficient facts to submit to the jury on the question of defendant's guilt of manufacturing spirituous, vinous, malt, or alcoholic liquors; and it is for the jury to say if the inferences drawn from them are sufficient to support the charge made and lead to a conclusion of guilt by that measure of proof required.

[3] The objection to the question asked the defendant on cross-examination, "You know how to make liquor, Jord?" is shown by the bill of exceptions to have been made after the witness answered the question; and it is therefore unnecessary to consider whether the question exceeded the latitude allowed on cross-examination. *McCalman v. State*, 96 Ala. 98, 11 South. 408; *Billingsley v. State*, 96 Ala. 128, 11 South. 409; *Traylor v. State*, 100 Ala. 142, 14 South. 634; *Ellis v. State*, 105 Ala. 72, 17 South. 119; *Washington v. State*, 106 Ala. 58, 17 South. 546; *Downey v. State*, 115 Ala. 108, 22 South. 479; *Coppin v. State*, 123 Ala. 58, 26 South. 333; *So. Ry. Co. v. Leard*, 146 Ala. 849, 39 South. 449; *W. P. Co. v. Andrews*, 150 Ala. 368, 43

South. 348; *B. R. L. & P. Co. v. Taylor*, 152 Ala. 105, 44 South. 580; *B. R. L. & P. Co. v. Chastain*, 158 Ala. 421, 48 South. 85.

[4] The exceptions to portions of the oral charge set out in the bill of exceptions are not available on review, as it is not shown that the exceptions were reserved, pending the trial, or before the jury retired. *Donahoo & Matthews v. Tarrant*, 1 Ala. App. 446, 55 South. 270; *Moore v. State*, 146 Ala. 687, 40 South. 345; *Reynolds v. State*, 68 Ala. 502; *Montgomery v. Gilmer*, 83 Ala. 116, 70 Am. Dec. 562. There was evidence tending to show the guilt of the defendant, and the general charge was properly refused.

There is no error in the record, and the judgment must be affirmed.

Affirmed.

PALMER et al. v. STATE.

(Court of Appeals of Alabama. Jan. 18, 1912.)

1. CRIMINAL LAW (§ 292*)—FORMER JEOPARDY—PLEA—SUFFICIENCY.

A plea setting out a previous trial on an issue tendered by accused's plea of not guilty to the indictment in the pending case, on which trial evidence was introduced and a verdict rendered, shows that he has been in former jeopardy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 668-671; Dec. Dig. § 292.*]

2. CRIMINAL LAW (§ 292*)—FORMER JEOPARDY—PLEA—SUFFICIENCY.

A plea of former jeopardy setting out a trial at a previous term on plea of not guilty to the indictment in the pending trial, on which trial a conviction was had, and setting forth a judgment on the verdict, including provision suspending the sentence pending an appeal, and alleging that the judgment was void, that no other judgment was rendered, and that accused was placed in jeopardy by such proceedings, was not demurrable as showing that there was a judgment on the verdict and sentence in conformity thereto, or that the judgment was reversed and the cause remanded on appeal for new trial, or that accused stands unprejudiced by any errors in the former trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 668-671; Dec. Dig. § 292.*]

3. CRIMINAL LAW (§ 293*)—PLEADING—DEMURRER.

A demurrer to a plea on an untenable ground should not be sustained, though the plea be demurrable on some other ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 672; Dec. Dig. § 293.*]

Appeal from Circuit Court, Marion County; C. P. Almon, Judge.

Hez Palmer and another were convicted of an offense, and they appeal. Reversed and remanded.

See, also, 53 South. 283; 54 South. 272; 56 South. 50.

The following is the plea in abatement: "Defendant Hez Palmer alleges that heretofore, to wit, at the February, 1910, term of the circuit court of Marion county, Alabama, this defendant and Jennie Langston, with whom he was jointly indicted, were tried on the indictment herein; that on said trial

defendants jointly pleaded not guilty, and evidence was introduced on the issue tendered by said plea, and a verdict was rendered on said trial by the jury which was organized to try defendant which verdict was in words and figures as follows: 'We, the jury, find the defendants guilty as charged in the indictment and assess a fine of \$100 to each defendant. W. B. Musgrove, Foreman.' And the defendant alleges that upon the rendition of said verdict on said trial the said circuit court of Marion county, Alabama, rendered the following as a judgment on said verdict, as shown by the minutes of said court, to wit: 'The State v. Hez Palmer and Jennie Langston. February Term, 1910. Indictment—Adultery and Fornication. Comes the state of Alabama, by its solicitor, and come also the defendants in their own proper person and by attorney, and the defendants, being arraigned in open court, for answer to said indictment, plead and say that they are not guilty in manner and form as charged therein. Thereupon came a jury of good and lawful men, to wit, W. B. Musgrove and eleven others, who having been impaneled and sworn according to law, on their oaths do say: "We, the jury, find the defendants guilty as charged in the indictment, and assess a fine of \$100 to each defendant." It is therefore considered and adjudged by the court that the state of Alabama, for the use of Marion county, have and recover from the defendants the sum of \$100 each, the fines assessed by the jury as aforesaid, together with the costs of this prosecution, for which execution may issue. It is therefore considered and adjudged by the court that the said defendant Hez Palmer be and he hereby is sentenced to hard labor for the county of Marion for a term of three months, and an additional punishment to that fixed by the jury in this case. Came into open court the defendants Hez Palmer and Jennie Langston, as principals, and D. J. H. Palmer, J. A. Palmer, W. B. Palmer, R. H. Palmer, W. G. Palmer, and Lucy Ann Nichols, as sureties, and in open court confessed judgment in favor of the state of Alabama, with waiver of exemptions, and against Hez Palmer and Jennie Langston, for the sum of one hundred dollars each, the fines imposed in this case, together with the costs in this behalf expended. It is therefore considered and adjudged by the court that the state of Alabama, for the use of Marion county, have and recover of the said Hez Palmer, Jennie Langston, D. J. H. Palmer, J. A. Palmer, W. B. Palmer, R. H. Palmer, W. G. Palmer, and Lucy Ann Nichols said sums so confessed, with waiver of exemptions as to the collection of this judgment, for which let execution issue. It being made known to the court that the defendants desire an appeal to the Supreme Court, the sentence is suspended pending an appeal, and defendants admitted to bail in the sum of five hundred dollars each, with sufficient sureties,

conditioned for their appearance at the next term of this court, and from term to term, to abide such judgment as may be rendered by the Supreme Court. It is further ordered by the court that the defendants have 90 days from the adjournment of this court to prepare and tender a bill of exceptions. This March 4, 1910.' Defendant alleges that said judgment rendered by said court in this cause upon said verdict was void and ineffectual as a judgment of conviction against this defendant, and defendant avers that no other judgment was rendered by said court upon said trial, except that hereinabove set out and shown by the minutes of said court. Defendant alleges that he has heretofore been put in jeopardy on the indictment against him herein, and above shown, notwithstanding the invalidity of the judgment rendered on said trial, and he should not now be again put in jeopardy, nor again tried on said indictment."

The state demurred upon the following grounds: That the allegations of the plea on its face show that there was a judgment by the court on the verdict of the jury and a sentence in conformity thereto; that there was an appeal to the Supreme Court, and the cause reversed and remanded for a new trial to this court; that Hez Palmer stands unprejudiced in this trial court, and is tried de novo, and no advantage can be taken of any errors in the former trial.

A. F. Fite, and K. V. Fite, for appellants.
R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. [1-3] The defendant's plea of former jeopardy in setting out a trial at a previous term on an issue then tendered by his plea of not guilty to the indictment in this case, on which trial evidence was introduced and a verdict rendered, undoubtedly showed that he had been in former jeopardy. *Scott v. State*, 110 Ala. 48, 20 South. 468. It is not denied that that plea was subject to demurrer, but it was not subject to objection on either of the grounds assigned in the demurrer actually interposed to it. Obviously the first and third grounds of the demurrer were untenable. The second ground suggested an objection to which the averments of the plea did not show that it was subject. The plea did not aver or show that the Supreme Court had reversed the judgment rendered at the former term, and remanded the case for a new trial. Nor is this fact otherwise disclosed by the record. It did not appear from the averments of the plea that the defendant had waived his privilege of not being put in jeopardy a second time for the same offense by procuring the vacation of the judgment rendered at the former term. *State v. McFarland*, 121 Ala. 45, 25 South. 625; *Gunter v. State*, 83 Ala. 96, 3 South. 600. As to its second ground, the demurrer was a speaking one

in suggesting as an objection to the plea the existence of a fact not averred. A demurrer to a plea on an untenable ground should not be sustained. *Coburn v. State*, 151 Ala. 100, 44 South. 58, 15 Ann. Cas. 249. For the error in sustaining the demurrer to the plea of former jeopardy, the judgment must be reversed.

Reversed and remanded.

STINSON v. STATE.

(Court of Appeals of Alabama. Jan. 18, 1912.)

1. CRIMINAL LAW (§ 178*)—FORMER JEOPARDY.

Accused is estopped to plead as a former jeopardy the beginning of a prior proceeding against him on the same charge which he procured to be dismissed on the ground that he could not be tried on a warrant, irrespective of whether such dismissal was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 326-329; Dec. Dig. § 178.*]

2. CRIMINAL LAW (§ 408*)—EVIDENCE—COMPROMISE.

The state offered in evidence in a larceny case accused's statement to the person whose wire was claimed to have been stolen that after it was found in accused's possession, and before a criminal prosecution was suggested, accused called the alleged owner aside, and told him that he would pay for the wire if he would drop the matter without further trouble. Held, that the statement was not admissible over accused's objection, being an offer by him to compromise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 785; Dec. Dig. § 408.*]

3. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY.

Evidence that a third person admitted that he committed the offense of which accused was charged is inadmissible, being hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

Appeal from Shelby County Court; E. S. Lyman, Judge.

Furman Stinson was convicted of larceny, and he appeals. Reversed and remanded.

Wallace & Henderson, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. [1] A defendant is estopped to plead as a former jeopardy the institution of a previous proceeding against him on the same charge which he procured to be dismissed on the ground substantially that he could not be held and tried on the warrant against him issued in that proceeding, whether or not such dismissal was proper. The court, having, at the defendant's instance, been led to treat that former proceeding as one which was not legally maintainable, may decline to entertain a subsequent inconsistent suggestion from him, by plea or otherwise, that the same proceeding constituted a legal and valid prosecution. *State v. McFarland*, 121 Ala. 45, 25

South. 625; *Stone v. State*, 160 Ala. 94, 49 South. 823, 136 Am. St. Rep. 69; *Noel v. State*, 161 Ala. 25, 49 South. 824. The court was not in error in sustaining the demurrer to the plea of former jeopardy.

[2] The statement of the defendant to the witness Strickland, whose barbed wire is charged to have been stolen, to the effect that, after the wire was found in the defendant's possession, and before there had been any suggestion of a criminal prosecution, the defendant called the witness aside and told him that if he would stop the matter right where it stood, and not have any more trouble about it, he would pay the witness for the wire, was on its face an effort by the defendant to settle or compromise the matter, and was not admissible in evidence against him over his objection duly and seasonably interposed. *Sanders v. State*, 148 Ala. 603, 41 South. 466; *Wilson v. State*, 73 Ala. 527; *Martin v. State*, 56 South. 64.

[3] There was no error in sustaining objections to testimony tending to prove that a third party had admitted that he committed the offense with which the defendant was charged. Such evidence is mere hearsay. *Owensby v. State*, 82 Ala. 63, 2 South. 764; *Goodlet v. State*, 136 Ala. 39, 33 South. 892; *McDonald v. State*, 165 Ala. 85, 51 South. 629.

Because of the error above mentioned, the judgment must be reversed.

Reversed and remanded.

WETZELL v. STATE.

(Court of Appeals of Alabama. Jan. 18, 1912.)

INTOXICATING LIQUORS (§ 236*)—UNLAWFUL SALE—TIME—EVIDENCE—SUFFICIENCY.

In a trial for unlawfully selling liquor, the time of the offense is insufficiently brought within the statute of limitations by testimony that a sale was made "in the winter and before Christmas."

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 303; Dec. Dig. § 236.*]

Appeal from Circuit Court, De Kalb County; W. W. Haralson, Judge.

Ed Wetzell was convicted of violating the prohibition law, and he appeals. Reversed and remanded.

R. C. Hunt, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. The defendant was tried and convicted for a violation of the prohibition law. The state introduced but one witness who testified to the time of the commission of the offense, and this witness testified that he did not remember the time when he bought the prohibited liquor, but that "it was in the winter and was before Christmas." The evidence is not sufficient

to show that the offense was committed within the period of the statute of limitations before the finding of the indictment. The defendant asked the general affirmative charge, and insists here that its refusal by the court below is error, because the evidence fails to show that the transaction occurred within the limitation prescribed by the statute in which the offense is punishable.

The record fails to present evidence from which a reasonable inference can be drawn that the offense was committed within the period prescribed by statute making it punishable, and the case must be reversed. *Yancey v. State*, 1 Ala. App. 226, 55 South. 267.

Reversed and remanded.

SPEAR v. STATE.

(Court of Appeals of Alabama. Jan. 16, 1912.)
ASSAULT AND BATTERY (§ 66*)—CRIMINAL RESPONSIBILITY—EXTENUATION OR JUSTIFICATION.

Under Code 1907, § 6308, providing that accused, on a trial for assault, assault and battery, or affray, may prove in extenuation or justification abusive language by prosecutor at or near the time of the offense, abusive language by prosecutor at or near the time of assault, not in the presence or hearing of accused, but communicated to him before the assault, may be proved in extenuation or justification.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 94, 95; Dec. Dig. § 66.*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Dick Spear was convicted of assault and battery, and he appeals. Reversed and remanded.

Lacy & Lacy, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. Section 6308 of the Code provides that, on the trial of any person for an assault, an assault and battery, or affray, he may give in evidence opprobrious words or abusive language used by the person assaulted or beaten at or near the time of the assault or affray, and such evidence shall be good in extenuation or justification, as the jury may determine. Opprobrious words or abusive language used by the person assaulted or beaten at or near the time of the assault, not in the presence or hearing of the defendant, but communicated to the defendant before the assault, are admissible in evidence under the above provisions of the Code in extenuation or justification of the offense, as the jury may determine. Opprobrious words spoken of, or abusive language used against, a man "behind his back," and communicated to the

man so spoken of or abused, frequently have the same effect upon him as if spoken in his presence. *Brooke v. State*, 155 Ala. 78, 46 South. 491.

In the present case the defendant was indicted for assaulting and beating Cam Smith, and offered to prove that just a few minutes before the difficulty said Cam Smith made use of opprobrious words or abusive language concerning the defendant, not in the presence or hearing of the defendant, but that said opprobrious words or abusive language were communicated to the defendant just a few minutes before the difficulty. The court refused to allow such proof, and in doing so committed an error for which the judgment in this case must be reversed.

Reversed and remanded.

PENNEY v. McCAULEY.

(Court of Appeals of Alabama. Dec. 19, 1911.
 Rehearing Denied Jan. 30, 1912.)

1. TRIAL (§ 210*)—INSTRUCTIONS—WEIGHT OF EVIDENCE—CREDIBILITY OF WITNESSES.

Where the evidence was conflicting on an issue, and the testimony of plaintiff was material, the refusal to charge that, in weighing the evidence of plaintiff, the jury must consider his demeanor, and if he willfully swore falsely to any material fact the jury could disregard his entire evidence, was reversible error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 490-494; Dec. Dig. § 210.*]

2. TRIAL (§§ 240, 244*)—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.

An instruction that, as a circumstance, the jury, to determine a fact, may look to another fact is properly refused as argumentative, and as singling out a particular part of the testimony.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 561, 577-581; Dec. Dig. §§ 240, 244.*]

3. TRIAL (§ 210*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

The refusal to charge that, in considering the weight which the jury will give to the testimony of a witness, they can look to the fact, if it be a fact, that he is not interested in the result of the case is not reversible error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 490-494; Dec. Dig. § 210.*]

4. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Where, in an action on a duell, defendant pleaded the general issue, payment, and special pleas setting up a subsequent agreement in settlement, an instruction that the burden of proving payment was on defendant, that the meaning of the duell was that, while rents of premises were pledged to plaintiff as security of the duell, yet such rents did not constitute payment, unless collected by plaintiff, correctly stated the law; and defendant, believing that it had a misleading tendency, must request an explanatory charge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

5. WITNESSES (§ 268*)—IMPEACHMENT—CROSS-EXAMINATION.

It is competent to show, on the cross-examination of a witness detailing a transaction, that when asked, prior to the trial, about the

transaction, supposed to be within his knowledge, he remained silent, as bearing on the credibility of his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 268.*]

Appeal from Circuit Court, Morgan County; Marvin West, Special Judge.

Action by Charles S. McCauley against J. E. Penney on a duebill. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The witness Kent was examined by interrogatories, and objection was interposed to the fourth cross-interrogatory: "Isn't it a fact that Charles S. McCauley asked you, in the presence of Thomas L. Jones, and also in the presence of A. E. Martin, in the city of Huntsville, Ala., on or about the 6th day of October, 1909, to state, if you remembered, a conversation between him and J. E. Penney in the year 1903, and that you failed or refused to state, in the presence of either of them, anything about the matter?" Counsel also objected to that portion of interrogatory 1 on the cross concluding as follows: "Or that in substance the interrogatory being, was it not a fact that on a certain day the witness stated to McCauley, in the city of Huntsville, that it was so long ago that the witness had no recollection of what was said in any conversation between McCauley and Penney in 1903."

The following charges were refused to the appellant: (4) "In weighing the evidence of the witness McCauley, you may consider his demeanor upon the stand, together with what he has to say as a witness; and if, after considering all the evidence, you find that he is contradicted as to material matters in the case by other evidence, and that he has sworn to any one material fact in the case falsely, and that this was willfully done by him, then, if you see proper so to do, you can disregard his entire evidence in this case." (3) "As a circumstance to which you may look in determining whether defendant agreed with plaintiff to let him have the farm, as is alleged in plea 4 and 5 filed in this cause, you may look to the fact, if it be a fact, that plaintiff collected rents from some of the tenants for the year 1903." (B) "I charge you that, in considering the weight which you will give to Thomas Kent's testimony, you can look to the fact, if it be a fact, that he was not interested in the result of this case."

The court, at the request of plaintiff, gave the following charges: (1) "The burden of proving that the duebill has been paid is upon Penney." (2) "That the meaning of the duebill itself was that, while the rents of the entire McCauley place were pledged to McCauley as security merely for the payment of the amount called for by the duebill, yet those rents were not to constitute any pay-

ment on the duebill until and unless collected by McCauley."

Kyle & Hutson, for appellant. E. W. Godbey, for appellee.

PELHAM, J. A duebill, given by the appellant to the appellee, is the foundation of the suit brought in the trial court. Appellee having declared on the duebill, the appellant pleaded the general issue, payment, and two special pleas, setting up a subsequent and separate agreement in satisfaction and settlement of the claim evidenced by the duebill.

[1] The evidence was in direct conflict as to the parties having entered into the subsequent agreement, and the testimony of the appellee, McCauley, on this proposition being material to the issues made under the pleading, charge No. 4, requested in writing by appellant, should have been given, and its refusal constitutes reversible error. So. Cotton Oil Co. v. Walker, 164 Ala. 33, 51 South. 169; A. G. S. R. R. Co. v. Frazier, 93 Ala. 45, 9 South. 303, 30 Am. St. Rep. 28; McClellan v. State, 117 Ala. 140, 23 South. 653; Edmondson v. Anniston City Land Co., 128 Ala. 589, 29 South. 596; Venable v. Venable, 165 Ala. 621, 51 South. 833; Williamson Iron Co. v. McQueen, 144 Ala. 265, 40 South. 306.

[2] Charge 3, requested by appellant, is argumentative, and singled out and gave undue prominence to a particular part of the testimony, and was properly refused.

[3] Charge B probably escapes the criticism made of charge 3, in that it falls within the exception to the general rule against giving such charges, as it goes only to the weight and credibility of the witness' testimony; but its refusal would not constitute reversible error.

[4] The court committed no error in giving the charges requested by appellee. They assert correct propositions, and, if calculated to have a misleading tendency, and to include the subsequent verbal agreement while construing the written instrument, it was the appellant's duty to request explanatory charges.

[5] The court's rulings on the evidence were free from error. The latitude allowed on cross-examination was not violated in the cross-examination of the witness Kent. That a person remains silent when accused of guilt is competent evidence as a circumstance tending to show guilt (Jackson v. State, 167 Ala. 44, 52 South. 835); and when a witness remains silent upon being asked about matters or a transaction supposed to be within his knowledge, and which he subsequently details upon the witness stand, it is competent to show this on his cross-examination, for the purpose of allowing the jury to consider it as a circumstance in de-

termining the weight they will give to his testimony; and if there was any explanation for the witness' silence, as suggested by appellant, this could be made to appear upon redirect examination.

For the error committed in refusing charge No. 4, requested by appellant, the case is reversed.

Reversed and remanded.

TRUET v. STATE

(Court of Appeals of Alabama. Jan. 18, 1912.)

1. OBSCENITY (§ 3*)—INDECENT EXPOSURE.

Indecent exposure of the person in a public place, willfully and intentionally, in the presence of an assembly, is an offense at common law.

[Ed. Note.—For other cases, see Obscenity, Cent. Dig. § 3; Dec. Dig. § 3.*]

2. OBSCENITY (§ 11*)—INDECENT EXPOSURE—INDICTMENT.

The indecent exposure of the person in a public place, willfully and intentionally, in the presence of an assembly, being a public nuisance per se, the indictment need not allege the act was a nuisance.

[Ed. Note.—For other cases, see Obscenity, Dec. Dig. § 11.*]

3. OBSCENITY (§ 3*)—INDECENT EXPOSURE—INTENT.

The intent, in the offense of indecent exposure of the person, which is complete if the act is intentionally committed at such time and in such manner as to offend public decency, may be inferred from the recklessness of the act.

[Ed. Note.—For other cases, see Obscenity, Cent. Dig. § 3; Dec. Dig. § 3.*]

4. OBSCENITY (§ 3*)—INDECENT EXPOSURE—ASSEMBLY.

As regards the offense at common law of indecent exposure of the person, it is enough that the act, committed in a public place, be in the presence of more than one person.

[Ed. Note.—For other cases, see Obscenity, Cent. Dig. § 3; Dec. Dig. § 3.*]

5. OBSCENITY (§ 3*)—EXPOSURE OF PERSON—PUNISHMENT.

Conviction of indecent exposure of the person, and imposition of a fine therefor, is authorized by Code 1907, § 7622, providing for fine on conviction of one who commits a public offense which is a misdemeanor at common law, and punishment of which is not particularly specified in the Code.

[Ed. Note.—For other cases, see Obscenity, Dec. Dig. § 3.*]

Appeal from Clay County Court; E. J. Garrison, Judge.

Flora Truet was convicted of indecent exposure of the person, and appeals. Affirmed.

The indictment is as follows (omitting charging part): "Flora Truet, alias Truit, whose name is to the grand jury otherwise unknown, then and there in a public place willfully and intentionally made an indecent exposure of her person, then and there making an uncovered exhibition of her person, to wit, her privates, in the presence of divers

persons then and there assembled. (2) Flora Truet (alias, etc., as in first count) then and there in a public place, to wit, a public road or highway, near Hughey Nappler's residence, in said county, willfully and intentionally made an indecent exposure of her person by then and there openly and notoriously making an uncovered exhibition of parts of her person, to wit, her legs and private parts, in the presence of divers persons then and there assembled, against," etc.

The judgment was guilty, and a fine of \$25 and all the costs in that behalf expended.

E. L. Whatley, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. The indictment charges an indecent exposure of the person in a public place, willfully and intentionally made by the defendant in the presence of an assembly of divers persons.

[1] The offense charged is indictable and punishable at common law. 29 Cyc. p. 1316; 1 Wood on Nuisances, c. 2, § 57.

[2] The indictment contains the necessary averments to constitute the common-law offense, and the defendant's demurrers are not well taken. No averment is necessary that the act was a nuisance, as the act complained of under the circumstances alleged is per se a public nuisance. It is a nuisance and punishable at common law because it is an act malum in se, when committed as alleged in the indictment, affecting the public morals. A public nuisance, because it is violative of the rules of propriety, noxious to moral sensibilities, outrages decency, shocks, and is offensive to those feelings of chastity that people of ordinary respectability entertain, and has a tendency to corrupt the public morals. 1 Wood on Nuisances, c. 2, §§ 23, 24, 57; Joyce's Law of Nuisances, c. 2, § 15; Rex v. Crunden, 2 Campbell, 89.

[3] The offense is complete if the act is intentionally committed at such time and place and in such manner as to offend against public decency, and the intent may be inferred from the recklessness of the act. Van Houten v. State, 46 N. J. Law, 16, 50 Am. Rep. 397.

[4] It is sufficient at common law that the act be committed in a public place in the presence of more than one person. State v. Rose, 32 Mo. 560; State v. Millard, 18 Vt. 574, 46 Am. Dec. 170; State v. Roper, 18 N. C. 208; Grisham v. State, 2 Yerg. (Tenn.) 589; Regina v. Orchard, 20 Eng. Law & Eq. 598; Regina v. Holmes, 20 Eng. Law & Eq. 597, 600.

[5] The judgment of conviction and fine imposed was authorized. Code 1907, § 7622.

There is no error shown by the record, and the case will be affirmed.

Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

SOUTHERN RY. CO. v. PROCTOR.

(Court of Appeals of Alabama. Dec. 19, 1911.
Rehearing Denied Jan. 30, 1912.)

1. CARRIERS (§ 227*)—CARRIAGE OF LIVE STOCK—INJURIES—COMPLAINT.

A complaint which claims damages for injuries to a car load of cattle "shipped by the defendant as a common carrier for hire for the plaintiff" sufficiently charges that the defendant as a common carrier undertook for hire the carriage of the property for the plaintiff as a person interested in the goods shipped.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 953; Dec. Dig. § 227.*]

2. CARRIERS (§ 227*)—CARRIAGE OF LIVE STOCK—INJURIES—COMPLAINT.

A complaint which alleges that the plaintiff "delivered to the defendant as a common carrier" a car load of cattle "to be shipped * * * for hire" sufficiently charges that the defendant, as a common carrier, assumed the duties of that relation to the plaintiff as a person interested in the stock shipped.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 953; Dec. Dig. § 227.*]

3. CARRIERS (§ 227*)—CARRIAGE OF LIVE STOCK—INJURIES—COMPLAINT.

Under Code 1907, § 5382, form 15, which provides the form of complaint on a bill of lading of a common carrier as follows: "The plaintiff claims of the defendant — dollars for the failure to deliver certain goods," etc.—a complaint which charges "that the defendant failed to deliver cattle" entrusted to it for carriage by the consignor, "within a reasonable time and that by reason of such delay the plaintiff was damaged," substantially follows the statutory charge of breach of duty, and is sufficient.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 953; Dec. Dig. § 227.*]

4. CARRIERS (§ 76*)—CARRIAGE OF GOODS—ACTIONS—WHO MAY SUE.

A consignor may maintain an action for damage from a failure of a carrier to deliver goods within a reasonable time though they are consigned to another; the presumption that the consignee has title being merely prima facie.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 264; Dec. Dig. § 76.*]

5. EVIDENCE (§ 155*)—ADMISSIBLE BECAUSE OF ADMISSION OF SIMILAR EVIDENCE FOR OPPONENT.

Where, in an action against a carrier for a failure to promptly deliver cattle entrusted for shipment, the defendant by cross-interrogatories to deponents for the plaintiff and by direct interrogatories to its own witnesses, sought proof as to the place and hours of making delivery, it cannot complain of the admission of such evidence on behalf of the plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 445-458; Dec. Dig. § 155.*]

6. CARRIERS (§ 211*)—CARRIAGE OF LIVE STOCK—INJURY TO LIVE STOCK.

In an action for injuries to cattle delivered to a carrier for shipment caused by an unreasonable delay in delivery, the plaintiff may show that the cattle were injured by being deprived of food and water for a long time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 926-928; Dec. Dig. § 211.*]

7. EVIDENCE (§ 471*)—OPINION EVIDENCE—APPEARANCE OF ANIMALS.

In an action for injuries to cattle caused by delay in delivery by the carrier to whom they were entrusted for shipment, a question

to a witness whether the cattle looked to be suffering for food and water upon their arrival was not improper as calling for an opinion, as an ordinary witness could not convey a picture of the animals, so as to enable the jury to reach a conclusion as to their condition without conveying the conclusions as to the need of food and water which he found on seeing the animals.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

8. CARRIERS (§ 228*)—CARRIAGE OF LIVE STOCK—FAILURE TO PROMPTLY DELIVER—EVIDENCE.

In an action against a carrier for failure to deliver cattle within a reasonable time, testimony that they were properly fed and watered before shipment, and were then in good condition, and that ordinarily cattle so shipped would be ready for the market as soon as they had been fed and watered after delivery from the car, together with evidence as to the actual condition of the cattle upon their delivery to the consignees, and as to how long they were kept before they were in condition to be put on the market, was proper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 959; Dec. Dig. § 228.*]

9. CARRIERS (§ 218*)—CARRIAGE OF LIVE STOCK—INTERSTATE COMMERCE—LIMITATION OF LIABILITY.

Under Act Cong. June 29, 1906, c. 3594, § 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), which prohibits the confining of animals in cars for more than 28 consecutive hours without unloading them in a humane manner into properly equipped pens for rest, water, and food, at the cost of the shipper, or on his default by the carrier, with a right to a lien for food furnished, where a shipment of cattle is interstate, the carrier cannot by any contract with the shipper relieve itself from the duty of feeding and watering the animals in a proper case.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 927, 928, 942; Dec. Dig. § 218.*]

10. CARRIERS (§ 211*)—CARRIAGE OF LIVE STOCK—INTERSTATE COMMERCE—LIABILITY.

And a failure of the shipper in an interstate shipment to perform the duty imposed upon it is negligence per se.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 926-928; Dec. Dig. § 211.*]

11. CARRIERS (§ 230*)—CARRIAGE OF LIVE STOCK—INSTRUCTIONS.

Where, in an action against a carrier for injuries to cattle in transit from a failure to promptly deliver, the court instructed that the defendant was not liable for any damages to the cattle attributable to a lack of proper bedding, it made it a question for the jury whether the injury was attributable in whole or in part to the lack of bedding, and gave the defendant the full benefit of a stipulation in the shipping contract against liability on that ground.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 961; Dec. Dig. § 230.*]

12. CARRIERS (§ 230*)—CARRIAGE OF LIVE STOCK—INJURIES TO STOCK—EVIDENCE.

In an action for injuries to a shipment of cattle from failure to deliver within a reasonable time, evidence as to the amount of damage to the cattle held sufficient to go to the jury for the estimation of damages under a stipulation of the shipping contract that value at the place and date of shipment would govern in the event of damage for which the carrier might be liable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 961, 962; Dec. Dig. § 230.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

13. CARRIERS (§ 230*)—CARRIAGE OF LIVE STOCK—INJURIES TO STOCK—QUESTION FOR JURY.

Where, in an action for damages sustained from the failure of a carrier to promptly deliver cattle shipped, there was evidence tending to support a replication to the defendant's plea that the plaintiff had not complied with a stipulation in the contract of shipment as to the giving of notice of injuries, the jury were entitled to determine the question.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 962; Dec. Dig. § 230.*]

14. APPEAL AND ERROR (§ 1004*)—REVIEW—VERDICT—CONCLUSIVENESS—AMOUNT OF RECOVERY.

The court on appeal will not reverse for an excessive verdict where there was evidence to sustain it, which the defendant did not impeach or rebut, and the court below refused to grant a new trial on that ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by R. F. Proctor against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint as amended was as follows: "(A) Plaintiff claims of the defendant \$150.00 damages for injury to one car load of cattle shipped by the defendant as a common carrier for hire for the plaintiff from Scottsboro, Ala., to Atlanta, in the state of Georgia, on or about the 8th day of July, 1907. Plaintiff avers that the defendant failed to deliver such car load of cattle to the consignee within a reasonable time, and by reason of such delay said cattle were injured, to the plaintiff's damage as aforesaid. (B) Plaintiff claims of the defendant the further sum of \$150.00 as damages for this: On or about the 8th day of July, 1907, the plaintiff delivered to the defendant as a common carrier one car load of cattle to be shipped within a reasonable time for hire to Atlanta, in the state of Georgia, and delivered to Shippey Bros. & White, stock commission merchants, and the defendant failed to deliver said cattle to said Shippey Bros. & White within a reasonable time, and by reason of such failure said cattle suffered from rough handling and for want of food and water, and were injured, to plaintiff's damage as aforesaid." Demurrers raised the questions discussed in the opinion.

The eleventh interrogatory was as follows: "What did you do with the cattle? Did you put them on the market; and, if so, when? Were they in condition to be put on the market, and, if not, how long did you keep them before they were in such condition?" The answer is: "We sold said cattle after keeping them and watering them and feeding them two or three days. They were not in any condition to sell on arrival; one party refusing to buy them at any price when offered for sale." Interrogatory 12 is as follows: "What was the extent or value of the

injury to said cattle, or what was the difference between the value of said cattle in the condition they were when received by you and the ordinary condition of such cattle shipped the distance from Scottsboro, Ala., to Atlanta, Ga., properly handled and cared for on the road?" The answer was: "When we first received the cattle, they looked to be almost valueless; but, after feeding and watering them for two days, I decided that from one-half to three-quarters of a cent per pound would cover the damages. Under ordinary circumstances, cattle shipped from Scottsboro, Ala., to Atlanta, Ga., properly handled and cared for while on the road, would be ready for market on arrival."

The following charges were refused to the defendant: (2) "If the damage to cattle arose from want of feed and water during the shipment, the defendant is not liable therefor, if it is shown that the shipper did not feed and water them, or request the company to do so." (3) "If the jury believe from the evidence that the damage complained of arose from a want of food and water by the cattle after they were left on the side track in Atlanta, the defendant is not liable therefor." (8) "If the jury believe from the evidence that the plaintiff failed to give written notice of the claim for damages to any agent of the defendant before said cattle were removed from the place of delivery, and before said cattle were mingled with other live stock, they must find for the defendant." (9) "If the jury believe from the evidence that the failure of the plaintiff or his agent to accompany the cattle proximately contributed, on account of the want of attention, to the injury to the cattle, in that event the defendant is not liable, even though the jury believe from the evidence that the cattle were injured." (10) "Under the evidence in this case, the fact, if it be a fact, that the arrival of the cattle was unduly delayed, and that the cattle suffered injury from a failure to feed and water them during the delay, will not entitle the plaintiff to recover for any damage growing out of such failure to feed and water the cattle."

Lawrence E. Brown, for appellant. John B. Tally, for appellee.

WALKER, P. J. [1, 2] It fairly appears from the averments of count A of the complaint as amended that the shipment of cattle mentioned was for the plaintiff, that the defendant as a common carrier undertook for hire the carriage of the property for the plaintiff. In count B the consignors were described as stock commission merchants. We are of opinion that each of those counts sufficiently shows that the defendant as a common carrier assumed the duties of that relation to the plaintiff as a person interested in the goods shipped.

[3] The averments of each of those counts

as to the defendant's breach of its duty as carrier substantially followed in this respect the form of complaint prescribed by the Code for an action against a carrier for failure to deliver property shipped within a reasonable time. Code 1907, § 5382, form 15.

[4] The consignor may maintain such a claim, though the goods were consigned to another, as the presumption that the consignee has title to the goods shipped is merely prima facie, and may be overcome by proof. The court was not in error in overruling the demurrer to the complaint as amended. *Louisville & Nashville R. Co. v. Allgood*, 113 Ala. 163, 20 South. 986.

[5] The appellant is in no position to complain of the admission of evidence as to the place and hours of making deliveries of cattle shipped to the consignees. By cross-interrogatories propounded to witnesses for the plaintiff whose testimony was taken by deposition and by direct interrogatories propounded to its own witnesses it sought proof on the same subject. And it may be added that the proof elicited by the question objected to was not at variance with the state of facts sought to be established by the defendant itself.

[6, 7] It is a matter of common knowledge that the effects of depriving animals of food and water for an unwonted time are manifested in their appearance. It was competent for the plaintiff to show that his cattle were injured in this way in consequence of an unreasonable delay in their arrival at the place of destination. Of necessity the principal available proof in this connection was evidence as to the appearance and condition of the cattle. The plaintiff sought to elicit proof on this subject by the question propounded to several of his witnesses: "State whether or not from your observation and experience in your judgment said cattle were suffering for food and water." This question was objected to because it called for the opinion or conclusion of the witness. Under a recognized modification of the general rule against admitting in evidence the opinions of ordinary witnesses, their conclusions as to the appearance of persons, animals, or things may be proved as being in their nature not mere opinions, but descriptive of facts. The law recognizes that ordinary witnesses as to such matters are not to be expected to be endowed with such powers of graphic description as to be able so to portray to the jury the subject of inquiry as to enable them to reach a conclusion as to its condition without the aid of the impression made upon or the conclusion reached by the witness who saw it. The ground upon which conclusions or opinions in reference to such matters are admitted is that from the very nature of the subject in issue it cannot be stated or described in such language as to enable persons not eyewitnesses to form an accurate judgment in regard to it. *Jones on Evidence*, § 360; *Smith v. State*, 137 Ala. 22, 34 South. 396; *Birmingham Ry., L. & P. Co.*

v. Franscomb, 124 Ala. 621, 27 South. 508; *South & North Ala. R. Co. v. McLendon*, 63 Ala. 266. If at the time in question the plaintiff's cattle were in fact suffering for the lack of food and water, and an eyewitness had been asked, not for his judgment or conclusion on the subject, but for a description of their condition so as to enable the jurors to draw their own inferences as to the fact and its cause, the probability is that, because of the inability of the witness to separate the indications upon which his conclusions were based from the conclusions themselves, he would not have confined himself to an enumeration of appearances, but would have attempted to convey to the jury the impression made upon himself by some such statement as that the cattle were in need of food and water, or that they appeared to be in a famishing and starved condition. The question objected to was not calculated to elicit, and did not in fact elicit, what the law regards as inadmissible opinion evidence.

[8] Part of the eleventh interrogatory to the plaintiff's witnesses was an inquiry as to the condition of the cattle when they were delivered to the consignees, and as to how long they were kept before they were in condition to be put on the market. It was proper to admit evidence on these points in connection with other evidence tending to show that the cattle had been properly fed and watered just before they were shipped, that they were then in good condition, and that ordinarily cattle transported by rail the distance from Scottsboro, Ala., to Atlanta, Ga., would be ready for the market as soon as they had been fed and watered after they had been delivered from the car. The defendant's objection was to the question as a whole. The question as a whole was not subject to objection on either of the grounds stated. On similar considerations it must be held that the court was not in error in overruling the defendant's objections to the twelfth interrogatory propounded to the plaintiff's witnesses and to the answers to that interrogatory. It is enough to say that the entire question and answers were not subject to objection on either of the grounds stated.

[9, 10] The plaintiff claimed that in consequence of undue delay in their transportation his cattle arrived at their destination in a damaged condition, resulting from rough handling and the prolonged deprivation of food and water. The defendant contended that it was not liable for any damage to the cattle which was attributable to lack of food and water while the shipment was delayed, and it assigns as error the refusal of several written charges which stated its position in reference to this feature of the case. This contention is based upon the stipulation in the bill of lading or shipping contract in reference to the shipper's feeding and attending the cattle at his own expense and

risk while on the car or at feeding or transfer points, etc. The claim is that the effect of that stipulation was to release the defendant from any duty to feed or water the cattle during the journey. Such effect could not be accorded to that stipulation under the facts in this case without a disregard of the peremptory requirements of the federal statute regulating the transportation of cattle, sheep, swine, and other animals. Fed. Stat. An. Supplement 1909, p. 44 (Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]). That statute prohibits, with exceptions not applicable to the facts of this case, the confining of such animals in cars for a period longer than 28 consecutive hours without unloading them in a humane manner into properly equipped pens for rest, water, and feeding for a period of 5 consecutive hours; and provides that the animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or, in case of his default in so doing, then by the carrier, at the reasonable expense of the owner or person in custody thereof, and that the carrier "shall in such case have a lien upon such animals for food, care and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of a reasonable duration, to enable compliance with section 1 of this act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires." The shipment in this case was an interstate one, and was within the influence of that statute. There was evidence to support an inference that, when the cattle arrived at their destination, they had been kept confined in the car, without food or water, for more than 28 consecutive hours. Under the statute, the carrier cannot, by any contract with the shipper, relieve itself of the prescribed duty of feeding and watering the animals, if their owner or custodian fails to do so. It cannot by contract with the shipper exempt itself from liability for its own negligence; and its failure to perform the duty imposed upon it by the statute is negligence per se. The stipulation in the bill of lading cannot be given the effect of relieving the carrier of the duty imposed upon it by the statute. *Grey's Ex'r v. Mobile Trade Co.*, 55 Ala. 387, 28 Am. Rep. 729; *Nashville, C. & St. L. Ry. Co. v. Heggie Bros.*, 86 Ga. 210, 12 S. E. 363, 22 Am. St. Rep. 453; *Chesapeake & Ohio R. Co. v. American Exchange Bank*, 92 Va. 495, 23 S. E.

935, 44 L. R. A. 449; *Reynolds v. Great Northern Ry. Co.*, 40 Wash. 163, 82 Pac. 161, 111 Am. St. Rep. 883. Each of the charges on this subject which the court refused involved the unwarranted assumption that there was no evidence tending to show that the defendant was under a duty to feed and water the cattle. The court was not in error in refusing to give either of those charges.

[11] The court having, at the request of the defendant, instructed the jury that the defendant could not be held liable for any damages to the cattle which was attributable to a lack of proper bedding in the car, the appellant cannot sustain a claim that it did not, in the trial, have the full benefit of the stipulation on that subject in the shipping contract. Under the evidence, it was a question for the jury whether the injury to the cattle was attributable, in whole or in part, to the lack of bedding in the car or to the negligence of the defendant of which the plaintiff complained.

[12, 13] In like manner the defendant had the benefit, under charges given, of the stipulations in the shipping contract in reference to the value at the place and date of shipment governing in the event of damage occurring for which the carrier might be liable, and in reference to giving notice to the carrier of a claim to damages for loss or injury to the cattle. Besides, there was evidence tending to support the averments of the plaintiff's replication to the defendant's plea setting up a breach of the last-mentioned stipulation, on which the defendant took issue. The evidence as to the damaged condition of the cattle when they were delivered at Atlanta and as to the extent of their depreciation in value in consequence of the injuries they had sustained afforded some basis for estimating the loss so caused in their value at the place and date of shipment. Under the proceedings and evidence in the case, the presence in the shipping contract of the stipulations mentioned did not have the effect of entitling the defendant to the general affirmative charge in its favor.

[14] It is insisted that the motion for a new trial should have been granted on the ground that the verdict was excessive in amount. In that respect the verdict was sustained by testimony which the defendant did not impeach or rebut. Under the familiar rules governing the review on appeal of the action of a trial court on a motion for a new trial, this court would not be justified in disturbing, on any of the grounds urged by counsel, the ruling made on such motion in this case.

Affirmed.

**CORN PRODUCTS REFINING CO. v.
DREYFUS BROS.**

(Court of Appeals of Alabama. Jan. 11, 1912.)

1. APPEAL AND ERROR (§ 497*)—RECORD—NECESSITY FOR NONSUIT.

The necessity for a nonsuit authorized by Code 1907, § 3017, must appear from the record, in order to support an appeal to secure a review of the order rendering necessary the nonsuit.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 497.*]

2. APPEAL AND ERROR (§ 105*)—DECISIONS REVIEWABLE—APPEAL FROM NONSUIT.

Code 1907, § 3017, provides that, if any ruling or decision on the pleadings, evidence, or charges to the jury renders it necessary for plaintiff to suffer a nonsuit, he may have such adverse ruling reviewed on appeal. *Held*, that a ruling of the court, requiring plaintiff, by January 1st, to which date the case was continued, to file its answers to interrogatories propounded by defendant, as a result of which plaintiff took a nonsuit, was not one relating to the pleadings, evidence, or instructions, within the statute.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 105.*]

3. APPEAL AND ERROR (§ 105*)—DECISIONS APPEALABLE—VOLUNTARY NONSUIT.

In absence of statute, an appeal does not lie from a voluntary or involuntary nonsuit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 717-723; Dec. Dig. § 105.*]

4. APPEAL AND ERROR (§ 886*)—REVIEW—JUDGMENT OF NONSUIT—VOLUNTARY NONSUIT.

Under Code 1907, § 3017, providing that, if from any ruling or decision on the pleadings, evidence, or charges to the jury it becomes necessary for plaintiff to suffer a nonsuit, he may have the adverse ruling requiring such nonsuit reviewed on appeal, only the rulings compelling such nonsuit will be reviewed on an appeal under the statute.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 886.*]

5. TRIAL (§ 165*)—JUDGMENT OF NONSUIT.

Where a judgment of nonsuit was taken in open court on plaintiff's motion in term time, and allowed by the court, it was a valid judgment as against him, whether rendered on the day the case was set for trial or not.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 165.*]

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Action by the Corn Products Refining Company against Dreyfus Bros. From a judgment of nonsuit, plaintiff appeals. Appeal dismissed.

Ball & Samford, for appellant. Steiner, Crum & Well and Coleman, Dent & Well, for appellee.

DE GRAFFENRIED, J. The appellee, under the provisions of section 4049 of the Code, filed interrogatories to the appellant. The appellant filed in the cause what it claimed was a proper answer to the inter-

rogatories; but it did not answer all of the questions contained in the interrogatories. It gave as its reasons for failing to answer all of the questions that some of the questions it was unable to answer, and that the other questions not answered called for matters not pertinent to the issues in the cause.

Section 4055 of the Code provides that if the answers to such interrogatories are not filed within 30 days after service of a copy of the interrogatories, or when the answers are not full, or are evasive, the court may either attach the party and cause him to answer fully in open court, or tax him with such costs as the court may deem just, and continue the cause until full answers are made, or *direct* a nonsuit or judgment by default, or render such judgment or decree as would be appropriate if such defaulting party offered no evidence. The appellee filed in the cause, on the 9th day of January, 1911, a motion to direct a nonsuit of the plaintiff in said cause, or that the plaintiff be attached and required to answer fully in open court, or be taxed with so much costs as might appear to be just, and the cause continued until it made full answers to said interrogatories. This motion was heard by the court on December 14, 1911, and the counsel for the appellant stated to the court that if the appellant would answer the interrogatories at all it could answer them before January 1, 1912. Thereupon the court made an order requiring the appellant "to file its answers to the said interrogatories on or before January 1, 1912." The bill of exceptions then recites that "thereupon, immediately upon said judgment being rendered, the plaintiff stated to the court that, on account of said adverse ruling and judgment requiring it to answer said interrogatories on or before January 1, 1912, it had become necessary for it to suffer a nonsuit, and that it would accordingly take a nonsuit, and thereupon it took a nonsuit, with leave to present and have allowed and signed a bill of exceptions to reverse said ruling and judgment for the decision of the Supreme Court, and said nonsuit was accordingly entered by the court in said cause."

[1, 2] 1. The only source of right to appeal from a judgment of nonsuit, voluntarily taken, is found in the Code of 1907, § 3017, which provides that if, from any ruling or decision of the court on the trial of a cause, either upon *pleadings*, admission, or rejection of *evidence*, or upon *charges* to the jury, it may become necessary for the plaintiff to suffer a nonsuit, the plaintiff may take such nonsuit, and, in the manner provided by the statute, have the particular adverse ruling which created the necessity for the nonsuit reviewed by an appellate tribunal. The defined necessity for such nonsuit must be shown by the record, in order that the right

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

to appeal may appear. *Long v. Holley et al.*, 157 Ala. 514, 47 South. 655.

In the case of *Scheidegger v. Terrill*, 39 South. 172, the Supreme Court held that the sustaining of a motion made by the defendant, after the plaintiff has announced readiness for trial, to suppress depositions taken by the plaintiff is a "decision of the court on the trial," within the meaning of section 3017 of the Code; and that the plaintiff in such a case may, on account of the suppression of depositions, take a nonsuit with bill of exceptions and appeal from such ruling. In that case, there was a ruling of the court on the *admission* or *rejection* of evidence, in that the court suppressed certain depositions which the plaintiff had taken as a part of his testimony, and which he had a right to use, unless suppressed, as a part of his evidence in the cause.

In the present case, the court simply continued the case to January 1, 1912, with an order that the plaintiff, by that time, file its answers to the interrogatories propounded to it by the defendant, which answers, if filed, could, at the election of the defendant, and at his election only, become evidence on the trial to be had on January 1, 1912. In other words, the plaintiff in this case took its nonsuit because, as stated by it, "on account of said adverse ruling and judgment requiring it to answer said interrogatories on or before January 1, 1912, it had become necessary for it to suffer a nonsuit." The nonsuit was not taken because of any ruling upon the *pleadings*, or because of any ruling upon the *admission* or *rejection* of evidence, or upon *charges* to the jury, which are the *only* grounds named by the only statute authorizing an appeal in *any* case from a judgment taken upon a voluntary nonsuit, but upon an entirely different ground, and a ground not named in the statute, *viz.*, because of the court's order requiring the plaintiff to answer certain interrogatories by a day named.

[3] "In the absence of a statutory provision authorizing it, a writ of error or appeal would not lie from a voluntary nonsuit, or a nonsuit taken by the plaintiff in consequence of the rulings of the court." *Rogers v. Jones*, 51 Ala. 354; *Engle v. Patterson*, 167 Ala. 117, 52 South. 397.

[4] When an appeal is taken from a judgment entered upon a voluntary nonsuit, under the provisions of the above-mentioned section 3017 of the Code, the appellant is confined, on his appeal, to the ruling superinducing the nonsuit, and to that ruling only. *Engle v. Patterson*, 167 Ala. 117, 52 South. 397.

As the particular ruling of the trial court which caused the plaintiff to take a nonsuit in this case was not a ruling which our statute has fixed as one from which a plaintiff

taking a nonsuit can appeal, the result follows, necessarily, that when the plaintiff took its nonsuit, as it was not protected by the statute, it ceased to have a case in court. *Engle v. Patterson*, 167 Ala. 117, 52 South. 397.

[5] 2. The nonsuit was taken in open court, upon motion of the plaintiff, in term time, allowed by the court, and this being true the judgment of nonsuit was certainly, as against the plaintiff, a valid judgment, whether rendered upon a day when the case was set down for trial or not.

3. As the appellant has no case in court, we are without authority to review any of the questions which it has attempted to present to us. No greater calamity could befall a state than that which would result if its courts should in any way knowingly undertake to exercise authority over matters concerning which they are wanting in jurisdiction.

It follows from what we have above said that this appeal must be dismissed.

Dismissed.

Ex parte SIMPSON.

(Court of Appeals of Alabama. Jan. 18, 1912.)

1. CRIMINAL LAW (§ 207*)—COMMITMENT—JURISDICTION.

That the grand jury, after issue of a warrant for petitioner's arrest by the county judge, acting as committing magistrate, but before a preliminary trial pursuant to Code 1907, §§ 7593-7615, failed to find an indictment, but requested that accused be held for further investigation, would not oust the county judge's jurisdiction, as committing magistrate, and give the city court of Gadsden, having the powers of the circuit court, jurisdiction to make an order requiring petitioner to be held for indictment by the next grand jury.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 207.*]

2. CRIMINAL LAW (§ 578*)—HOLDING FOR SUBSEQUENT GRAND JURY.

A trial court, to which accused is properly bound over by a committing magistrate, may, for good cause, continue the case for further investigation by another grand jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1306; Dec. Dig. § 578.*]

3. CRIMINAL LAW (§ 240*)—HOLDING ACCUSED—ORDER—COLLATERAL ATTACK.

Where the trial court had no jurisdiction to make an order holding petitioner for investigation by another grand jury, because the committing magistrate had not then given him a preliminary trial, it was void, and could be attacked in any court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 240.*]

4. CRIMINAL LAW (§ 207*)—COMMITMENT—PRELIMINARY TRIAL—JURISDICTION.

That a city court made an order holding petitioner for further investigation by the grand jury, which was void, because the committing magistrate had not then held a preliminary trial, would not deprive the commit-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ting magistrate of jurisdiction to hold the preliminary trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 207.*]

5. HABEAS CORPUS (§ 21*)—PURPOSE OF WRIT—DISCHARGE BEFORE PRELIMINARY TRIAL.

When affidavit is made before a committing magistrate, charging accused with an offense as to which such magistrate only has jurisdiction to hold a preliminary trial, he remains within the magistrate's jurisdiction until after preliminary trial, so that habeas corpus will not lie to discharge him before such trial, though mandamus will lie to compel the magistrate to grant a preliminary trial, if he refuses to do so.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 21.*]

6. HABEAS CORPUS (§ 21*)—PURPOSE OF WRIT—LEGALITY OF COMMITMENT.

After preliminary trial and before indictment, the legality of accused's commitment may be inquired into upon habeas corpus and accused discharged, if there appears no probable cause for believing him guilty.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 19; Dec. Dig. § 21.*]

7. CRIMINAL LAW (§§ 239, 240*)—COMMITMENT.

If the evidence at the preliminary trial does not show probable cause for believing accused guilty of the offense charged, he is entitled to be discharged; but, if it does show probable cause for believing him guilty, he should be held to answer an indictment.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §§ 239, 240.*]

Appeal from Circuit Court, Etowah County; J. E. Blackwood, Judge.

Application by Jesse Simpson for writ of habeas corpus. From a judgment quashing the proceedings, relator appeals. Affirmed.

Boykin & Bailey, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. Jesse Simpson was arrested by the sheriff of Etowah county, without a warrant, on the 30th day of November, 1911. After the arrest, the sheriff went before the judge of the county court and made an affidavit, charging the defendant with murder, and a warrant was then obtained, authorizing the arrest of the defendant under the charge of murder.

On the 4th of December, 1911, the grand jury of Etowah county was impeached and adjourned on the 9th. The affidavit and warrant against the defendant were sent by the judge of the county court to the grand jury, and the grand jury made an investigation into the case, but found no bill against the defendant. On the 12th of December, the defendant, through his counsel, appeared before the judge of the county court and demanded a preliminary trial; but the judge of the county court stated that there was no case in his court against the defendant, and declined to grant the defendant a preliminary trial. Thereupon, on the 13th day of

December, the defendant filed with the judge of the circuit court a petition for a writ of habeas corpus, setting up the fact of his arrest and the issuance of a warrant, and also that the grand jury had investigated the case and found no bill, and that the judge by whom the warrant authorizing the defendant's arrest had been issued had declined to grant the defendant a preliminary trial. Thereupon it appears that the solicitor of the circuit appeared in the city court of Gadsden, which is a court possessing all of the powers of a circuit court, and prayed for and obtained from the court, on the 14th day of December, the following order: "State v. Jesse Simpson. Dec. 14, 1911. No indictment having been found by grand jury and grand jury requesting that the defendant be held for further investigation of this case by the next grand jury, on motion of solicitor this cause is continued for investigation by the next grand jury, and defendant ordered to be held to answer any indictment by next grand jury, if it should be found for the offense."

[1] The judge of the county court, before whom the affidavit against the defendant was made, and who issued the warrant authorizing his arrest, was, so far as this case is concerned, only a magistrate charged with the duty of giving to the petitioner a preliminary hearing; and at the time the petition for the writ of habeas corpus in this case was filed with the judge of the circuit court, so far as this record discloses, he was still charged by law with giving to the petitioner a preliminary trial. The mere fact that the grand jury of Etowah county, after the issuance of a warrant, and before a preliminary trial was had, made an investigation into the defendant's case and failed to find a bill in no way ousted the jurisdiction of the county judge as a committing magistrate.

[2, 3] The petitioner, not having been given by the judge of the county court a preliminary trial, as provided in article 3 of chapter 275 of the Code (Code 1907, pp. 852-859), was never, so far as this record discloses, within the jurisdiction of the city court of Gadsden. It is the purpose of the above article of the Code to provide a speedy, fair, and convenient method of ascertaining whether a defendant, charged before a magistrate with a crime over which he has no final jurisdiction, shall be discharged from the prosecution because of an absence of probable cause for holding the defendant, or shall be held by the court possessing the power to try the case until it has caused a proper investigation of the case by its grand juries. If a defendant is properly bound over by a committing magistrate to a court having jurisdiction to finally try the defendant, if he is indicted by a grand jury, then, when such order of commitment is made by the magis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

trate, and the papers in the case are properly transmitted by the magistrate to the clerk of the trial court, the case immediately becomes a case over which such trial court has jurisdiction. In such a case the trial court may, within its discretion, for good cause shown, continue the case and keep it on its docket for further investigation by a grand jury after one of its grand juries has investigated it. *State v. Kyle*, 99 Ala. 258, 18 South. 538; *State v. Fuller*, 128 Ala. 45, 30 South. 506; *Young v. State*, 131 Ala. 51, 31 South. 373. The mere recommendation by a grand jury to a trial court can certainly confer upon such court no jurisdiction to do anything or make any order in a case over which it has no jurisdiction. Grand juries, in cases like the present, can confer jurisdiction upon a court by returning an indictment, and in no other way. When the grand jury made the recommendation to the city court of Gadsden that it hold the petitioner for further investigation, there was not, and, so far as the record discloses, never had been, a case pending in that court against the petitioner. A case was then pending against petitioner before the judge of the county court of Etowah county, as a committing magistrate, and only before the judge of such court. The city court of Gadsden was therefore without jurisdiction to make the above-quoted order. As this is true, the order was void and of no effect. Its validity can be challenged in any court. *Mobile L. & R. Co. v. George*, 57 South. 50; *Corn Products Refining Co. v. Dreyfus Bros.*, 57 South. 517.

[4] The petitioner does not allege in his petition, which was filed before said void order of the city court of Gadsden was made, that the solicitor was present when he applied to the judge of the county court for a preliminary trial on December 12th; and he does not allege in his petition that said judge of the county court refused to grant him a preliminary trial on account of any motion made or other act done by the solicitor before said county court judge as a committing magistrate. We presume that the judge of the county court refused to grant the preliminary trial because, under a misapprehension of the law, he thought that the case was properly within the jurisdiction of the city court of Gadsden, and therefore not within his jurisdiction. The mere fact that the city court of Gadsden, under a mistaken view as to its authority in the premises, upon the motion of the solicitor, made a void order that the defendant should be held by the sheriff in no way affected the jurisdiction of the judge of the county court to give the petitioner a preliminary trial, and in no way absolved him from the duty which the law imposed upon him to hold such preliminary trial. So far as this record discloses, no order of any sort has ever been made by

the judge of the county court in the prosecution instituted before him against the defendant at the instance of the solicitor or any person authorized to represent the state. There has therefore been no discontinuance of the prosecution instituted before the judge of the county court. *Drinkard v. State*, 20 Ala. 9.

[5] The rule seems to be well settled that when an affidavit is made before a committing magistrate, charging the defendant with the commission of an offense as to which such magistrate has only the jurisdiction to hold a preliminary trial, the defendant remains within the jurisdiction of such magistrate until after the preliminary trial is held. If the magistrate refuses to grant a preliminary trial, he can be compelled to do so by a writ of mandamus; but the petition for a writ of habeas corpus cannot be filed, praying for the discharge of such a defendant, until after the preliminary trial is had. *Humphrey's Case*, 125 Ala. 112, 27 South. 969.

[6] After the preliminary trial and before indictment, the legality of the defendant's commitment can always be inquired into upon a petition for a writ of habeas corpus; and if the facts of his case show that there is no probable cause for believing him guilty of the offense with which he is charged he is entitled to discharge from said prosecution. *Ex parte West*, 100 Ala. 67, 14 South. 901; *Riley's Case*, 94 Ala. 82, 10 South. 528.

[7] In the present case, the defendant is held by the sheriff, so far as the allegations of the petition for the writ of habeas corpus are concerned, under a valid warrant, issued by the judge of the county court of Etowah county. The petitioner is entitled to a fair and speedy hearing of his case by said judge of the county court on a preliminary trial. If the facts adduced on such trial do not show that there is probable cause for believing that he is guilty of the offense with which he is charged, he is entitled, as a matter of right, to his discharge. If the facts developed upon such preliminary trial show that there is probable cause for believing him guilty of the offense with which he is charged, then he should be held to answer an indictment. The petition shows that the judge of the county court had jurisdiction of the defendant's case when the petition for the writ of habeas corpus was filed, and the circuit judge had no authority to oust the judge of the county court, as a committing magistrate, of his jurisdiction, by granting to the petitioner the writ of habeas corpus prayed for.

We are therefore of the opinion that the judge of the circuit court committed no error in quashing the proceedings in this cause, and the judgment of the court below is therefore affirmed.

Affirmed.

(129 La.)

No. 18,738.

QUIRK v. MILLER.

(Supreme Court of Louisiana. Jan. 2, 1912.
Rehearing Denied Feb. 12, 1912.)

(Syllabus by the Court.)

1. DEDICATION (§§ 15, 31*)—NATURE AND REQUISITES.

Dedication of private property to public use should be made to appear, and an intention on the part of the owner to do so should be shown, and an acceptance by the public, either express or implied, should also be shown.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 13, 64, 65; Dec. Dig. §§ 15, 31.*]

2. DEDICATION (§ 19*)—REQUISITES AND SUFFICIENCY.

The mere making of a plat of a thinly settled area, whereon the name of a street is given, is not sufficient proof of the existence of such street.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.*]

3. INJUNCTION (§ 9*)—NATURE OF REMEDY.

An injunction will issue only when necessary to protect one in the enjoyment of a right, but will not issue to protect a right not in esse and which may never arise.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 8; Dec. Dig. § 9.*]

4. INJUNCTION (§ 257*)—WRONGFUL INJUNCTION—LIABILITY.

While the case at bar is not such a one as to justify the issuance of an injunction, neither is it one where damages should be allowed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 606; Dec. Dig. § 257.*]

Appeal from Eighteenth Judicial District Court, Parish of Acadia; William Campbell, Judge.

Action by Edmund C. Quirk against Denis Miller. Judgment for defendant, and plaintiff appeals. Affirmed.

Smith & Carmouche, for appellant. Cline, Cline & Bell, for appellee.

BREAUX, C. J. Plaintiff complains that defendant blocks up the public street in the village of Millerville and prevents free access to his warehouse and to his pumping plant, and that he trespasses upon his property, and prevents him from keeping up his guy ropes.

Plaintiff obtained an injunction to enjoin defendant from interfering with the guy ropes, and, in addition, asks that he be condemned to remove the obstructions in the streets, and also to remove the warehouse that he is constructing in so far as it encroaches upon the public street or road.

The defendant moved to dissolve the injunction on the ground that the affidavit for the injunction is not true. He denied that his warehouse obstructed the public street or road, or encroaches upon the property of plaintiff; denied that Millerville is a village, or that there are public streets at the place known by that name; and he denies that

plaintiff has any servitude of way upon any of the land mentioned in the petition.

Defendant claims ownership of all the land on which his warehouse is situated and of the large tract of land on which Millerville is situated. He states in his answer that in 1889 he had a plat made of the land; that it is not a correct plat; that it was not drawn to scale; that the streets do not connect with any road or stream; that they have never been used; that plaintiff is without interest in the land, and his injunction was issued without right; that plaintiff's warehouse is near defendant's land, and in order that plaintiff may go to and from his warehouse, he has to pass over his (defendant's) land, which he, to be neighborly, has permitted. As to his own warehouse, he states that it stands in no one's way; that there is a strip of land measuring 30 feet in width which is used by plaintiff and defendant; that it is all that he needs for a passage-way.

Defendant reconvenes and states that Broad street is occupied by an irrigating canal company of which plaintiff claims to be the owner; that, if there should be a judgment in favor of plaintiff, he in turn should be condemned to close his irrigating canal running through the entire length of that street.

Furthermore, the defendant urges that the alleged streets have never been accepted by any one; that they are entirely useless as streets, either to the public or to any particular person.

He claims damages in the sum of \$350, and avers that the injunction should be dissolved.

The court dissolved the writ of injunction, and reserved to the defendant the right to sue for damages on the injunction bond, and the plaintiff has appealed.

All the issues are before us on the motion filed by Miller to dissolve the injunction. The grounds of the motion are that the injunction issued without cause, as he did not construct any part of his warehouse on the street; that there is no public street upon which it is possible to encroach, for there is no village of Millerville; and he particularly denies that plaintiff has any right or other use upon any of the ground occupied by his (defendant's) warehouse.

Defendant further claims in his motion to dissolve that he is the owner of the land upon which his warehouse is built; that an incomplete and erroneous plat, which he caused to be made and merely left in the clerk's office, without instruction to record it, was not a dedication of streets to public use; that Millerville is not even a village, and only has a name, and exists only on paper; that plaintiff owns no land within the limits of the town and does not have the right to a passageway over the said street; that plaintiff passes over his (defendant's) land

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

to go to his pumping station just outside of the plated place; that altogether plaintiff does not have the least ground for an injunction; that plaintiff's irrigating canal flows through Broad street, an asserted street within the limits indicated by the plat; and, furthermore, that, these alleged streets have never been recognized as public streets, and form no part of the street system of any town or of the roadways of any parish.

[2] Millerville, known as such only by a plat in which the place is designated by that name, has no population. The respective dwellings of plaintiff and defendant are not within its limits. It does not even have a blacksmith shop. At one time there was a saloon there. It is located on the plat as the old saloon. The interests in the place are represented by plaintiff and defendant, whose differences lately have taken the shape of one claiming that the other is a trespasser upon public rights, although it does not appear that there are persons to constitute a public save plaintiff and defendant and a few others.

If it ever was any one's ambition to see a village and then a town grow to any size in the prairies watered by the Bayou Ney Pique, in which the few hamlets are, that dream has never been realized, for there is there only a waste through which flows an irrigation canal and near which rice farms are cultivated.

Plaintiff does not prove in what respect the public is interested, nor in what respect he is injured. He has all the passageway he needs. Unless he, in some way, proves an interest which is imposed upon, he is without a right of action. *Tilly v. Mitchell & Lewis Co.*, 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007; R. S. 3384-3386.

At this time, plaintiff uses oil as fuel in operating his irrigation canal. His apprehension is that oil for fuel will be exhausted in the near future; as we take it, oil is piped to his tanks. Later, he may have to burn wood instead, and then he will have to haul wood in wagons, and more road space will be required than there is at present.

Furthermore, without specifying, but in general terms, he asserts that he, at no distant day, may have to haul heavy machinery to his irrigation plant, and, in that case, the narrow way, about 25 feet, will not be wide enough.

If there should be a street, the right to which plaintiff has not proven, it will be time enough to apply for relief. For the time being, the situation can well remain unchanged.

[1] Dedication of private property to public use should be made to appear; there should an intention be shown on the part of the owner, and it should at least be implied by acceptance by the public. *Elliot on Roads*, c. 5, pp. 85, 86; *De Grilleau v. Frawley*, 48 La. Ann. 198, 19 South. 151; *Arrowsmith v. City of New Orleans*, 24 La.

Ann. 194; *Heirs of Leonard v. City of Baton Rouge*, 39 La. Ann. 283, 4 South. 241.

In the days when there was some prospects of Millerville becoming a center of population, the owner sold two or three lots for small amounts. They were bounded, it was stated, on a street. The vendees would have the right to complain were this fact proven, and it was evident, besides, that there was an intention to sell property bounded by a street to be used, and that it was not a mere description, a word used when in reality there was no street, and therefore no servitude acquired.

[3] The plaintiff who seeks to have Main street opened holds the whole of Broad street, with his irrigation canal. It does seem that it would be fair, if plaintiff insists upon the removal of every obstacle on Main street, that he should begin by finding another channel for the irrigation waters of his canal to flow through. It would scarcely be right for him to hold Broad street with his canal and at the same time deny to defendant the right to occupy part of the main street, so called, though it was never a street.

Another complaint of plaintiff that we have not particularly noticed heretofore is that his guy ropes, which hold up the smokestack of his pumping plant, or make them more steady, are interfered with by defendant. If there is interference, it is a very mild interference. The guy is secured a few more feet above the surface of the ground than it would be if plaintiff had not objected to anchoring it so near his warehouse. If the sketches forming part of the record are correct, there is ground to amply secure the guy of the smokestack.

Furthermore, the sale by defendant to plaintiff did not include agreement to furnish place chosen by plaintiff.

[4] Defendant prayed for damages for wrongful issuance of injunction, in an amount of \$350. Of this, \$250 for fee of attorney and \$100 for expenses and loss of time by defendant. The demand was rejected and disallowed.

The nature of the case is such that we really do not think there is much ground for damages. One is about as much at fault as the other in this quarrel between owners of adjacent lands.

It does not abundantly appear that this court has jurisdiction. There is not an issue of the case representing a money value. No damages are claimed, and none of the properties affected are proven as worth an amount within the jurisdiction of this court.

There is a judicial allegation made to bring this case within the lower limits of the court's jurisdiction. There is also an admission by counsel to the same effect. There is no evidence as to any value at all.

It may be that there is a value somewhere lurking among the facts, which, although not expressed or proven, warranted the allega-

tion and the admission before mentioned. For that reason, we have concluded to affirm the judgment, and put an end to this litigation.

We will state that counsel should not depend too much upon admission to bring cases within this court's jurisdiction.

For reasons stated, the judgment is affirmed.

(129 La.)

No. 19,214.

STATE v. HOLT.

(Supreme Court of Louisiana. Jan. 29, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1106*)—APPEAL—ABANDONMENT—FAILURE TO FILE TRANSCRIPT.

When an appellant fails to file the transcript on the return day, it is an abandonment of the appeal, which will be dismissed by this court *ex proprio motu*. The agreement of counsel that the appellee will not move to dismiss the appeal on the ground that appellant failed to file the transcript on the return day will not affect the right or duty of this court to dismiss the appeal *ex proprio motu*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2890-2892; Dec. Dig. § 1106.*]

Appeal from Sixth Judicial District Court, Parish of Ouachita; J. O. Madison, Judge.

Charley Holt was charged with a simple assault. From a decree sustaining a plea of *autre fois* convict and discharging the accused, the State appeals. Dismissed.

Walter Gulon, Atty. Gen., and Fred M. Odom, Dist. Atty. (G. A. Gondran, of counsel), for the State. Clarke & Sholars, for appellee.

BREAUX, C. J. The state of Louisiana appeals from a decree of the judge of the district court sustaining defendant's plea of *autre fois* convict, and discharging the accused. Defendant is a woman, although her name is Charley Holt.

As relates to her plea, it appears that she was charged in the city court with a simple assault in violation of a state law. The state was not represented in the city court by the district attorney either in having the charge of simple assault preferred or in the prosecution of the case.

Subsequent to the trial and conviction of the defendant in the city court of simple assault, the district attorney filed an information against defendant charging her with having committed the crime of assault with intent to commit murder.

The defendant through counsel filed the plea of *autre fois* convict, which was sustained by the district court. She was fined by the city court, and has paid the fine.

One of the points for decision presented in the motion to dismiss the appeal is that the

15 days provided by law to file the appeal in the Supreme Court was not allowed in that the order of appeal made the appeal returnable in 10 days; that the minimum delay for such an appeal is 15 days, a requirement that the district court failed to observe.

As to the order of appeal, it is not strictly speaking in legal form, for after mentioning that the judgment discharging the defendant was read and signed, it is stated that an appeal was granted to this court, returnable on the thirtieth instant; said appeal being made returnable according to law.

We are of opinion that the appeal should be dismissed, but not on the ground urged for dismissing the appeal. There are several irregularities. There was an indictment found by the grand jury and presented to the district court. There was a motion made to quash this indictment, and it does not appear that the motion was overruled. None the less, thereafter a bill of information was filed. As no objection was urged on that ground, it is of no moment and will be passed without further comment, except that in the agreed facts reference is made only to the indictment, and not to the bill of information. That is, facts were agreed to upon which defendant's points of law were to be considered and decided under the indictment against her, and nothing is said in the agreed statement about the information.

Be that as it may, there is further irregularity, an order of appeal to which we have before referred to in stating the case, but it does not appear that it was applied for by the state. It is a lost order in the record, for which, on the face of the record, no one seems to be responsible.

The district court in granting an order of appeal always grants it on the motion of the party applying for the appeal, or his attorney.

But the last error is not only an irregularity. It is a fatal illegality. The judge of the district court granted an extension of time within which to file the appeal in the district court. Such extension under the law is granted by this court, and not by the court of first instance.

The return day had long since elapsed when the record was filed here. The counsel for defendant only bound himself not to take an exception "to the failure to lodge the transcript in the appellate court." He waived nothing. He only promised not to file an exception; but, as no exception is necessary in order to dismiss the appeal on the ground stated, it will be dismissed.

An appeal was dismissed *ex proprio motu* on the ground stated in *Pierce v. Cushing*, 33 La. Ann. 401, affirmed in *Holz v. Fishel*, 40 La. Ann. 298, 3 South. 888, and reaffirm-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed in Succession of Llula, 42 La. Ann. 475, 7 South. 585.

Failure to file the transcript is an abandonment. *State v. Clark*, 49 La. Ann. 780, 22 South. 257; *Building Association v. Church*, 49 La. Ann. 880, 21 South. 517; *Digest*, p. 45, No. 16b.

An accused cannot be heard to plead guilty in this court, nor can he waive illegalities that may be serious.

As to the plea of autre fois convict, it will not be passed upon for it is not necessary.

The appeal is dismissed.

(129 La.)

No. 18,667.

VORDENBAUMEN LUMBER CO., Limited,
v. PARKERSON.

(Supreme Court of Louisiana. Jan. 29, 1912.)

(*Syllabus by the Court.*)

LIBEL AND SLANDER (§ 100*)—ACTIONS—ISSUES AND PROOFS.

In an action for damages for slander, the plaintiff must prove the words strictly as alleged in the petition.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 246-272; Dec. Dig. § 100.*]

Appeal from Eighteenth Judicial District Court, Parish of Lafayette; William Campbell, Judge.

Action by the Vordenbaumen Lumber Company, Limited, against Charles M. Parkerson. From a judgment for defendant, plaintiff appeals. Affirmed.

Crow Girard, Story & Pugh, and Kennedy & Mouton, for appellant. O. C. Mouton, Chas. D. Caffery, and W. S. Parkerson, for appellee.

LAND, J. Plaintiff sued for \$15,000 damages for slander, in this: That the defendant in a conversation with Sidney Mouton and L. E. Lacour did falsely and maliciously state to them as follows:

"The Vordenbaumen Lumber Company has gone into bankruptcy. I have got it pretty straight."

The defendant for answer denied the use of the words alleged in the petition, and averred that a short time before the conversation referred to in the petition he had been informed in the city of New Orleans that the Vordenbaumen-Eastham Company of Shreveport, La., was about to go into the hands of a receiver; that said information was true as shown by a resolution of the board of directors of said corporation of date September 2, 1910; that in the conversation he had with Lacour and Mouton on the occasion referred to in the petition he stated that the Vordenbaumen & Co., meaning the corporation at Shreveport, had gone

into bankruptcy; that either Lacour or Mouton asked the defendant:

"Do you think that will affect the Vordenbaumen Company here?"

And defendant replied:

"I certainly think it will."

There was judgment for the defendant, and the plaintiff has appealed.

The burden was on the plaintiff to prove the slanderous words as alleged. Mr. Mouton testified as follows:

"It was on the 17th day of September, right there at the corner of the store, I met Mr. Charley Parkerson and Mr. L. E. Lacour, speaking. When I reached there, I have made the question to Mr. Charley Parkerson if he knew if the Vordenbaumen Lumber Company would be in the corn market. He answered: 'By the way, I heard that these people had gone into bankruptcy.' I said: 'Charley, does this include the Vordenbaumen Lumber Company of which Hopkins is manager?' 'Undoubtedly,' he says, 'the whole thing.' I said, 'Charley, where did you get this?' 'I've got it pretty straight.'"

Mr. Mouton, being requested to repeat the exact words used, replied:

"I hear that the company had gone into bankruptcy."

It is evident that this witness did not remember the *exact* words used, and that the language that was used did not necessarily embrace the Vordenbaumen Lumber Company, as shown by the question of the witness:

"Charley does this include the Vordenbaumen Lumber Company," etc.

Mr. Lacour testified:

"Mr. Mouton asked him the question if the Vordenbaumen Lumber Company would buy corn, and he told Mr. Mouton: 'By the way, have you heard that Vordenbaumen had gone into bankruptcy?' and Mr. Mouton asked him if it would affect the Vordenbaumen Lumber Company of this town. He said, 'Undoubtedly, the whole concern,' and then Mr. Mouton asked where he had gotten it. He said, 'I got it pretty straight.' That was all that was said, and we all separated."

Defendant in his testimony, after stating the conversation up to a certain point, continued as follows:

"Then it was I said that I had just returned from New Orleans on the No. 9, which reaches here about 5 o'clock, and that I had heard down there that Vordenbaumen & Co. of Shreveport had gone into bankruptcy. Sidney Mouton asked me if I thought that would affect the Vordenbaumen Company of this place. I told him I thought so. Lacour and I talked a little while longer about the shortness of the cotton crop, and I went on down to the theater."

As a matter of fact, proceedings had commenced early in September in the district court of Caddo parish to place the Vordenbaumen-Eastham Company of Shreveport in the hands of a receiver. The board of di-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rectors, by resolution of date September 7, 1910, consented to the appointment of a receiver.

It is evident we think from the testimony of Mouton and Lacour that they did not understand from the language used by the defendant at the time that he intended to convey the idea that the Vordenbaumen Lumber Company of Lafayette had gone into bankruptcy. The version of the conversation given by the defendant is a reasonable one under all the surrounding facts and circumstances of the case. Defendant spoke to two business men on the same day about the bankruptcy of the Vordenbaumen Company at Shreveport. The plaintiff has failed to prove that the defendant uttered the slanderous words charged in the petition. As a general rule, a failure on the part of the plaintiff to prove the words strictly as alleged in the petition constitutes a variance, and apart from a statute to the contrary, is fatal to his cause of action. 25 Cyc. 484.

Our learned Brother below in his reasons for judgment says:

"Viewing all the evidence and all the surrounding facts in connection with this case, the court is of the opinion that the plaintiff has not made out a case of slander."

His subsequent remarks on the law as to malice, does not affect his conclusion that, "under the law and the evidence, judgment must be rendered in favor of the defendant." Judgment affirmed.

(129 La.)

No. 19,139.

FISCHER et al. v. PARISH SCHOOL BOARD et al.

(Supreme Court of Louisiana. Jan. 29, 1912.)

(Syllabus by the Court.)

1. ELECTIONS (§ 285*)—CONTESTS—PETITION—SUFFICIENCY.

A petition alleging irregularities in an election and that the result was thereby changed shows a cause of action, unless it clearly appears from all the allegations taken together that the irregularities charged did not affect the result of the election.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 285.*]

2. ELECTIONS (§ 285*)—CONTESTS—PETITION—SUFFICIENCY.

Where the allegations of a petition disclose a corrupt combination or conspiracy to control an election by inducements amounting to bribery of voters, they show a cause of action.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 266-277; Dec. Dig. § 285.*]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

Action by John Fischer and another against the Parish School Board and others. From a judgment sustaining an exception of no

cause of action, plaintiffs appeal. Reversed and remanded.

B. B. Purser, for appellants. W. H. McClendon, F. W. Sherman, and R. C. & S. Reid, for appellees.

LAND, J. Plaintiffs, property taxpayers, residents, and qualified voters of school district No. 52, in the parish of Tangipahoa, sued to set aside a special election held in said district to ascertain the will of the property taxpayers on a proposition to levy a special tax of 3 mills for 10 years on all the taxable property in the district aforesaid to secure the payment of an issue of bonds to the amount of \$20,000. The grounds of the contest are fraud and illegality in the conduct of the election.

The petition alleges that the largest taxpayer in the district who was opposed to the tax was induced to change his vote by reason of a corrupt written agreement with a deputy assessor and other persons, which was acquiesced in by the assessor and board of review, to the effect that for the year 1912 and subsequent years the assessment of said taxpayer would be so reduced as to practically relieve him from the payment of the special tax of 3 mills. The petitioners allege that, if said taxpayer had voted "No" instead of "Yes," the election would not have carried; the assessed valuation of said taxpayer being \$20,640, and the amount voted for the tax being \$57,440, and against the tax \$26,760. The petition further alleges that proxies were obtained from both white and colored taxpayers on representation that there would be no increase in the aggregate amount of taxes on account of the revision of valuation as covered by the said agreement, and that a lady who had already given a proxy to vote against the tax was induced to give another proxy to a person who in violation of her instructions voted the same for the tax, instead of against the tax. The petition further alleges that two co-owners in indivision of property valued at \$1,390 were not permitted to vote at the election; that a nonresident taxpayer, owning property in the district of the assessed value of \$400, was not permitted to vote; and that a resident widow assessed with community property to the amount of \$2,970 was not permitted to vote. The petition further alleges that in the canvassing of the votes the valuation on a certain ticket was returned as \$9.30 instead of \$930.

On motion of the plaintiffs, the court ordered the said largest taxpayer to produce the alleged written agreement, but he successfully pleaded that, if the document ever had any existence, its production would subject him to a criminal prosecution for a felony under the provisions of section 2 of Act 78 of 1890.

Defendants filed an exception of no cause of action, which was sustained, and plaintiffs have appealed.

[1] The contention of counsel for the appellees is thus stated in their brief:

"In other words, if your honors should strike out the alleged influenced vote of J. R. Abels, and allow plaintiffs all the votes they contend for in their petition, there is still a majority in favor of the tax."

[2] Counsel overlooked the allegations of fraud as to proxies, as to which no figures are given in the petition, which, moreover, alleges that the election would not have been carried had Mr. Abels voted "No," instead of "Yes." It therefore cannot be said on the face of the petition that the illegalities charged in the petition did not affect the result of the election. Moreover, the fraudulent practices alleged in the petition are not mere irregularities, but amount to a corrupt combination or conspiracy to control the election by bribery.

We think that the exception should have been overruled.

It is therefore ordered that the judgment below be reversed, and it is now ordered that this cause be remanded for further proceedings according to law.

(129 La.)

No. 19,130.

ADAMS v. PORTER.

In re PORTER.

(Supreme Court of Louisiana. Jan. 15, 1912.
Rehearing Denied Feb. 12, 1912.)

(Syllabus by the Court.)

VENDOR AND PURCHASER (§ 167*)—PERFORMANCE OF CONTRACT—DEFICIENCY IN QUANTITY.

When there is a deficiency of land in a sale per aversionem, the court cannot order the vendor to supply the deficiency out of land not included in the tract intended to be sold.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 332; Dec. Dig. § 167.*]

Action by Thomas J. Adams against J. W. Porter. Application by the defendant for certiorari or writ of review to the Court of Appeal, Parish of Caddo. Judgment of the district court in favor of defendant reinstated, and made the judgment of the Supreme Court.

Hall & Jack and Liverman & Pollock, for applicant. Lee, Pegues & Atkinson, for respondent.

BREAUX, C. J. This suit was brought by plaintiff to recover the following described tract of land, to wit: Commencing in the center of Wilson's Ferry, and running in a southeasterly direction along Bayou Pierre, to a dry bayou south of a cabin, at or near

the east and west line of section 5, dividing the N. $\frac{1}{2}$ and the S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 5, and running thence east between parallel lines to the east boundary of the section, containing 80 acres, more or less.

The facts are slightly complicated. They are in the main that on the 22d day of December, 1908, Thomas J. Adams, the plaintiff, sold to Joseph W. Porter, the defendant, a tract of land of 33 acres for the price of twelve hundred dollars, represented by the note of J. W. Porter in favor of the plaintiff, payable on January 1, 1910, secured by a vendor's mortgage and privilege.

On the face of the papers, this was a complete deed.

Subsequently the parties by their agreements beclouded the issues.

The defendant, Porter, agreed with plaintiff to transfer to the latter, Adams, the land described (which was mortgaged at the time to a Mr. Marsden) in exchange for plaintiff's land, sold as above mentioned, and for the price for which a note had been executed. In order to enable Porter, the defendant, to make title to Adams, to the 80 acres of land above described, a note, secured by mortgage and vendor's privilege, as above mentioned, was assigned to Porter to enable him to pay the vendor's privilege and mortgage due by him (Porter) on the land which he promised to transfer to the plaintiff in exchange. The note was placed in the hands of Mr. K. M. Reeves to pay the note and vendor's privilege due by Porter to Marsden. The note was taken up by Reeves for account of Adams, and it remained in the hands of Reeves to guarantee the faithful performance on the part of Porter according to the terms of the contract; that is to say, to guarantee the valid deed and title to the tract of land which he had promised to exchange with plaintiff for the land sold as first above mentioned.

It appears on the face of the papers as a sale, but in reality this sale was a step toward the exchange.

Some time after these agreements, defendant, Porter, delivered two mules to the plaintiff, for the value of which he received 45 acres of land, the very land that he had under private signature agreed to make title to plaintiff in exchange of the first land above described, but which he had not yet delivered in accordance with the agreement.

The mules transferred for the land had been in plaintiff's possession and use several months when this suit was brought.

There is no question but that the transaction between the plaintiff and the defendant involving the two mules and 45 acres of land is complete and irrevocable.

The judge of the district court so considered this part of the transaction, and so did the Circuit Court of Appeal.

Plaintiff in bringing this suit ignored en-

tirely the exchange of land for mules; made no allegation in that respect.

We are of opinion that we must give effect to this part of the exchange between the parties.

Had the defendant undertaken, instead of the transaction about lands, to pay the \$1,200 note, and had transferred the two mules in part payment, observing the proportion of the 45 acres to the 80 acres as the basis of value, the defendant would then have paid $\frac{11}{20}$ of the note; that is, in the proportion of $\frac{9}{20}$ to $\frac{11}{20}$, the value of the land.

The defendant informed the plaintiff that he would take possession of the 45 acres. He had them surveyed, and became the owner of a separate tract on the east side of the tract he had promised to transfer to plaintiff in exchange.

But the transaction took another shape, and from it grew the difference between the parties.

The plaintiff, we have seen, was to receive 80 acres of land in exchange for the \$1,200 note, which is the same thing in this case as an equivalent for the 33-acre tract of plaintiff, as before mentioned.

But this transfer of the 80-acre tract was impossible for the reason that the tract as described contained only 50 acres. It was not possible to carve out of 50 acres two tracts—one of 45 acres, and another of 35 acres—the last number being the number of acres plaintiff now claims as due him as a balance of land on the exchange made.

The number of acres remaining is five acres.

Defendant's contention is that the tract was to be transferred by metes and bounds, and that, when the agreement was signed, it was expressly understood that the plaintiff would accept the number of acres without the reference to the actual number described in the deed.

This is not denied by the plaintiff. On the contrary, it is admitted by him as a witness.

The Circuit Court of Appeal undertook to settle this difference between the parties by decreeing that the 35 acres of land should be taken from the 45 acres for which defendant had conveyed two mules, as before stated.

In this opinion we are unable to agree with our learned brothers of the Circuit Court of Appeal. Defendant had acquired as absolute right and title and the land was not subject to any further claim in the part of plaintiff. He could not be made to supplement a deficiency of measurement in that way. It would have been taking other land to supply an alleged deficiency.

A very similar question was decided in *Gladstone Realty Co. v. Currie*, 126 La. 115, 52 South. 237, in which it was decided that lands other than those included in the metes and bounds of the tract sold could not be

taken and applied in satisfaction of any deficiency.

These 45 acres of land by effect of the agreement between the parties were taken out of the metes and bounds of the tract which defendant had promised to convey to the plaintiff in exchange.

The same principle applies here which was laid down in the cited case. We do not think we would be justified in undoing that which the parties had done in recalling a complete transaction for the purpose of adjusting misunderstandings (if there was misunderstanding).

As this was an important point, that relating to the consent of plaintiff, we will transcribe here the evidence upon the subject.

The defendant in testifying said:

"That plaintiff understood what he was getting, and that the description covered, and that he would take what there was according to lines from one point to the other on Bayou Pierre, extending back east to the section line."

We infer that one of the principal objects of plaintiff, as stated by him, was to become the owner of Wilson's Ferry, which it appears is a part of the remaining five acres.

When plaintiff was questioned as a witness on cross-examination, he was asked if defendant, Porter, advised him that he was falling into a mistake against his interests. His answer was that he was so advised by the defendant. The question was then propounded to him:

"Did you not tell him that you did not care if you got 30 acres so you got the land you wanted?"

The answer was:

"Just as I got the land I showed him. I did not care."

That he wanted the land from one point of the bayou to the other. Witness concludes by stating that he made an exchange with defendant for a certain number of acres on the Douglas place for the land described in the contract.

The action should be for an amount in money representing the deficiency.

From any point of view, plaintiff would not be entitled to relief in this case.

It is therefore ordered, adjudged, and decreed that the judgment of the Circuit Court of Appeal, sitting in the parish of Caddo, is avoided, annulled, and reversed, the costs in that court to be paid by plaintiff. It is further ordered, adjudged, and decreed that the judgment of the district court, the decretal part of which reads, in substance, as follows: That defendant J. W. Porter's deed to plaintiff, Thos. J. Adams, conveys the land contained within the metes and bounds as described in said contract, less 45 acres on the east boundary, being stiff land, accepted from plaintiff for a pair of mules, delivered to and accepted by plaintiff, plaintiff to pay all the costs of this suit. It fol-

lows from the foregoing that plaintiff is the owner of the five acres mentioned, and that, in case the defendant neglects or refuses to make deed to these five acres, then this judgment to be considered equivalent to a title between parties from the date of its rendition and among all parties after it will have been recorded as required.

The judgment of the district court is reinstated, and made the judgment of this court at the costs of plaintiff, and it is remanded to the district court for execution.

(129 La.)

No. 18,986.

CITIZENS' BANK & TRUST CO. v. BOARD OF ASSESSORS et al.

(Supreme Court of Louisiana. Jan. 15, 1912.
Rehearing Denied Feb. 12, 1912.)

(Syllabus by the Court.)

TAXATION (§ 79*) — PERSONS LIABLE — PURCHASE.

The law provides that all taxable property should be assessed, and the fact that plaintiff did not on the first day of the year own the property sought to be assessed, but acquired it only subsequently, does not have the effect of making it nontaxable property from the date of its acquisition until the end of the year in which it was acquired. Taxes are due on the property, since it does not come within any tax exemption, and the taxes must be paid by the owner.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 139; Dec. Dig. § 79.*]

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by the Citizens' Bank & Trust Company against the Board of Assessors and others. From a judgment for plaintiff, defendants appeal. Reversed, and suit dismissed.

Geo. H. Terriberry, for appellant Board of Assessors. Harry P. Sneed, for appellant State Tax Collector. John J. Reilley, for appellant City of New Orleans. Dufour & Dufour, for appellee.

BREAUX, C. J. Plaintiff alleges that the assessment of its property is null and void, and asks that its assessment and the taxes claimed under the assessment be declared null.

Plaintiff collected the shares of its stock on the 31st of January, and commenced business as a bank and trust company in the February following. It then became a going corporation.

Prior to the dates before mentioned plaintiff had no corporate existence.

We learn from the record that the board of assessors, acting under Act 170 of the General Assembly for the session of 1898 and the amendments thereto, assessed for the purpose of taxation, for the year 1911, in the name of plaintiff, the Citizens' Bank & Trust

Company, the real estate and improvements formerly owned by the Citizens' Bank, situated in the First district of New Orleans. The property assessed is described in plaintiff's petition.

Plaintiff acquired the real estate and improvements of the Citizen's Bank from the board of liquidators of that bank on the 6th day of February. The property consisting of real estate and improvements of the Citizens' Bank of Louisiana were exempt from taxation on the 1st of January, 1911, also the shares of the capital stock of the bank.

Plaintiff argues:

Under the law and jurisprudence of this state, assessments relate back to the first of the year, and all assessments must be made on the basis of the condition of things on the 1st day of January of each year. As plaintiff was not the owner of the property on January 1, 1911, and became owner only some time afterwards, it opposes the assessment and taxation of its property. Plaintiff avers, in substance, that it will owe no taxes until the year 1912. It also avers that it made due returns and protested against the assessment.

The defendant board of assessors and John Fitzpatrick, state tax collector, for answer to plaintiff's petition, admit the truth of all the allegations of fact in the petition, and aver that, notwithstanding the truth of the allegations of fact, plaintiff has shown no cause of action and no right to the relief sought.

The district court canceled and annulled the assessment on the property described in plaintiff's petition, and canceled and annulled the taxes levied on the assessment. From this judgment, the defendant appeals.

It is true that in the 49 La. Ann. 401, 21 South. 913, case—Southern Insurance Co. v. Board of Assessors—the court held that assessments are based on the condition of things existing on the 1st of January, that the levying of taxes is for the calendar year, and that the law provides that the assessment is to begin on the 2d of January and be completed on the 1st of March. It contemplates an assessment on the basis of the condition of things existing on the 1st of January.

The court in this 49 La. Ann. 401, 21 South. 913, case, cited the Home Ins. Co. v. Board of Assessors, 48 La. Ann. 451, 19 South. 280, as controlling.

After having examined into the cases, we found no great similarity between these cited cases and the case under consideration.

In the last of the cited cases, the court reiterated that in assessing the insurance companies the assessment should relate to the first day of the year. We state as to the principle controlling in these decisions: The assets of insurance companies fluctuate.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

They are handled very actively. The cash balances are large one day and small the next. The frequency of losses in the insurance business is not considered particularly abnormal. As the profit and loss column is not a certainty, it was deemed proper by the tax assessing and collecting department to adopt a date to which assessments relate; to the adoption of this date this court has given sanction in the cited decisions, *supra*.

It will be noted in the cases before cited the assessment alone of insurance companies was considered.

Under the decisions before cited, it has never been considered, if an insurance company were to bring assessable property in this state after the 1st of January, whether it would be taxable.

In *Palfrey v. Connely*, Sheriff, 106 La. 699, 31 South. 148, the rule in assessing insurance companies was extended so as to include all owners. But it was not intended to sanction a hard and fast rule which would enable the taxpayer to control the situation, and to have his property valued at the time fixed and to remain as listed, although thereafter it becomes very evident that he has other property not assessed, and which should be assessed.

Although here again the text of the opinion is too broad for the subject sifted down, the purpose related particularly to valuation of the property which should be as of a particular date and as to title that the state could not have the property (the tract) assessed twice—once on the first of January, when the land belonged to one owner, and again, during the year when the title to the tract had passed to a new owner, in whose name it was again assessed.

This brings us to the *Prytania Street Market Case*, 110 La. 835, 34 South. 797, as to which we will state that it is not pertinent. The court held that, after an assessment is finally completed, it will not be reopened for the purpose of enabling the owner to show that since the assessment the property has become exempt from taxation. The finality of the assessment is a judgment in the nature of *res judicata*.

In *Bunkle Brick Works v. Police Jury*, 113 La. 1062, 37 South. 970, the court adopted the previous ruling. In this last case the issues did not suggest the discussion that has arisen in the case under consideration.

In *Hammond Lumber Co. v. Smart*, Sheriff (No. 18,874) 57 South. 277, a rehearing has been granted, and it will afford an excellent opportunity to the plaintiff in that case and the plaintiff in the case under consideration to demonstrate, if they can, wherein both of the decisions are erroneous.

We have searched in vain for a tax statute under which to hold that property can be relieved from the payment of taxes which is properly assessable and taxable at the

time that the assessor assesses the property of all the owners in the parish. He is charged, by statute, in the broadest terms possible to assess all property except that which is specially and expressly excepted, and to these laws the courts are bound to adhere in all cases.

We will state that there was only a difference of opinion between the plaintiff and the assessing and tax collecting department left to the courts for decision. It is a mere business proposition in regard to which there may be a difference of opinion. As to ourselves, after careful consideration, with the light before us, we are positive that the taxes claimed should be paid.

For reasons stated, it is ordered, adjudged, and decreed that the judgment appealed from is avoided, annulled, and reversed; that there is a judgment dismissing the suit; and that defendants recover a fee equal to 10 per cent. for the amount of taxes and penalties.

Further, that plaintiff and appellee pay the costs of both courts.

PROVOSTY, J., takes no part, being absent on account of sickness.

(129 La.)

No. 18,711.

WEBSTER SAND, GRAVEL & CONSTRUCTION CO. v. VICKSBURG, S. & P. RY. CO.

(Supreme Court of Louisiana. Jan. 13, 1912.)
Rehearing Denied Feb. 12, 1912.)

(*Syllabus by the Court.*)

1. VENDOR AND PURCHASER (§ 212*)—SUBSEQUENT PURCHASERS—NOTICE—RECORDS.

Purchasers of immovable property, save in cases of fraud and certain others, exceptional in character, are affected only by adverse titles and incumbrances which are spread upon the public records.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 436-439; Dec. Dig. § 212.*]

2. VENDOR AND PURCHASER (§ 212*)—SUBSEQUENT PURCHASERS—FAILURE TO RECORD.

The case of a railway company, which, with the consent or acquiescence of the owner, has built a public service road upon his land, is of the exceptional character referred to in the above paragraph; and it is now well settled that, in such case, though the consent or acquiescence of the owner of the land be not spread upon the public records, neither he nor those who claim under him can recover the land, free of the servitude so acquired by the railway company, or interfere with such company in its operation of the road so built; the remedy being an action in damages for the value of the land occupied as a right of way for the road and for injury to the adjacent land.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 212.*]

3. VENDOR AND PURCHASER (§ 212*)—SUBSEQUENT PURCHASERS—PRIOR RIGHT—PRIVATE OR PUBLIC USE.

The construction, by a railway company, of a branch road, siding, or spur, for the ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

clusive benefit of itself and the owner of a private business enterprise, and from the use of which the public is excluded, does not fall within the exception stated in the above paragraph; but the mere fact that the primary purpose of a branch road, siding, or spur is to accommodate a particular private enterprise, is not the controlling test in determining whether it is intended for private or public use. The character of the use is determined by the extent of the right of the public thereto, rather than by the extent to which such right may, presently, be exercised.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 212.*]

Appeal from Second Judicial District Court, Parish of Webster; R. O. Drew, Judge.

Action by the Webster Sand, Gravel & Construction Company against the Vicksburg, Shreveport & Pacific Railway Company.—From a judgment for plaintiff, defendant appeals. Reversed in part and affirmed in part.

Stubbs, Russell & Theus and Wise, Randolph & Rendall, for appellant. Stewart & Stewart and Thigpen & Herold, for appellee.

MONROE, J. This is a petitory action, the object of which is to have plaintiff decreed the owner of, and to compel defendant to remove its track from, a strip of land which crosses certain tracts belonging to the plaintiff; the facts bearing upon the issue presented by the pleadings being as follows, to wit:

On April 18, 1906, T. E. Jarrett entered into a contract with defendant, which recites that he had purchased gravel lands in the N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 1, township 17 N., range 10, and S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of fractional section 36, township 18 N., range 10, in Webster parish; and that he desired defendant to construct a branch road, in a southerly direction, connecting said gravel land with its main line, at Sibley, a distance of about four miles; and whereby he agreed to procure a right of way, 50 feet wide, for said branch road, and, within four years, make defendant a complete title thereto. He also agreed to grade the right of way, construct thereon the necessary trestles and waterways, and the necessary tracks, in the gravel pit. Defendant, on the other hand, agreed to furnish the rails, spikes, fastenings and ties necessary to lay the road from Sibley "to the gravel pit tracks to be constructed by said Jarrett," and to construct such side tracks as might be needed for the delivery and receipt to and from the gravel pit of empty and loaded cars; and, after other stipulations, which need not be particularly set forth, the contract concludes with the following:

"In the event of the exhaustion of said gravel lands, or, if for any other reason, said branch railway shall no longer be needed

and operation thereof shall cease and determine, said railway company shall have the right to remove therefrom the rails, spikes," etc.

A portion of the land known as the "Miller land," lying between the gravel land and Sibley, was, at that time, owned by the Shreveport Realty Trust Company, Limited, and was subject to a mortgage in favor of T. F. Bell; and on April 23, 1906, the owner and the mortgagee addressed a letter to Jarrett reading, in part, as follows:

"You are hereby authorized and granted privilege to use a railroad right of way, for a period of twenty years from this date, through our property known as the Miller land. * * *"

The branch road was, accordingly, constructed, partly through the "Miller land," during the year 1906; Jarrett's obligation to obtain for defendant a complete title to such right of way having been left, for the time, in abeyance. On January 19, 1907, Jarrett and E. R. Bernstein entered into a contract with defendant, which, after reciting the fact and the purpose of the agreement between Jarrett and defendant, reads, in part, as follows:

"And, whereas, said gravel pits belong to the said T. E. Jarrett, and E. R. Bernstein, instead of the said T. E. Jarrett, as set forth in said agreement; and whereas, the said E. R. Bernstein and T. E. Jarrett desire to lease from the said railway company certain steel rails for the purpose of laying tracks in the said gravel pit: Now, therefore, the said T. E. Jarrett, for valuable consideration, has transferred all of his rights and interest under said agreement with the * * * company to the said E. R. Bernstein and T. E. Jarrett (a partnership, it appears), * * * who, hereby, accept same and bind and obligate themselves, towards the said railway company, to take the place of the said T. E. Jarrett in said agreement and to assume all his obligations toward the said railway company, therein set forth"—and then follow the stipulations concerning the lease of the steel rails.

It may be here remarked that the contract between Jarrett and defendant and the contract last mentioned were duly recorded, but the letter from the Realty Trust Company and T. F. Bell to Jarrett was not so recorded. On August 3, 1907, the "Miller land" was sold, under foreclosure of mortgage, and adjudicated to the mortgagee, T. F. Bell, who, on August 15th following, sold it, for \$7,200 cash, to E. R. Bernstein and his two brothers, Michel and Julius who, on June 7, 1910, for a recited consideration of \$30,000 cash (of which \$7,500 is said to have been the consideration for the sale of the personal property, engines, boilers, derricks, steam shovels, etc., and the balance, of \$22,500, to have been the consideration for the sale of the land), sold the property to F. H. Drake. On June 22d thereafter, E. R. Bernstein and Drake

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

organized the plaintiff corporation, with a nominal capital of \$100,000, and with authority to commence business whenever \$30,000 of such capital should have been subscribed; each of the parties mentioned subscribing for 150 shares of the stock (of the par value of \$100), and W. B. Lee subscribing for 5 shares. And on July 22d Drake, for a recited consideration of \$1,884 cash, conveyed to the company so created the "N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 1, township 17, range 10, and the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of fractional section 36, township 18, range 10," which is part of the "Miller land," and is the same land that is described in the original contract between Jarrett and the defendant. Soon after matters had been arranged in that way, plaintiff brought this suit, and it here asserts the right to compel the defendant to remove the branch road from the land so acquired, on the grounds: (1) That, when Drake, and when it (plaintiff), acquired said land, there was no incumbrance of the title upon the public records; and (2) that said road was not constructed for public use, but merely to subserve private interests; and hence that the matter does not come within the doctrine of those cases in which it has been held that, where a railway company, being a public service corporation, has been allowed to build its road over private property, the owner cannot compel it to remove such road, but must seek another remedy.

[1] The ground first stated appears to us to be well taken, for, though we are satisfied that Drake and the plaintiff were fully informed as to all that had been done, before either of them acquired the land in dispute, there was no title or incumbrance, adverse to the title acquired by them and which identified said property, on the public records, and this court has repeatedly held that purchasers of immovable property, save in cases of fraud, and certain others, exceptional in character, are affected only by adverse titles and incumbrances which are spread upon the public records. *McDuffie v. Walker*, 125 La. 152, 51 South. 100; *John T. Moore P. Co. v. Morgan's La. & T. R. & S. S. Co.*, 126 La. 866, 53 South. 22; *Riggs Cypress Co. v. Albert Hanson Lumber Co.*, 127 La. 455, 53 South. 700; *Riggs v. Eicholz*, 127 La. 750, 53 South. 977; *Sorrel v. Hardy*, 127 La. 847, 54 South. 122; *Washington v. Flier*, 127 La. 871, 54 South. 128.

It is true that defendant has produced a plat which shows the gravel spur running through the "Miller land," and which is said to have been registered in the conveyance office; but it bears no certificate to that effect and does not appear to have been identified with any conveyance, mortgage, or other contract, and it therefore proves nothing.

[2] The other ground relied on by plaintiff is not well taken. The case of a rail-

way company which, with the consent or acquiescence of the owner, has built its road upon his land, is of the exceptional character to which we have just above referred, and it is now well settled that, in such case, though the consent or acquiescence be not spread upon the public records, neither the owner of the land nor those who claim under him can recover such land, free of the servitude so acquired by the railway company, or interfere with such company in its operation of the road so built; the remedy being an action for the value of the land used and for damages, for injury to the adjacent land. *McCutchen v. Texas & P. Ry. Co.*, 118 La. 436 (and authorities there cited pp. 438, 439), 43 South. 42; *Taylor v. N. O. Terminal Co.*, 126 La. 420, 52 South. 562, 139 Am. St. Rep. 537; *John T. Moore P. Co. v. Morgan's La. & Tex. R. & S. Co.*, 126 La. 872, 53 South. 22.

[3] The decisions in the cases thus cited are predicated, in part, upon the idea that, where a railway company, having the power of eminent domain, is already in possession of property which it may expropriate, if dispossessed, it would be a vain thing to eject it; to which is added the further consideration that the owner, by consenting to, or acquiescing in, the construction of the road, and its operation for, perhaps, a series of years, has created a situation affecting the rights of the railway company, of the public at large, and of particular individuals, which he ought not to be allowed, altogether, to ignore. In the instant case, counsel for plaintiff say that the branch road, or spur track, here in question, was not constructed for the use and benefit of the public, but solely for the private use and advantage of the railway company, and of the owners of the gravel pit; from which, they argue, that as the company could have no power to expropriate the right of way for such purposes, the reason for not ejecting it therefrom no longer exists. Counsel's premise is not, however, sustained by the fact. The branch road was constructed by defendant in the exercise of its franchise as a public service corporation and is subject to the same conditions as affect its main, intrastate, and interstate lines, and it does not lose its character as a public service road merely because the primary object in its construction, and its principal use at present was and is to supply the public with the product of a particular industry. Mr. Hearn, defendant's superintendent, testifies, in effect, that the branch road was built to get the hauling of the gravel and such other commodities as might be offered, and for the purpose of building up a traffic, and from his testimony, and that of others—wholly uncontradicted—it appears that its use is open to the public, and that whatever business it does is subject to the same control, by the State and Interstate Railroad Commissions, as is the business done upon

other parts of defendant's lines. It also appears that several thousands of car loads of gravel have been hauled over the road since 1906, and that there are many persons and corporations who are interested in obtaining it for paving, building, ballasting, and other purposes for which such material may be used; a large proportion of that which has been carried having been consigned to another railroad company, at Shreveport, and probably by it used in ballasting its own roadbed, or transported to, and distributed among, towns, villages, and contractors in other parts of the state or country, where gravel is needed and is not otherwise obtainable. The decision in the case of *Pere Marquette R. Co. v. United States Gypsum Co.*, et al., 154 Mich. 290, 117 N. W. 733, 22 L. R. A. (N. S.) 181, is inapplicable here, since the court there found as a fact that the right of way sought to be expropriated was for a branch railroad intended for the use of a private enterprise; one of the paragraphs of the syllabus reading as follows:

"A side track of a railroad cannot be regarded as for public use, where it reaches a private factory and the railroad company has contracted for its use only when it can use it without interfering with the business of the manufacturer."

In the exhaustive note to the case thus cited, the author says:

"Two general principles applicable to the subject under annotation are laid down by the courts with practically no dispute. (1) That the construction of a branch siding, or spur, solely and exclusively for the benefit and accommodation of the railway company and of the owner of a private business enterprise, does not constitute a public purpose which will sustain the exercise of the power of eminent domain. *Ulmer v. Lame Rock Co.*, 98 Me. 579, 57 Atl. 1001, 68 L. R. A. 387. (2) That the mere fact that the primary purpose of a branch siding, or spur, is to accommodate a particular private enterprise, is not a controlling test. The character of the use, whether public or private, is determined by the extent of the right of the public to such use, and not by the extent to which that right is, or may be, exercised. *Id.*"

In a comparatively recent case, involving the exercise of the power of eminent domain for the purposes of a spur track, this court quoted, with approval, the following from an opinion by the Supreme Court of Wisconsin:

"A brief reference to the leading authorities will amply show, that a spur track may run to a single factory does not militate against the devotion of the property thereto being a public use thereof, so long as the purpose of maintaining the track is to serve all persons who may desire it and all can demand, as a right, to be served, without discrimination." *Kansas City S. & G. R. Co. v. La. W. R. Co.*, 116 La. 185, 40 South. 627, 5 L. R. A. (N. S.) 512.

See, also, *In re Chicago & N. W. R. Co.*, 112 Wis. 1, 87 N. W. 849, 56 L. R. A. 240, 88 Am. St. Rep. 918.

The judgment of the district court decrees the title to the strip of land in question to be in plaintiff; "that the injunction herein sued out * * * be maintained and perpetuated; and that the Vicksburg, Shreveport & Pacific Railway Company be ordered, within 20 days, to remove their spur track off of said strip of land, described in the petition, upon which it is now laid, so as to leave the land unobstructed and pay all the costs of this suit."

We have not been able to find any petition or order for, or any writ of, injunction in the record, and, for the reasons stated, are of opinion that there is error in the judgment referred to, in so far as it purports to enjoin the defendant from continuing to use its spur track and orders the removal of the same. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, in so far as it orders defendant to remove the spur track off the strip of land described in the petition or otherwise interferes with defendant in the use of said strip, for the purposes of said spur track. It is further decreed that, in other respects, said judgment be affirmed, and that plaintiff pay the costs of the appeal.

(130 La.)

No. 18,949.

STATE v. LAZARONE.

(Supreme Court of Louisiana. Jan. 17, 1912.)

(Syllabus by Editorial Staff.)

1. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY.

Testimony that on the day before the homicide witness gave decedent 25 cents, to spend 5 cents for mailing a letter and return the remaining 20 cents; and that decedent's father returned the 20 cents after the homicide, was not hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

2. CRIMINAL LAW (§ 412*)—EVIDENCE—HEARSAY—DECLARATION AGAINST INTEREST.

Hearsay declaration against interest should only be admitted where it clearly appears that the declaration was against declarant's interest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 894-972; Dec. Dig. § 412.*]

3. HOMICIDE (§ 163*)—EVIDENCE—IMMORAL ACTS BY ACCUSED.

That an accusation of murder depended on circumstantial evidence did not justify the admission of evidence that accused, a white man, had a room at the house of a colored woman, for the purpose of secretly meeting and spending the night with another colored woman, some three nights or more each week.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 310, 311; Dec. Dig. § 163.*]

4. HOMICIDE (§ 338*)—APPEAL—HARMLESS ERROR—EVIDENCE.

The admission of such evidence was prejudicial error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709-718; Dec. Dig. § 338.*]

5. CRIMINAL LAW (§ 400*)—EVIDENCE—SECONDARY EVIDENCE.

Evidence of persons present at the coroner's inquest as to statements then made by accused is not objectionable under the secondary evidence rule.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886; Dec. Dig. § 400.*]

6. COURTS (§ 56*)—INTERPRETERS—BIAS.

The appointment as court interpreter of a person who had contributed toward a fund for accused's prosecution avoids a conviction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 194-197; Dec. Dig. § 56.*]

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; G. H. Couvillon, Judge.

Joe Lazarone, Jr., was convicted of manslaughter, and appeals. Verdict set aside, and case remanded for further proceedings.

Coco & Couvillon, for appellant. Walter Guion, Atty. Gen., S. Allen Bordelon, Dist. Atty., and J. W. Joffrion (G. A. Gondran, of counsel), for the State.

PROVOSTY, J. The accused was tried for murder, and found guilty of manslaughter, and sentenced to 20 years at hard labor.

The deceased was found dead by the wayside, slain by some person unknown. This was a few hours after he had received his week's wages, and been cursed and abused by the accused because of his refusal to pay a just debt of \$2.85 out of said wages.

The theory of the defense was that the motive of the crime had been robbery; whereas, that of the prosecution was that it had been the animosity of the accused against the deceased for having refused to pay the debt, although having the money in his pocket.

Over the objection of the accused, a witness was allowed to testify that on the day before the homicide he had handed 25 cents to the deceased, to spend 5 cents in mailing a letter, and to return the remaining 20 cents; and that after the homicide the father of the deceased returned the 20 cents.

The purpose for which this evidence was offered, and the grounds on which it was objected to, are stated in the bill of exception, as follows:

"This evidence being for the purpose of showing the valuables found on the person of the deceased when he was found on the wayside dead, and to sustain the case in its theory as to the motive for the crime; that is, that the accused had killed the deceased for a debt of \$2.85, which the latter had refused to pay the former a few hours before the killing, and to rebut the claim by the defense that the deceased, as a matter of fact, paid said debt to defendant. Said evidence being also intended to repel the idea that robbery could have been the motive for the crime.

"The evidence was objected to as being hearsay, and relating to matters which had taken place between the witness and the deceased out of the presence of the accused; and the evidence was admitted because 'simply leading to some other facts.'"

[1] The "other facts" in question are not stated; but the entire testimony of the witness is brought up in the bill, and, while we fail to discover wherein it was hearsay, since the witness does not say that any one told him anything, we fail to discover anything in it going to show that the 20 cents given by the father of the deceased to the witness had been found on the dead body; and, in the absence of such showing, we fail to see what relevancy the said testimony could have had. On the face of the bill, therefore, said testimony would appear to have been inadmissible; but we shall make no express ruling on the point, as the verdict has to be set aside on other grounds.

[2] To prove the nonpayment of the debt, the state sought to have a witness repeat a statement made to him by the deceased, to the effect that he had not paid the debt to the accused. This evidence was objected to as being hearsay, but was admitted as being a declaration against interest made by a person now deceased. The rule by which hearsay declarations of that kind are admissible in evidence has to be applied with caution. The fact of the declaration having been against interest ought clearly to appear. In the present case, we are very doubtful whether there was such opposition of interest. True the acknowledgment of owing a debt is, in general, against the interest of the speaker; but the motive of pecuniary interest may in particular cases yield to some stronger motive. In the present case, the deceased, at the time he is said to have made the statement in question, had just been cursed and abused by the accused in the presence of a crowd because of the nonpayment of the debt, and may well have made the said statement by way of assertion, or vindication, of his own manhood, in order to show that he had not been intimidated into paying the debt. We shall make no ruling on the point; but leave it to the good judgment of the learned trial judge, upon a full consideration of all the facts, on the retrial of the case.

The cases of *State v. West*, 45 La. Ann. 17, 12 South. 7, and *State v. Young*, 107 La. 618, 31 South. 998, cited by the learned counsel for accused in support of the contention that the declarations against interest of a witness, since deceased, are not admissible, are not in point. The rule is that such declarations are admissible. An exception is recognized to that rule in the case of an acknowledgment by a third person that he committed the crime of which the accused stands charged; and *State v. West* and *State v. Young* are mere applications of this exception. Prof. Wigmore (Wig. Ed. § 1476) criticises this distinction as arbitrary and illogical; but he recognizes that it is now too firmly founded to be shaken.

[3] The state was allowed to prove by a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

colored woman that the accused, a white man, had a room at her house which he, for the purpose of meeting clandestinely and spending the night with another colored woman, occupied three nights of the week, and sometimes oftener.

The reason given in the per curiam for admitting this evidence is as follows:

"The accused being on trial for murder, and the only evidence being circumstantial evidence, it is competent for the state to show where the accused resided, the places he ate, the places he slept, and the places he frequently visited when not at his own home; the habits, conduct, and all circumstances surrounding the disposition of the accused are admissible, especially when the evidence shows the accused was arrested the night following the evening of the homicide, which was at a different place of his habitual stays."

[4] Because dependent upon circumstantial evidence and for murder, the case was not emancipated from the rule that evidence, to be admissible, must be relevant. We see no connection between the murder and the fact that the accused had this room and met a colored woman there clandestinely; and since this evidence was of a character to prejudice the case of the accused we think its admission was reversible error.

The next bill has reference to an attempted impeachment of one of the witnesses of the accused. The complaint is that the questions propounded for the purpose of laying the foundation for the impeachment were involved and complicated, and embraced different matters, some true and some false, so that it was not possible for the witness to give a single or even intelligent answer to them; and that the testimony adduced for the ostensible purpose of the impeachment went far beyond that purpose, bringing up new matters which not only had no tendency to impeach the witness, but were not even properly rebuttal.

This complaint, we find, is largely well founded. The mode of proceeding for laying the foundation for impeaching a witness, and for adducing the impeaching evidence, is very simple; and we assume that on the new trial of the case there will be no occasion for the renewal of the present complaint on that score.

[5] The next bill embodies the objection of the accused to the sheriff having been allowed to testify to statements made by the accused at the coroner's inquest. The objection is that the best evidence of the testimony given by the accused at the coroner's inquest is the testimony itself, as reduced to writing by the coroner and embodied in his procès-verbal of the inquest.

While the testimony, as reduced to writing by the coroner, may be the most reliable evidence of what the testimony was, it is not the best evidence in the sense of the rule of best evidence; or, in other words, the tes-

timony of the other persons who were present when the testimony was given, and who heard and remembered it, is not secondary evidence, but is primary evidence; and, as such, is equally admissible with the written report of the testimony. 30 Am. & Eng. Enc. p. 1100; State v. Farrier, 114 La. 579, 38 South. 480.

[6] The next and last bill was to the act of the court in choosing as interpreter a person who had been summoned as a witness for the state, and had contributed to a fund for the prosecution of the accused.

This alone is sufficient to vitiate the verdict. The person chosen to interpret into English testimony given in a tongue not understood by jury, court, or counsel must be absolutely disinterested, unprejudiced, and unbiased; and the mind of a person who has contributed towards a fund for the prosecution of an accused can hardly be said to be in that condition.

The verdict and sentence are therefore set aside, and the case is remanded, to be proceeded with according to law.

(130 La.)

No. 18,506.

Succession of ALEXANDER.

(Supreme Court of Louisiana. Jan. 15, 1912.
Rehearing Denied Feb. 12, 1912.)

(Syllabus by the Court.)

1. TENANCY IN COMMON (§ 55*) — MUTUAL LIABILITIES OF COTENANTS — SUFFICIENCY OF EVIDENCE.

The uncorroborated testimony of the surviving co-owner of a piece of real estate, to the effect that, as between her and the deceased co-owner, it was understood that she was not to be liable for any part of a debt of \$1,000, secured by mortgage on the common property, is insufficient to release her from such liability, and particularly where it appears that she had joined with the deceased in making notes in renewal of the debt.

[Ed. Note.—For other cases, see Tenancy in Common, Dec. Dig. § 55.*]

2. PARTNERSHIP (§ 110*) — MUTUAL RIGHTS AND LIABILITIES—ACTIONS.

Where real estate held in common is sold, and one of the joint owners retains possession of the proceeds, the fact that he and the other joint owner are partners in the planting business is no bar to an action by such other joint owner for the recovery of his share of the price, where it does not appear that the property was held as a partnership asset.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 110.*]

3. LIMITATION OF ACTIONS (§ 146*) — ACKNOWLEDGMENT OR NEW PROMISE—REQUISITES—SIGNATURE.

An unsigned memorandum, the date and meaning of which are uncertain, exhibited in a book which is produced by the opponent and shown to have been turned over to her after the death of the alleged debtor, is insufficient to establish an interruption of prescription

against a claim for \$500, said to have been loaned to the decedent.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 593-596; Dec. Dig. § 146.*]

4. CONTRACTS (§ 217*)—TERMINATION—OPTION.

The improbability that two persons will enter into a particular agreement may be said to disappear with the establishment of the fact that they actually did the improbable thing said to have been agreed on. Thus, though it may appear improbable that, immediately after executing an act of sale of real estate in which certain rights are reserved to the vendor, the vendee should propose to the vendor that the latter should collect the revenue from the property and, after paying the taxes and maintenance charges, appropriate the surplus to his own support; nevertheless, if that course was actually pursued for several years after the date of the sale, and up to the death of the vendee, who, in the meanwhile, paid no part of the purchase price, such facts, together with positive testimony, may be sufficient to prove that the proposition was made and acted on. But where, in such case, the revenues from the property far exceed the required outlay, and it is not shown that the vendor accepted the proposition, otherwise than by acting on it, and did not so bind himself that he could be held liable for such outlay in the event of its exceeding the revenue, and where other circumstances point to the conclusion that something in the nature of a donation or benefaction was intended, and not a contract which would bind the vendor, to his loss or prejudice, the arrangement, proposed and acted on, will be held to have been binding on the parties so long as they acquiesced in it, to have been terminable at the option of either, and to have been terminated when the executor of the vendee notified the vendor that he should no longer collect the revenue of the property.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1006-1009; Dec. Dig. § 217.*]

5. NOTARIES (§ 3*)—COMPENSATION—STATUTORY PROVISION.

The fees to which notaries are entitled for making inventories of succession property are regulated by Act No. 101 of 1870, according to which the charge of a round sum, including other services, is inadmissible.

[Ed. Note.—For other cases, see Notaries, Dec. Dig. § 8.*]

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Charles A. O'Neill, Judge.

In the matter of the succession of Moses S. Alexander. From a judgment maintaining in part oppositions by Leah Hope and others to the provisional account of the executor, he appeals. Modified.

Allen & Pecot, for appellant. Borah & Himel, for appellee testamentary executor.

MONROE, J. Decedent died early in 1909, and in due time his executor filed a provisional account, which was opposed by Leah Hope, Frank Jackson, and W. J. Formento, and he has appealed from a judgment which, in part, maintained those oppositions.

[1] 1. Leah Hope claimed, originally, \$1,175, with interest, as the balance due upon her share of the price of the "Daisy" plantation, and \$500, money said to have been loan-

ed to decedent. She was allowed \$550 on the first item, and the \$500 representing the second item, less \$241.65, deducted on account of money shown to have been received by her from the decedent. She has answered the appeal and complains only of the reduction in the item of \$500. We find that on September 17, 1906, opponent and decedent sold the "Daisy" plantation (which they owned in the proportions of $\frac{1}{4}$ and $\frac{3}{4}$) for \$8,200, which price was paid by the notes of Henri Julien, the vendee; one, for \$1,950, and five for \$1,250 each, all of which notes the decedent kept in his possession. In order to make the sale it was necessary to clear the property of a mortgage that was resting on it, and the money for that purpose was borrowed from the Bank of Baldwin, on a note made by the vendors, with one of the Julien notes as collateral. The loan from the bank was renewed, probably, more than once, and, in the end, amounted to \$1,250, for which amount the bank held a note made by the opponent and decedent, and secured as stated, which note has been paid by the estate of the decedent. The net amount realized from the sale of the plantation was therefore \$6,950, of which opponent was entitled to $\frac{3}{4}$, or \$1,737.50. She admits, in her opposition, that she received from the decedent, as of date January 1, 1909, one of the Julien notes for \$1,250, so that the balance due her is \$487.50. She testifies that it was understood that she was not to be liable for any part of the mortgage debt, but her testimony is improbable on its face, and is not only uncorroborated, but is in conflict with the fact that she joined with the decedent in borrowing money to pay that debt and in making a note for the money so borrowed. [2] It is said, on the other hand, that opponent and decedent were partners in the planting business, and that her only action is one for the settlement of the partnership; but it is not shown that the plantation was an asset of the partnership, and the mere fact that opponent and decedent were joint owners of a piece of real estate and were, at the same time, the partners of each other, in planting, is no bar to a suit by the one against the other with respect to the interest first mentioned. It is true that there is some indication, in the testimony, that the decedent used some of the Julien notes in obtaining money for the purposes of the partnership; but it is not shown to have been done with the knowledge or consent of the opponent, and in delivering to her one of the notes, under the circumstances stated, decedent appears to have admitted that she was entitled to her interest in them, in kind. We therefore conclude that upon this item opponent should be allowed \$487.50, with interest at 8 per cent. from September 17, 1906, until paid. Opponent testifies that she loaned the decedent the \$500 which she

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

here claims, in cash (though she kept a bank account), and that she took no receipt or other written evidence of the transaction. She says the loan was made in the summer of 1907, to assist decedent in taking up "Frank Jackson's notes." She also says that she was borrowing money from the banks, in 1907, for her planting operations, but that she loaned the \$500 from money which she had kept in her possession and had not deposited in bank. Beyond that, it appears that, late in 1908, opponent called on the attorney who is now representing the executor and asked his advice as to the course that she should pursue in regard to her interest in the Julien notes; that he told her that Alexander was very sick and she had better call on him and have the matter adjusted; that she took the advice so given and called on Alexander, who sent to the bank and had one of the Julien notes brought to his house and delivered to her. There is some conflict in the testimony as to whether anything was then said about a balance being still due to opponent, or whether Alexander said that the delivery of the note was a settlement in full; but no one pretends that, either upon the occasion of opponent's visit to the attorney or upon that of her interview with Alexander, any claim was asserted for the \$500 here demanded. On her cross-examination, the opponent was asked whether she was paid any money by Alexander in 1907, 1908, and 1909, and she answered, very positively, that she was not. She was then confronted with checks, for various amounts, drawn, in those years by Alexander to her order and by her indorsed and she admitted that she had collected the amounts called for by them, saying, as we understand her testimony, that the checks had been given in payment of money due her on account of the planting business, or to enable her to pay the laborers employed for the purposes of that business. [3] Opponent produced a small book containing a miscellaneous lot of entries, and among them a page, at the top of which appears the figures "1907-1908," and, below:

Frank Jackson to M. S. A.

Cash not (sic).....	27 00
From Leah	500 00

One of the witnesses testified that the handwriting is that of the decedent, but he seemed to be unable to recognize the other writing and figures in the same book, and it appears that the book had been turned over by the widow of the decedent to the opponent; that the widow had had some litigation, or threatened litigation, with the executor, which was compromised; that, as part of the compromise, the papers of the decedent were to have been turned over to the executor; that some papers were turned over; but that there was not a canceled check among them. Upon the whole, the book does not recommend itself. Finally, James Hope, the

brother of the opponent, was called to corroborate her testimony upon the subject of the loan of the \$500, and, like the opponent, he said the loan of the \$500 was made in 1907, for the purpose of aiding Alexander in the purchase of Frank Jackson's place, and he further said that it was made on the prairie, on the Daisy plantation, before that plantation was sold. If, however, the money was borrowed for the purposes of the Jackson business, it must have been borrowed prior to the month of August, 1906, when that business was transacted, and, if it was borrowed on the Daisy plantation, and before the sale of that property, it must have been borrowed prior to September, 1906, when that sale took place. In either case, the claim is barred by the prescription of three years, which the executor pleads, since the opposition was not filed until December 7, 1909. This prescription cannot be held to have been interrupted by the entries in the little book, because they are unsigned and, in our opinion, not sufficient for that purpose. C. C. art. 2278; Coyle v. Succession of Creevy, 34 La. Ann. 543; Well v. Jacob's Estate, 111 La. 364, 35 South. 599; Succession of Driscoll, 125 La. 287, 51 South. 200.

[4] 2. Frank Jackson appears on the account as a creditor, on a mortgage note of \$1,000, representing part of the purchase price of certain property sold by him to decedent; but, as against the amount called for by the note, the executor charges the opponent with \$900, as rent collected from tenants upon the property.

The opponent sets up the note, also a stipulation, in the act of sale, of the property whereby he and his wife are to continue to live upon said property, and, further, an alleged subsequent, verbal agreement, whereby he is to have the right to collect the rents from certain tenements, other than that occupied by him and, after paying the expense of maintaining the property, to appropriate the balance to his own use, so long as the purchaser should live. He alleges, in the alternative, that, should the court hold that he must account for the rents, the amount collected is \$728, and that he is entitled to set off, against the claim therefor, various amounts expended on the property and loaned to the owner, aggregating \$506.83.

We think it necessary to say, in order that this matter may be made comprehensible to the ordinary mind, that the opponent is a negro, about 80 years of age, with a wife who is, probably, not much younger, and that he owned several lots lying contiguous to each other, near the depot in the town of Franklin, containing a superficial area about equal, as we infer, to a block 300 feet square, and having upon them the dwelling in which he lived, and a garden attached thereto, together with five other dwellings which appear to have brought a rental of about \$5 per month each. Part of the property was subject to a mortgage, in order to clear off which the

opponent, on August 8, 1906, sold a half interest in the part mortgaged to the decedent for \$1,500; and thereafter, on August 20th, at the earnest solicitation of decedent, sold him the remaining half interest in said part, together with the whole interest in another lot, measuring 62x155 feet, for the recited consideration of \$1,220, concerning which the act reads:

"Payable as follows, to wit: \$220 payable one year from date, August 20, 1907, and which sum shall be a first mortgage and vendor's privilege on the property and be paid by preference out of the remaining portion of the purchase price, which is \$1,000, and is payable three years from date, August 20, 1909; as representing which credit portion said vendee has made and signed his several two promissory notes, made payable at the epochs aforesaid, to the order of himself and by him indorsed in blank, dated with this act, with interest at the rate of eight per cent. per annum from date, payable annually, until paid, which said promissory note * * * have (sic) been delivered to said Frank Jackson, who acknowledges the receipt thereof as well as the cash portion of this sale."

The act contains a further stipulation as follows, to wit:

"In addition to the consideration expressed in this deed and in the deed passed before H. G. Block, the vendor reserves the right to live upon the premises sold, in the house now occupied by him, and reserves the use of the yard and garden attached to said premises. This right reserved to him so long as he or his wife lives; the vendors (to) exercise no right of ownership, but merely to occupy the one house and lot."

The story that the opponent now tells is: First, that he never saw or heard of any note for \$220; next, that upon the same day that the act of sale was signed, Alexander came to his house and, to quote his testimony:

"He told me we would collect the rents and keep the entire expenses of the place, and the balance, we could use it. Q. When was that? Tell us exactly when that was. A. It was the day you passed the sale (the counsel having acted as the notary in the case). Q. Where was it you had that agreement? A. It was the day you, Mr. Borah, passed the sale. After the sale was over, I left and went down to my house, and Mose come down there, and my wife was kinder grumbling, and Mose told me everything was all right; we could collect the rent and keep the entire expense of the place and use the balance to live off."

He says that his wife and Dan Overton were present, and that there were two women in the house who had come to pay their rent and who went away; that he does not remember whether Jim Hope was there; that Alexander told him the same thing on several other occasions. He further says that his understanding was that he was to have the rents so long as he and his wife (and not so long as Alexander) lived.

The testimony so given is corroborated by that of Overton, who says:

"Mose said to the old man, Frank: 'Uncle, you just go on and collect these rents and keep the property and you live off the money, just so you keep the property up; you and your wife live off it and keep up the property

and the taxes.' Q. Do you remember when that conversation was had? A. Yes, sir; we went back to old man Frank Jackson's house, after the sale was over. Q. And you are certain that Mose told him that? A. Yes, sir."

Leah Hope testifies that she heard Alexander say the same thing, more than once, to Frank Jackson, and the testimony of Lizzie Nelson, Amelia Doucet, and James Hope is much to the same effect. It must be confessed that the proposition or understanding relied on by the opponent, following, as it is said to have done, immediately upon the execution of the written instrument evidencing the sale of the property affected, bears upon its face an air of improbability; but it is to be borne in mind that the actors belong to a class who are not unlikely to deal with their affairs in unexpected ways, and the improbability disappears when we find that what we should be disposed to assume they would not do, they have actually done. Thus, there appears to be no doubt that, from the day of the sale up to that of his death, nearly three years later, Alexander allowed Jackson to collect the rents from the premises in question and dispose of them as he pleased, and it is beyond dispute that Jackson paid the taxes for the years 1906, 1907, and 1908, and also premiums of insurance for the years from 1907 to 1910, upon a policy covering not only the house that he lives in, but the other five tenements. We are inclined to think, too, that he expended some money in repairs, after the sale of the property; but as there is some uncertainty in the testimony as to the date of the repairs, we shall not enter into that question. On the other hand, it is not pretended that Alexander paid any taxes on the property, or kept it insured, and it is neither shown nor suggested that he paid the note of \$220, or that he ever paid any one of the annual installments of interest on the note of \$1,000. He seems to have been satisfied to have the title vested in him, and, paying no part of the price, to allow opponent the use of the property on condition of his paying the taxes and the cost of insurance and maintenance. The revenue from the property, however, far exceeded the required outlay, including compensation for opponent's services, upon any ordinary basis: and, as we find nothing in the record, save the fact that he acted upon decedent's offer, which would authorize a court to hold that opponent could be condemned for such outlay in the event of its exceeding the revenue, or, in fact, in any event, our conclusion is that the offer was intended as in the nature of a donation or benefaction, and not as the basis of a contract whereby opponent should, under any and all circumstances, be bound, to his loss or prejudice; that the arrangement resulting from such offer was therefore binding on the parties so long as they acquiesced in it, but was terminable at the option of either; and that it was terminat-

ed, when, after the death of Alexander, his legal representative notified opponent, or caused him to be notified, that he should collect no more rents. We are, accordingly, of opinion that opponent should recover on the note of \$1,000, held by him, as prayed for, and without deduction or set-off.

[5] 3. Mr. W. J. Formento is placed on the account as a creditor in the sum of \$25, for having, as notary, inventoried a single piece of real estate in New Orleans. He filed an opposition, claiming a larger amount, and was allowed \$40. The question is governed by the law as heretofore interpreted by this court, according to which the charge of a round sum in such case, including other services, is inadmissible. Succession of Morgan (Whitney), 124 La. 755, 50 South. 703, and authorities there cited. On the basis fixed by the statute (Act No. 101 of 1870, p. 161) the amount allowed by the executor is as much as can be demanded.

It is therefore ordered, adjudged, and decreed that, as to the opposition of Leah Hope, the judgment appealed from be amended by reducing the aggregate amount allowed from \$808.85 to \$487.50, upon which last-mentioned amount opponent is allowed interest at the rate of 8 per cent. per annum from September 17, 1906, until paid; that, as to the opposition of Frank Jackson, said judgment be amended by allowing the opponent \$1,000, with interest at the rate of 8 per cent. per annum, from August 20, 1906, until paid, and 10 per cent. as attorney's fees, upon the aggregate of the principal and interest of the note sued on; that, as to the opposition of W. J. Formento, said judgment be amended by reducing the amount thereby allowed to \$25. It is further adjudged and decreed that the costs, in the district court of the oppositions of Leah Hope and Frank Jackson, be paid by the succession; that those of the opposition of W. J. Formento by the opponent; and that the costs of this appeal be paid by the succession, Leah Hope and W. J. Formento, in the proportions of three-sevenths each, by the succession and Leah Hope, and one-seventh by W. J. Formento. It is further decreed that in all other respects said judgment be affirmed.

(130 La.)

No. 18,970.

CENTRAL GLASS CO., Limited, v. GERMAN AMERICAN INS. CO.

In re GERMAN AMERICAN INS. CO.
(Supreme Court of Louisiana. Jan. 29, 1912.)

(Syllabus by the Court.)

1. INSURANCE (§ 655*)—ACTIONS ON POLICY—ADMISSIBILITY OF EVIDENCE.

Where misrepresentation and false swearing are set up as a defense to an action on a policy of fire insurance, the vital question being

whether the percentage of profit, as shown in the proof of loss, is correct or inflated, and where, from the character of the business and the nonexistence and loss of records, the report of experts, upon which the court is to predicate its judgment, is based largely upon the estimates of the plaintiff, which defendant attacks, defendant should be allowed to show from plaintiff's books the profits earned during the few years immediately preceding the fire in order to establish a basis for comparison with the profits claimed to have been earned since the taking of the last inventory.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1677-1685; Dec. Dig. § 655.*]

2. ACCOUNT (§ 20*)—STATING BY EXPERT-REPORT.

Where a report of expert accountants is to constitute the basis of a judgment, and, in the preparation of such report, one of the litigants is represented by an expert whom he names, the other litigant ought to be similarly represented.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 109-131; Dec. Dig. § 20.*]

Action by the Central Glass Company, Limited, against the German American Insurance Company. Application by defendant for certiorari or writ of review to review the judgment of the Court of Appeal, Parish of Orleans, affirming the judgment of the district court for plaintiff. Reversed and remanded.

Caffery, Quintero, Gidlere & Brumby, for applicant. Lazarus, Michel & Lazarus, for respondent.

Statement of the Case.

MONROE, J. On the basis of a total insurance of \$32,200 on a stock of merchandise, and an alleged loss in excess thereof, plaintiff recovered judgment against defendant for \$1,000 on its policy for that amount, with interest and damages as provided by Act No. 168 of 1906. Defendant originally denied liability on the grounds that plaintiff had failed to comply with "the iron-safe clause," had been guilty of misrepresentation and false swearing, had intentionally burned, or caused to be burned, the property insured, and that the act of 1906, if applied to the contract sued on, would be unconstitutional. Thereafter, by supplemental answer, defendant abandoned the charge of arson (for the reason that a criminal prosecution, based on that charge, had resulted in the acquittal of the accused), and confined itself to the other defenses mentioned.

The policy in question covered the period between November 25, 1907, and November 25, 1908. The fire occurred August 30, 1908. This suit was instituted December 30, 1908. The supplemental answer was filed April 22, 1909, and in May following Mr. Samuel Marcuse was examined by consent as a witness for plaintiff, for the reason, as stated, that he was about leaving the city, the sole purpose apparently being to show by him that during the period from April 1, 1905, to January 1, 1908, plaintiff had made certain profits in its business, from which, it might be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

deduced that, deducting such profits, or even larger profits, from the cost of the goods which went out after the date last mentioned, there is nothing improbable in plaintiff's claim as to the quantity or value of the goods that were on hand at the time of, and were destroyed by, the fire. Thus, according to plaintiff's proof of loss, the value of the goods destroyed by the fire was \$38,238.18, which value was arrived at, substantially, as follows:

Stock on hand, as per inventory, Jany. 1, 1908.....	\$22,017 20	
Purchases between Jany. 1, 1908, and Aug. 29, 1908.....	19,851 59	
Expended for labor.....	16,386 45	
" fuel	620 49	
" freight and drayage..	2,577 18	
Mdse. on storage and for repair....	615 61	
	\$62,008 52	
Sales from Jany. 1, 1908, to Aug. 29, 1908.....	\$38,655 50	
Less profit 33½%.....	12,885 06	25,770 34
Net loss.....	\$36,238 18	

Assuming that the figures showing the value of the stock on hand, as, also, those representing the purchases, expenditures and sales, are correctly stated, it would, of course, follow that, if there was no profit on the sales, the value of the stock burned would be found by deducting the entire \$38,655.50 (representing the value of the goods sold) from the \$62,008.52 (representing the amount received), and would be \$23,353.02. Or if, instead of making a profit of 33½ per cent., as appears from its sworn statement, plaintiff made a loss on its sales from January 1 to August 30, 1908, as defendant asserts, of 20.44 per cent., then we should have to add \$7,935.05 to the \$38,655.50, and, deducting the total of \$46,591.15 from the \$62,008.52, we should have \$15,417.37 as the value of the goods on hand and burned. The question of the profit or loss made by plaintiff during the eight months preceding the fire is therefore of vital consequence in determining whether in making its proof of loss plaintiff swore truly or falsely in valuing the goods burned. And it was as bearing upon that question that the testimony of Mr. Marcuse was taken.

Mr. Marcuse testified that the plaintiff company was organized in April, 1905, with a capital of \$5,000; that he was its president and bookkeeper, and so continued until about the end of the year 1907, and that the books were correctly kept; that between April 1, 1905, and January 1, 1906, the company made a profit of \$8,000, which was added to the capital; that he had recently examined the books, and from them had prepared a statement in order to facilitate him in testifying, and he thereupon proceeded to testify with the aid of the statement so prepared. Upon his examination in chief he stated that, during the years 1905 (from April 1st), 1906, and 1907, respectively, the profits of the company were 29½ per cent., 22½ per cent., and 42½ per cent. On his cross-examination he said

that he owned one-third of the stock of the company; that he sold his stock to his partners in the firm of B. J. Wolf & Son (who, with him and Mr. J. J. Lips, appear to have organized and constituted the company) at the close of the year 1907, because he was interested in, and was treasurer of, a company doing business in Panama; that the sale included his interest in the firm, and was made for a lump sum, and he "supposes" that he may "probably" have received \$125 or \$130 per share for said stock. He further gives figures and makes explanations from which counsel for defendant conclude that the profits of the company could not during the period mentioned much have exceeded 17 per cent. About a month after the testimony of Mr. Marcuse had been thus taken, the case was called for trial, and counsel for plaintiff placed on the stand as their first witness Mr. St. Paul, an expert accountant (who had been employed by the district attorney in connection with the criminal prosecution to which we have referred, and who was then in the employ of the insurance companies), and elicited from him testimony to the effect that he had been furnished with plaintiff's books up to the time of the fire, and, so far as he could discover, they were correctly kept, but that he had been denied access to the books containing entries made after the fire; that he was informed that the "work tickets" issued from January 1, 1908, to the date of the fire had been destroyed; that those tickets represented material and labor used upon outside jobs, etc. On his cross-examination he testified that there was no record kept by which it could be ascertained how much stock plaintiff had on hand at the time of the fire, or any book which showed the amount of labor and material which had been invested in contracts prior to the fire; that he asked for such a book, and they "said they had no record of it, and said there was no material outstanding in jobs outside of the building." He was further interrogated, and testified as follows:

"Q. Mr. St. Paul, was it possible, from the records which were submitted to you by the Central Glass Company, to ascertain exactly the amount of profit which that company made after the taking of the last inventory and before the happening of the fire—I mean during that period? A. Well, it was impossible to ascertain that for the mere reason that there was no inventory taken at the time of the fire of the net cost of the goods sold. Q. Therefore I understand you to say that the profit, if any was made, between the time of the taking of the last inventory and the happening of the fire, it was impossible for you, as an expert accountant, to ascertain from any books or records which they had? A. Yes, sir; it was impossible. * * * Q. Now, Mr. St. Paul, have you made a statement of the profits earned by the Central Glass Company during the years they were in business? A. Yes, sir. Q. Will you state, Mr. St. Paul, how many years the Central Glass Company appeared to have been in business from their books? A. They went into business about the 1st of April, 1905, and I took up from that period of time to August 30, 1908, making, practically, four years almost.

Q. Now, can you tell me, Mr. St. Paul, what the average profits were which were made by the Central Glass Company as shown by their books during the years 1906 and 1907?"

Counsel for plaintiff objected to the question as irrelevant and impertinent, and the court sustained the objection; and, after the examination of one other witness called by defendant, the case was continued over the summer vacation, and came up again in October (1909), when, after plaintiff had introduced the testimony of several witnesses to show that certain goods had been omitted from the inventory of January 1, 1908, and relating to some other topics, Mr. Jarreau, its bookkeeper who had succeeded Mr. Marcuse, was asked, on cross-examination:

"Now, will you turn to the books of the Central Glass Company for the year 1908, and tell us what the inventory was in the beginning of the year 1908?"

Whereupon counsel for plaintiff objected that the question was immaterial and irrelevant, and the objection was sustained; the court holding that the inquiry should be confined to the period between January 1, and August 30, 1908, and the ruling so made was thereafter adhered to throughout the trial. Plaintiff at that time called to the stand J. J. Lips, who had been its manager from the beginning, and one of its stockholders, and he testified that he had charge of all the glass department, and did practically all the buying, selling, and estimating for the concern, but had nothing to do with the management of its finances. In fact, he appears to have been the only member of the company who pretended to have had any knowledge or experience of the particular business in which the company was engaged. He was examined at considerable length with a view of establishing plaintiff's claim, and was cross-examined, at still greater length, for the purpose of showing that by reason of the fact that important records such as pay rolls, estimate books, glaziers' tickets, etc., had been destroyed by the fire, and for other reasons it was impossible to ascertain the profit realized upon the business done during the eight months preceding the fire without ascertaining, as a basis of comparison, the profit, if any, which had been realized during the two or three preceding years. The merchandise which had gone out of plaintiff's establishment between the date of the last inventory preceding the fire and the date of the fire had been used in the execution of some 2,200 contracts or jobs (large and small), with respect to which there was little or no specific data, save a single line, in a book kept for that purpose, showing the number of the contract, the name of the party for whom the work was done, and the amount of money called for, and defendant was and is resisting plaintiff's demand upon the ground, among others, that less of profit was earned and more of actual material used than is represented, and hence that there was less of material left behind to burn. The wit-

ness testified that he furnished the figures which appear in plaintiff's proof of loss, and, in effect, that he arrived at them by calculating the percentages of material, labor, freight, and drayage in each of the different contracts to which we have referred. Examined by plaintiff's counsel, he testifies, at one time, as follows:

"Q. I understand you to say that you furnished the Central Glass Company—that is, their officers and their counsel—with a statement that the profits of the Central Glass Company were between 40 and 50 per cent. That was before the definite amount was ascertained? A. I made that statement after I had calculated things, and they asked me and I told them it is between 40 and 45 per cent. Q. That was based upon calculations—not guesswork—was it? A. That was based upon what I had knowledge for the last year or two in my capacity with the Central Glass Company. Q. And you figured out that percentage? A. That is what I figured. Q. Now, then, after the answers were filed in this case, you were directed to ascertain specifically the profits, were you not? A. Yes, sir. Q. And you examined each transaction carefully, and figured the profit upon each transaction? A. The glass, freight, drayage, and labor. Q. You figured the profits upon each transaction—figuring the glass, labor, freight, and drayage? A. Yes, sir."

Elsewhere, under cross-examination, he testifies as follows:

"A. There is nobody can figure a contract twice the same amount. Q. And few people figure an estimate alike, do they? A. No, sir. Q. And labor is a very difficult thing to figure? A. Yes, sir. * * * A. Yes, sir; you can make 10 estimates of the same thing, and I will defy you that you will make two of them alike."

The last testimony above quoted was given in connection with some, not very successful, efforts on the part of the witness to apportion the amounts called for by a few of the contracts to which we have referred into their different percentages of material, labor, and profit, and make the sums coincide with such amounts. The witness testified that from his experience in the business he estimated the percentage of the cost of labor to material in contracts for putting glass in buildings at from 10 to 15 per cent., but, when asked the percentage of the cost of beveling glass, he replied: "You couldn't figure it."

The cross-examination was apparently abbreviated to some extent by the intimation of the learned trial judge that it would be necessary to appoint experts who would furnish the information which counsel were endeavoring to obtain, and, though defendant's counsel did not approve of that course for the reason, as stated, that in their opinion the experts could accomplish nothing, if, under the ruling of the court, the books were not to be examined with regard to the business done prior to January 1, 1908, they subsequently concurred, in so far as to name one of the experts, the plaintiff naming the other, and the court naming an umpire, and instructing the parties so named that they

were to ascertain from plaintiff's books and records "the profits earned by plaintiff in the conduct of its business from January 1st to August 30, 1908," and were to confine themselves to the books and records showing the business of that period. Counsel for defendant some time afterwards obtained from the court an order reading as follows:

"The Central Glass Company, Limited, plaintiff in the above-entitled cause, is hereby directed and ordered to furnish to the experts appointed in this matter a detailed statement showing the cost of material, the cost of labor and fuel, and the cost of freight and drayage, as calculated by the witness Lips, on such contracts as the experts and umpire call for, and sales appearing in the book offered in evidence in this case and marked: 'J. J. Lips, A. A.'"

At about the same time the expert who had been named by defendant (Mr. St. Paul) addressed a letter to plaintiff, saying that he was ready to begin work, but that Mr. Fortier (representing the American Audit Company, the expert named by plaintiff) seemed to be under the impression that he was to make his report to the umpire, without consulting with his coexpert.

"This [the letter goes on to say] is not my understanding of our functions as experts, and it is my belief and desire in this matter to confer and consult with Mr. Fortier on all matters before reference is made to the umpire."

Several months later defendant appeared in court by rule alleging that a certain statement had been prepared by Mr. Lips, but that Mr. Fortier, representing plaintiff, refused to allow Mr. St. Paul, representing defendant, to examine it, and praying that plaintiff be ordered to show cause why Fortier should not be dismissed for improper conduct. When the rule was called for hearing, the trial judge declined to hear any testimony, dismissed the rule, revoked the order that he had made appointing the experts and the umpire, and at once reappointed Fortier and Mr. Elkin Moses (who had been the umpire) as experts. The judge was evidently impatient because of the slow progress which the experts appeared to be making with their work. Upon the other hand, the experts, having insufficient data, were unable to progress more rapidly. Lips, who had testified that plaintiff's proof of loss was predicated upon figures furnished by him and which were the results of his calculating the cost of material, freight, drayage, fuel and profit, in and upon each of the 2,200 contracts representing defendant's business between January 1 and August 30, 1908, and who had been ordered (through defendant) to furnish the experts with a detailed statement of those calculations, had never done so and never did so at any time, but he had furnished a statement containing some information, which went into the hands of Fortier and was used by him and Moses, but was denied to St. Paul, when he called for it; hence, the complaint set forth in the rule. The reasons

assigned by the judge for dismissing the rule, and also dismissing St. Paul, are, in part, as follows:

"As the court understands it, it is now proposed for this court to try the disagreements between the expert selected by the defendant and the expert selected by the plaintiff and their disagreements with the umpire. The court declines to hear any evidence on that question. This court is here to try the case of the Central Glass Company, Limited, against the German American Fire Insurance Company. During the progress of that case it became necessary to appoint experts to examine the books of the Central Glass Company. There were two modes of making those appointments: One was the court could of its own motion have appointed its own experts, but, on the suggestion of counsel, the court adopted another way. The court permitted the Central Glass Company to name its expert, and they named the American Audit Company, which is a corporation. Neither the plaintiff nor the court understood or knew what individual would be selected by the American Audit Company as an expert in this case. The defendant, the German American Insurance Company, much to the surprise of the court, selected as their expert a witness in this case, Mr. George St. Paul. Mr. St. Paul was a witness in this case, and from his testimony the court derived the impression, and believes, that he was employed by the defendant corporation to examine their books and was their expert before this suit was instituted. Human nature is human nature, and it was not to be expected by what he would probably endeavor to serve those that employed him or try to sustain the testimony that he gave upon the witness stand. Now the public time is too precious, and this court is not called upon, to try these disputes between experts. They were appointed October 27, 1900. They repeatedly applied for extensions of time to examine these books. Time has passed on, and no report has been made, and now, on March the 2d, it is expected for me to try the issue as to who is right between these experts and the umpire. The court positively declines to hear any evidence or to try any such question. The court will now revoke the order which, was granted appointing these two gentlemen and Mr. Elkin Moses as the umpire, and now enters an order of its own motion that, having the utmost confidence in the American Audit Company and Mr. Moses, it appoints them, as the court's experts, to take these books, to go through them, and make a report to this court as to what those books show. The court would appoint some person other than the audit company if it were not for the fact, after hearing the correspondence read on the returns here, that the court has confidence in the audit company, and does not desire to injure a company of that kind by revoking the order appointing it."

A few weeks afterwards the two experts so appointed made their reports, which, though made separately, are in effect the same, and plaintiff ruled defendant to show cause why the report should not be homologated, to which defendant answered that the dismissal of the rule taken by it, the revocation of the original order appointing the experts and the umpire, and the reappointment of Fortier and Moses were unauthorized and illegal, as defendant was denied the right to sustain its complaint by evidence; that during the trial defendant had been denied the right to cross-examine Lips upon the method adopted by him in arriving at the

figures prepared by him, and that the conclusions reached by the experts as to the percentage of profits earned by plaintiff were based entirely upon the figures furnished by said Lips, the correctness of which the experts had not examined. And there are some other minor matters set up which do not require attention.

On the trial of the rule, Mr. Moses gave the following with other testimony, to wit:

"Q. Has it not been universally the custom with you, as an expert accountant, in arriving at the amount of loss and in determining the ratio of profits on sales, to consult the books of previous years, and find out your percentage in that way? (Objected to as immaterial and irrelevant, and objection overruled.) A. As a general rule, I take the percentage of profits for one or two or three years prior. Q. From the books? A. Yes, sir. But I wish to set myself right in this case, and state my reason for not doing it in this case was in accordance with the instructions which were given in the ruling of the trial judge, whose authority is way ahead of my authority, and, for that reason, I had no reason to go to the previous years prior to 1908. By the Court: I think I so instructed him. By Mr. Gidiere: Q. In this case your work was done under the ruling of his honor, Judge King, but my question was directed to work on previous losses, and I wanted to find out from you whether it had not always been your custom as an accountant, in calculating these losses, to apply the profits to the sales derived from transactions shown in the books during previous years? A. To which, Mr. Gidiere, I answer yes. Q. And this, Mr. Moses, is the first case, is it not, in your experience as an accountant, in which you have attempted to do otherwise? A. Don't put that word 'attempted,' Mr. Gidiere. I don't think it would be right to put that word 'attempted.' Understand it is a question of authority or instructions from a higher source than I am that simply has made me take the instructions of the court, but I don't want to go down as 'attempted,' because that would be a reflection on me, and I don't want it. Q. Is not this the first time you were ever directed to ascertain profits in this way? A. Yes, sir. Q. And at all other times you took them from the books? A. Correct."

Mr. Moses also testified that the report of the audit company served as the basis of his report, but that he had gone over the calculations of the audit company, and checked them up, and had in many instances, and so far as he could, verified them by going to the original sources of information. Both he and Mr. Fortier (by whom the report of the audit company was prepared) admit that the principal source of information was Mr. Lips; so that to all intents and purposes the report of the experts upon the vital question at issue in the case is based upon the figures furnished by Mr. Lips. This may be illustrated by the following excerpts from the testimony: First, of Mr. Moses, to wit:

"Q. How did you know anything about the salvage glass in the factory? A. The same way as before—took the figures given by Mr. Lips. * * * A. The only way that those items can be obtained is from those experts of the company in position to furnish you with the items. Q. By 'experts of the company' you mean Mr. Lips? A. Yes, sir. Q. And the officers? A. Only from Mr. Lips, because he

was about the only one in position to furnish you with all that information. Q. So this Exhibit 15 [forming part of the report of the audit company] is really made up from information derived from Mr. Lips? A. The only information we could obtain, unless we would go on the outside and ascertain from other experts, on the outside, what would be the approximate cost of labor of that kind. * * * Q. Now, will you turn, Mr. Moses, to * * * Exhibit 18, which is headed 'Merchandise on outside contracts'? Where did you get the information in regard to the merchandise that was outstanding? A. Through Mr. Lips."

Mr. Fortier testifies to much the same effect, thus (by way of illustration):

"Q. Now, in making up this report, Mr. Fortier, you have had to place absolute confidence in the estimates furnished you by Mr. Lips, hadn't you? A. Yes, sir. Q. If Mr. Lips' estimates are wrong, of course, your report is wrong? A. The report is wrong, too—that is, to the extent that it refers to the estimates only."

Mr. St. Paul testifies, in part, as follows:

"Q. Do I understand you to say, Mr. St. Paul, that you disagreed absolutely with the approval of the experts in adopting the prime cost of glass obtained from Mr. Lips, as a basis for making up their report? A. Yes, sir. * * * Q. Now, I want to ask you from your examination of the books in this case is it possible to ascertain, with any certainty, as an accountant, what profits were earned by the Central Glass Company from the time of the taking of the last inventory up to the time of the fire? A. It was not. It is not. * * * Q. Now, I want to ask you as an expert accountant whether it is possible for you to ascertain with any accuracy what the prime cost of glass is which should enter into the various contracts of the Central Glass Company, after the last inventory, up to the time of the fire? A. No, sir. * * * Q. It is impossible to ascertain how much labor went into each contract? A. Yes, sir. Q. It can't be done? A. No; there is no system by which it could be done."

The defendant called as a witness Mr. Joseph Weckerling, who testified that he had for over 14 years been in a business in New Orleans, which appears to be the same as that in which plaintiff was engaged; that the competition in that business in the year 1908 was very keen, more so, perhaps, than in previous years; and that the profits were smaller. He was then asked:

"Q. Now, Mr. Weckerling, is it possible in your business to start with the last inventory which you took, say, the 1st of January, 1908, and take every sale and contract which you had and calculate the cost of glass and the cost of labor on these various contracts—taking the cost of material in each contract and estimating the amount of labor which ought to be allowed in each contract, and freight and drayage, to arrive, with any precision, at the general profits in your business?"

The question was objected to as irrelevant and immaterial, and the objection was sustained, on the ground that:

"To permit the question to be answered by the witness would be to allow him to give his opinion as to the manner in which the business of the plaintiff has been conducted, based upon and compared with his own business. * * *"

The witness was then asked:

"Q. Now, Mr. Weckerling, in asking you that previous question, I said, 'could you, in your business.' By the words 'your business' I mean in the general glass business; could that calculation have been arrived at?"

The question was objected to and the objection was sustained. Counsel for defendant then said:

"Your honor will permit me, as I understand, to ask him, irrespective of his particular business, whether they could be calculated in the general glass business? By the Court: That is exactly what my ruling is, that you cannot do it, that it is a comparison of the general glass business with this business, and I say that you cannot decide this case on the business of one concern compared with another. By Mr. Gldiere: Counsel's object in putting this witness on the stand was, as an expert, to testify whether such calculations could be made in the glass business. The same ruling would apply to that? By the Court: Yes; that is my view of it."

Counsel for defendant then exhibited to the witness the document marked "Lips 3," purporting to show, without detail, the gross amounts expended and received upon the various contracts which have been heretofore referred to, and he was asked whether such profits as those shown could have been made, in the glass business in 1908, and his reply was:

"I don't think they could. * * * That is my opinion. * * * I am telling you now what is usual in the glass business. You can't make that much profit. Q. You are telling me you can't make that much profit. You had no such organization as the Central Glass Company, had you? A. I don't know. We were in the same business, I think."

It may be here stated that, plaintiff having declined or failed to offer in evidence the testimony of Marcuse, it was offered by defendant, but was admitted subject to the ruling that the court would not go into the question of profits earned by plaintiff prior to January 1, 1908.

Opinion.

The judge a quo considered, as do we, that the decision of the case depends upon the determination of the question whether the profit with which defendant is credited in its proof of loss is correct or inflated, and in his written opinion he enters upon the discussion of that question as follows:

"The character of business conducted by the Central Glass Company was such that the profits on each transaction could be definitely ascertained. Thus, by taking the cost of the raw material and adding the freight, drayage, labor, etc., representing the actual outlay as against the sale or contract price; the difference being the gross profit earned. The books recorded some 2,200 transactions between the 1st of January, 1908, and the 30th of August, 1908. Each of these transactions was analyzed by Mr. Lips, and are embodied in the document submitted to the court as 'Lips A. A.' It shows that the gross profits were largely in excess of the profits claimed by the plaintiff to have been earned."

[1] The defendant was ordered to prepare and furnish a statement containing an analysis such as that to which the learned judge refers, but it never complied with the order. What it did was to furnish a statement in which, a single line being devoted to each of the contracts in question, there is entered in one column a lump sum representing the amount expended (including the cost of material), and in another column a lump sum representing the amount received, and the respective columns being added, the expense column amounts to \$19,359.13, and the receipt column to \$38,527.07, from which plaintiff deduces a profit of \$15,940.47. Mr. Lips was cross-examined upon the figures thus given, and said that the \$19,359.13 was made up of material, labor, freight, and drayage, but that he could not say how much of it was for labor or how much for freight; that he allowed—meaning that he estimated—the labor at "between 12 and 15 per cent." on each item and the freight at 12 per cent. on window glass, and 15 per cent. on plate glass; his estimates being predicated upon his experience. Elsewhere, he says, as we have seen, that, in making 10 estimates upon a contract such as these in question he would not be likely to reach the same result twice, and that admission was made, because, in several attempts, while on the stand, he was unable to arrive at the figures contained in his statement. Mr. St. Paul testified that, with the data at their command, and for reasons which he gives at length, it was impossible for the experts definitely to ascertain the profits on each transaction. Mr. Weckerling, who has had an experience of over 14 years in the same business, was asked whether it could be done, and his answer was excluded; but he was allowed to testify, and did testify, that no such profit as that which plaintiff claims could have been made in 1908. On the other hand, Mr. Fortier expresses the opinion that the thing could be done, and says, in effect, that it has been done by him, in his report, and Mr. Moses seems to acquiesce in that view. The experts by their report, however, to a very large extent, adopt the estimates of Mr. Lips, and the judgment here made the subject of review adopts the report of the experts, so that, in effect, defendant is condemned by the very estimates made by plaintiff, with respect to which it charges plaintiff with fraud, misrepresentation, and false swearing. It will be remembered that Mr. Moses in stating where he obtained certain of the information upon which he relied in adopting the report of the audit company as the basis of his own report gives such testimony as this:

"Only from Mr. Lips, because he was about the only one in position to furnish you with all that information."

[2] It is true that in some respects he found data whereby he was able to test the

accuracy of the information furnished by Mr. Lips, but in other respects—respects which, as it appears to us, were vital to the result—there was no such data in existence. It is not surprising, therefore, that defendant should have found the method prescribed for the investigation of its charge of fraud and false swearing unsatisfactory, nor does it appear to us unreasonable that it should have asked that the doors be opened, in order that the verity or falsity of plaintiff's affidavit to its proof of loss should be subjected to some test, in addition to that furnished by its reiteration of that affidavit as a witness in its own behalf. The course pursued was, and is, open to the further objection that the report, which constitutes the basis of the judgment in question, was prepared by two persons, one of whom (and the one whose report was adopted by the other) was named by plaintiff as its representative, whilst the defendant was wholly unrepresented. We confess that we are unable to follow the reasoning by which the judge a quo reached that result. It being a fact that Mr. St. Paul was denied the use of a written instrument which was intended for his use, as well as the use of the other expert, it appears to us that defendant's counsel pursued the proper course in complaining to the court, and that he should have been heard upon his complaint. If, after hearing, the court had found reason to be dissatisfied with the experts, or either of them, it might properly have discharged them, or either of them. But we find nothing in the record which authorized it to discriminate, as it did, against defendant and defendant's expert. All that was then known as to the relations between the expert and the defendant had been known

when the former was named and appointed, and, though it is true that he had testified as a witness for defendant, it is also true that he was first called, and testified, as a witness for plaintiff. On the other hand, defendant's expert, who was reappointed, had at that time been working as defendant's expert for some four months, and we can see no reason why, when the question of discharging the one or the other or both was to be decided, the feelings of the corporation should have been considered and those of the individual ignored. The point that is material to this case, however, is that the action taken left the work of preparing the report, upon which the court expected to predicate, and has predicated, its judgment, to be done by a body in which plaintiff was represented and defendant was not represented, a result which is wholly inadmissible. Upon the whole, we are of opinion that defendant should have been permitted to show from the records of plaintiff's business the profits or losses made by it during the period from April 1, 1905, to the date of the fire. We are also of opinion that testimony as to profits earned by another concern engaged in the same business as plaintiff would be competent evidence for the purposes of the case.

It is therefore ordered, adjudged, and decreed that the judgment which is here made the subject of review, as also the judgment of the district court, be annulled, avoided, and reversed, and that this case be now remanded to the district court, to be there proceeded with according to law and to the views expressed in the foregoing opinion; the costs of the appeal and of this application to be paid by plaintiff, and those of the district court to await the final judgment in the case.

WINSTON v. STATE. (No. 15,662.)
(Supreme Court of Mississippi. Feb. 26, 1912.)
INDICTMENT AND INFORMATION (§ 160*)—
AMENDMENT AFTER PROOF.

Under Code 1906, § 1508, which permits amendments to conform to the proof to be made in the name of any county, city, town, village, division, or any other place mentioned in an indictment, an amendment to an indictment for assault and battery by the insertion of the words "and district" in the venue laid, to make it "in the county and district aforesaid," was properly permitted.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 515; Dec. Dig. § 160.*]

Appeal from Circuit Court, Jones County; Paul B. Johnson, Judge.

Ollie Winston was convicted of assault and battery, and appeals. Affirmed.

R. E. Halsell, for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

SMITH, J. Appellant was indicted and convicted in the Second district of Jones county for assault and battery with intent, etc. In the body of the indictment the venue was laid "in the county aforesaid." On motion of the district attorney, and in order that the indictment might conform to the proof, the court permitted the indictment to be amended by the insertion of the words "and district" between the words "county" and "aforesaid," making the indictment read "in the county and district aforesaid." This amendment was authorized under section 1508 of the Code, which permits amendments to conform to the proof to be made in the name of any county, city, town, village, *division*, or any other place mentioned in such indictment.

The court committed no error in reference to the other matters complained of.

Affirmed.

HOOKS v. MILLS et al. (No. 15,362.)
(Supreme Court of Mississippi. Feb. 12, 1912.)

1. MASTER AND SERVANT (§§ 285, 286*)—INJURIES TO SERVANT—QUESTIONS FOR JURY.

In an action for the death of a servant while employed as an engineer, the questions as to whether the derailment of the train was caused by a defective track, and, if so, whether the defect was from the master's negligence, were for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 285, 286.*]

2. MASTER AND SERVANT (§ 284*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Evidence in an action for the death of an engineer from derailment of the train held sufficient to go to the jury on the question as to whether deceased at the time of the accident was in control of the repairing of the track.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 284.*]

3. MASTER AND SERVANT (§ 103*)—INJURY TO SERVANT—DELEGATION OF DUTY.

Where an engineer on a dummy railroad was at his own request given entire supervision of the track and roadbed, and the direction and the inspection of the work of the trackmen, the company was not liable for his death from a defective condition of the track, even though he was not an expert as to its safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

4. MASTER AND SERVANT (§ 291*)—INJURY TO SERVANT—INSTRUCTIONS—EVIDENCE.

An instruction, in an action for the death of an engineer employed on a dummy line, that the fact that the deceased had a right to direct the trackmen where to work would not imply that he had an opportunity to judge of the sufficiency of the work after it was done, held not supported by any evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1136-1147; Dec. Dig. § 291.*]

5. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Such instruction is improper, as a charge on the weight of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-441; Dec. Dig. § 194.*]

6. TRIAL (§ 244*)—INSTRUCTIONS—UNDUE PROMINENCE TO PARTICULAR MATTERS.

In an action for the death of an engineer on a dummy railroad, an instruction that, in determining whether or not the deceased had assumed charge of the repairs and maintenance of the track, the jury is to weigh the testimony in the light of the deceased's duties as engineer, is improper, as giving undue prominence to the fact that the deceased's duty as engineer would probably be inconsistent with the duty of attending to the repairing of the track.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

7. TRIAL (§ 252*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

An instruction, in an action for the death of a servant, that no proposition or suggestion on the part of the master, made to the decedent, as to assuming charge of or responsibility for the repair of the roadbed and track, could put that duty on the deceased, unless he did in fact undertake it, is improper, where the evidence shows that the suggestion was made by the deceased to the master.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

8. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

A person operating a railroad does not owe its servants an absolute duty to at all times have and maintain a safe roadbed, but must simply exercise reasonable care to furnish a reasonably safe place in which to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 174; Dec. Dig. §§ 101, 102.*]

Appeal from Circuit Court, Newton County; C. L. Dobbs, Judge.

Action by Mrs. E. E. Mills and others against W. B. Hooks. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

This is an appeal from a judgment for appellees, who were plaintiffs in the court below, for \$5,000 for the death of E. E. Mills;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the suit being predicated upon the alleged negligence of the appellant, due to the unsafe condition of a dummy line owned by him and used for bringing logs to his mill. The deceased was engineer on the only engine operated on the dummy line. At his own request he had been given supervision of the roadbed and track. In hauling a train load of logs to the mill, the engine left the track on a downgrade and was upset by the weight of the cars behind it, resulting in the death of Mills. The declaration contains the following allegation: "That the said rails of the said railroad track, at the point where said engine left the said track, were not properly jointed, and the said rails were not bolted on the west side of said track, and secured by a fishplate, and said railroad bed at said point was not provided with a sufficient number of cross-ties with the proper strength, and the ground or earth was not sufficiently tamped around the cross-ties, so as to fasten them securely, and the rails on said railroad bed at said point were not properly in line, and said rails were improperly laid with low centers and high joints at said point."

On appeal, appellant assigns as error the refusal by the court to grant him a peremptory instruction, and the granting of instructions Nos. 3, 6, 9, and 10 for the appellees. These instructions are as follows: No. 3: "The fact that the deceased, Mills had the right to direct the trackmen where to work, would not necessarily imply that he was an expert as to the safety of the railroad track, or that he had any opportunity to judge of the sufficiency of the work after it was done." No. 6: "The court charges the jury, for the plaintiff, that in determining whether or not the deceased, Mr. Mills, had assumed charge of the repairs and maintenance of the railroad track, the jury is to look at all of the testimony, and weigh the same in the light of their everyday experience and common sense, and also in the light of what the evidence in this case shows the duties of his position as engineer to have been." No. 9: "The court charges the jury that no proposition or suggestion on the part of the defendant made to the deceased, Mills, with respect to his (Mills') assuming charge of or responsibility for the maintenance or repair of the roadbed of the railroad, could put that duty upon the deceased, unless the deceased did in fact undertake to assume those additional duties." No. 10: "The court charges the jury, for the plaintiff, that it is the duty of a person operating a railroad to at all times have and maintain a safe roadbed, and that when the defendant undertakes to show that he escapes this responsibility by pleading that the deceased himself had un-

dertaken to look after the safety of the roadbed that the burden rests upon the defendant to make out that defense by a preponderance of the evidence."

Green & Green, for appellant. G. C. Tamm and Wm. C. Fitts, for appellees.

SMITH, J. [1, 2] Appellant's request for a peremptory instruction was properly refused. It was for the jury to say whether or not the derailment of the train was caused by a defective track, and, if so, whether or not such defect was the result of appellant's negligence. If the evidence of Mrs. Mills that appellant, in the latter part of November, declined to permit Mr. Mills to assume control of the repairing of the track, is true, the jury were warranted in not believing that he had been in such control since August 1st, as claimed by appellant.

[3-5] Appellee's third instruction ought not to have been given. One of appellant's defenses is that the defective conditions of the track was caused by Mr. Mills' own negligence, for the reason that, at his request, he had been given entire supervision of the track, and that it thereby became his duty, not only "to direct the trackmen where to work," but also to inspect their work and see that it was properly done. If this was Mills' agreement, it was immaterial whether or not "he was an expert as to the safety of the railroad track." There was also no evidence introduced by either party indicating that Mills had no "opportunity to judge of the sufficiency of the work" after it had been done. Even if otherwise proper, this instruction is clearly a charge upon the weight of the evidence.

[6] By the sixth instruction the court singled out and gave undue prominence to the fact that Mills' duties as engineer were probably inconsistent with the duty of attending to the repairing of the track. This ought not to have been done.

[7] The ninth instruction is erroneous, for the reason that the evidence shows that the "proposition or suggestion" that Mills assume "charge of or responsibility for the maintenance or repair of the roadbed" was made by Mills to appellant, and not by appellant to Mills.

[8] A "person operating a railroad" does not owe to his servants the duty "to at all times have and maintain a safe roadbed." The duty of the master to furnish the servant with a safe place to work is not absolute, but it is simply to exercise reasonable care to furnish the servant with a reasonably safe place in which to work. The tenth instruction was, therefore, erroneous.

The judgment of the court below is reversed, and the cause remanded.

DISMUKES v. TOWN OF LOUISVILLE.

(No. 15,581.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

MUNICIPAL CORPORATIONS (§ 592*)—ORDINANCES—OFFENSES.

An ordinance which adopts as the laws of the municipality Code 1906, c. 28, relating to crimes, is void, because it undertakes to make all crimes, including felonies committed within the municipality, municipal offenses, while section 3410 limits the power to misdemeanors only.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 592.*]

Appeal from Circuit Court, Winston County; G. A. McLean, Judge.

"To be officially reported."

Mahaly Dismukes was convicted of selling intoxicating liquors in violation of an ordinance of the Town of Louisville, and she appeals. Reversed and remanded.

Z. A. Brantley, for appellant. Claude Clayton, Asst. Atty. Gen., for appellee.

McLAIN, C. Affidavit was made before the mayor of the town of Louisville, against appellant, charging her with the unlawful selling of intoxicating, etc., liquors. She was convicted and sentenced by the mayor. From this judgment she appealed to the circuit court. There she was again convicted, and was sentenced by the court. From that judgment she appeals to this court.

The alleged ordinance under which she was tried is set out in the record and reads as follows: "Section 1. Be it enacted by board of mayor and aldermen of the town of Louisville, Miss., that chapter 28 of the Annotated Code of Mississippi be and the same is hereby adopted as the Criminal Code and laws of said town." Code 1906, § 3410, provides that "all offenses under the penal laws of the state amounting to a misdemeanor or shall, when so provided by a general ordinance of the municipality, also be offenses against the city, town or village in whose corporate limits the offense may have been committed to the same effect as though such offenses were made offenses against the city, town or village by separate ordinance in each case, and upon conviction thereof the same punishment shall be imposed by the city, town or village as is provided by the laws of the state with regard to such offenses against the state not in excess of the maximum penalty which may be imposed by municipal corporations."

By an inspection of this town ordinance, it is clear that it includes all felonies, as well as misdemeanors; but it is manifest that section 3410, Code 1906, carefully limits the jurisdiction of villages, towns, etc., to misdemeanors. But this town ordinance "sweepingly provides that not only misdemeanors, but that all felonies against the state, shall

be dealt with by the mayor of the town as if he had full jurisdiction." This ordinance is "absolutely null and void, because it attempts to clothe the mayor [of Louisville] with jurisdiction over felonies, as well as misdemeanors." In support of this position, we cite the well-considered opinion of this court in the case of *Town of Oakland v. Miller*, 90 Miss. 277, 43 South. 467.

We think the case should be reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment is reversed, and the cause remanded.

McALLISTER v. RICHARDSON et al.

(No. 15,618.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

1. APPEAL AND ERROR (§ 351*)—TIME OF TAKING APPEAL—LIMITATIONS.

The filing of an appeal bond within two years after decree stops the running of limitations, though no citation was served.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1915-1919; Dec. Dig. § 351.*]

2. APPEAL AND ERROR (§ 435*)—APPEARANCE—CITATION.

An appeal from a decree in the Third district was perfected by the filing of an appeal bond in July. In October the appellees moved in the Supreme Court to docket and dismiss the appeal. *Held*, that as the docket of the Third district is called on the first Monday of December, and as that day is, under the direct provision of Code 1906, § 4906, the return day for appeals from that district, citation for the appellees was unnecessary, for by their motion to docket and dismiss the appeal they entered their appearance in Supreme Court before the return day.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 435.*]

3. APPEAL AND ERROR (§ 787*)—DISMISSAL—DELAY IN PROSECUTION.

Where the transcript was filed before the return day, and appellee's appearance was entered ten days prior thereto, there was no such delay in the prosecution of the appeal as to warrant dismissal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8129, 8130; Dec. Dig. § 787.*]

Appeal from Chancery Court, Tippah County; I. T. Blount, Chancellor.

Suit between Mrs. M. J. McAllister and S. M. Richardson and others. From a decree for the latter, the former appealed. On motion to docket and dismiss. Motion overruled.

Spight & Spight, for the motion. Fontaine & Fontaine and Flowers, Alexander & Whitfield, opposed.

SMITH, J. The final decree in this case was rendered on the 2d day of October, 1909,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and the appeal bond was executed and filed on the 28th day of July, 1911; but no citation has been served on appellees. On the 20th day of October, 1911, appellees filed a motion to docket and dismiss for the following reasons: (1) Because the decree in said cause by the chancery court of Tippah county was rendered on the 2d day of October, 1909, and the appeal bond was filed July 25, 1911. (2) Because no citation has ever been issued or served on appellees. (3) Because no transcript has been filed in the Supreme Court. (4) Because of delay on the part of appellant in properly and promptly prosecuting said appeal. Afterwards, on the 25th day of November, 1911, the record was filed with the clerk of this court.

[1] The case of *Beasley v. Cottrell*, 94 Miss. 254, 47 South. 662, seems to hold that the filing of an appeal bond does not stop the running of the statute limiting the time within which appeals must be taken, but that the statute continues to run until the appellee is served with a citation, or the transcript filed in this court. That case was decided upon the authority of *Chambliss v. Wood*, 84 Miss. 209, 36 South. 246. As pointed out in the case of *Lumber Co. v. Stevenson*, 89 Miss. 678, 42 South. 796, this is a misconception of what the court held in *Chambliss v. Wood*, caused by the imperfect reports of that case. What the court in fact did hold in *Chambliss v. Wood* was that "the appeal is perfected on the filing of the bond, which stops the running of the statute." The appeal in the present case, therefore, was not barred by the statute of limitation.

[2] The docket of the Third district, from which district this appeal comes, at the October term of this court, is called on the first Monday of December, which day was by section 4906 of the Code the return day for appeals from that district. When appellees filed their motion to docket and dismiss, they thereby entered their appearance in this court, and citation for them therefore became unnecessary.

[3] When the return day for this appeal arrived, the record in the cause had been filed and appellees' appearance had been entered more than ten days prior thereto. There was, therefore, no delay in the prosecution of the cause after the taking of the appeal, and, it being now on the docket, the motion to dismiss is overruled.

MINOR v. STATE. (No. 15,529.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

CRIMINAL LAW (§ 713*)—TRIAL—ARGUMENT OF COUNSEL.

In a prosecution for murder, a statement by the district attorney in his argument that on a verdict of manslaughter the court does not have to sentence the defendant to the

penitentiary, but may fine her or send her to the county farm, was reversible error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1663, 1678; Dec. Dig. § 713.*]

Appeal from Circuit Court, Warren County; H. C. Mounger, Judge.

Rosa Minor was convicted of manslaughter, and appeals. Reversed and remanded.

McLaurin & Thames, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

SMITH, J. Appellant was indicted for murder, and convicted of manslaughter. The district attorney in his closing argument used the following language: "If you bring in a verdict of manslaughter, the court does not have to sentence her to the penitentiary, but can fine her or send her to the county farm." Appellant's objection to this language was overruled, and an exception taken.

This language is practically the same as that used by the district attorney in *Windham v. State*, 91 Miss. 845, 45 South. 861, and consequently the judgment of the court below must be reversed, and the cause remanded.

SOUTHERN LUMBER & MFG. CO. v. MALLETT. (No. 15,405.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

JUSTICES OF THE PEACE (§ 174*)—APPEAL—ANSWER OF GARNISHEE—TIME OF FILING.

Under Code 1906, § 2347, providing that garnishees shall, in actions in the justice court, answer by noon of the return day of the writ, unless the court shall extend the time, the answer of a garnishee cannot, over objections, be filed for the first time in the circuit court after an appeal from the justice court.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 174.*]

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Garnishment by W. E. Mallett against the Southern Lumber & Manufacturing Company on a judgment recorded against W. L. McDaniel. From a judgment in the justice court for the garnishor, the garnishee appealed to the circuit court; and from an order sustaining an objection to the filing of an answer in that court, the garnishee appeals. Affirmed.

Willing & Davis, for appellant. L. H. Doty, for appellee.

MAYES, C. J. There is only one question in this case that needs discussion; all others, we think, having already been settled by this court in several decisions. The appellant was garnished in a justice of the peace court on a judgment recorded by appellee against W. L. McDaniel. Appellant failed to answer on the day required by sec-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion 2347 of the Code of 1906, whereupon the justice of the peace rendered judgment for the amount of appellee's demand, as required by section 2345 of the Code. Subsequently the lumber company appealed to the circuit court, and for the first time undertook to file an answer to the garnishment, which was objected to by appellee, and the trial court sustained the objection and refused to allow the answer to be filed. Appellant excepted to the action of the court, and the case is appealed to this court.

It is argued by appellant that this court held in the case of *Mitchell v. Mead*, 92 Miss. 596, 46 South. 58, that the answer of the garnishee could be filed, for the first time, in the circuit court, and that the above case is in conflict with the case of *G. & S. I. R. R. Co. v. Ramsey*, 54 South. 440, in which last case it is argued that the court held that the answer could not be filed. Section 2347 of the Code of 1906 is clear and positive as to when the answer of the garnishee shall be filed. The case of *G. & S. I. R. R. Co. v. Ramsey*, 54 South. 440, but redeclares the statute. Of course, this section may be waived, and is waived if the party having the right to object to the filing of the answer out of time allows same to be filed without objection, and this was what was done in the case of *Mitchell v. Mead*, 92 Miss. 596, 46 South. 58. In the *Mitchell* Case the court does not predicate its opinion upon the fact that the statute requires the answer to be on file at a certain time. The opinion of the court does not allude to the statute. The facts in the *Mitchell* Case show that the answer was filed in the circuit court for the first time, and allowed to remain on file for more than three years, when a motion was made to strike the answer from the files, and the trial court sustained the motion, not because an answer could be filed out of time, but because the right to object had been waived by allowing the answer to be filed, and remain on file, without objection, for so long a time.

There is no conflict between the above cases, and the judgment of the court below is affirmed.

MINTER v. CITY OF JACKSON. (No. 15,410.)

(Supreme Court of Mississippi. Jan. 29, 1912.
On Suggestion of Error, Feb. 28, 1912.)

On Suggestion of Error.

INTOXICATING LIQUORS (§ 238*)—CRIMINAL PROSECUTIONS—EVIDENCE—WEIGHT AND SUFFICIENCY.

Under Acts 1908, c. 115, providing that the fact that any person shall be found to be in possession of appliances adapted to retailing intoxicating liquors shall be presumptive evidence that he is keeping for sale intoxicating liquors contrary to law, evidence held sufficient to present a question for the jury

whether defendant was keeping intoxicating liquors for sale, although there is testimony tending to indicate that any liquor drunk on the premises was drunk by friends of defendant, and was not sold.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 324-330; Dec. Dig. § 238.*]

Mayes, C. J., dissenting.

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Jennie Minter was convicted of keeping liquor for sale, and she appeals. Affirmed on suggestion of error.

This is an appeal from a conviction of keeping liquor for sale. The appellant was prosecuted in the police court of the city of Jackson under an ordinance making criminal laws not amounting to a felony offenses against the city. From a conviction she appealed to the circuit court, where she was again convicted. The opinions state the facts.

On the trial in the circuit court, the following instructions were given:

For the City.

(1) "The court instructs the jury, for the city, that it is not necessary that you should know that the defendant is guilty before you are authorized to convict, but only that you should believe from the evidence beyond a reasonable doubt that she is guilty in which event you should say by your verdict 'We, the jury, find the defendant guilty as charged.'"

(2) "The court instructs the jury, for the city, that if you believe from the evidence beyond all reasonable doubt that Jennie Minter, the defendant, had in her possession or under her control 10 quarts of Schlitz beer in the refrigerator on ice, and 26 quarts of Schlitz beer concealed in the back yard in a tub, and that the same was kept by her for the purpose of selling it, then it is the sworn duty of the jury to return the following verdict in this case: 'We, the jury, find the defendant guilty as charged.'"

(3) "The court instructs the jury, for the city, that if you believe from the evidence beyond all reasonable doubt that 10 quarts of Schlitz beer were found in the refrigerator in the defendant's house, and also a beer opener, a waiter with four beer glasses, empty quart bottles which had contained Schlitz beer, and empty flasks, that all these things may be considered by you in making up your verdict; and if you further believe from the evidence beyond a reasonable doubt that all these articles were found in the possession of the defendant, and that they were appliances adapted to retaining either whisky or beer, then, under the law of the state of Mississippi, this would be presumptive evidence of the defendant's guilt."

For the Defendant.

(1) "The court instructs the jury, for the defendant, that it is their solemn duty to try honestly, fairly, and conscientiously to reconcile the testimony in this case with the defendant's innocence, and to return a verdict of not guilty, unless from all the evidence in the case they believe beyond every reasonable doubt that the defendant kept the liquor with the intent and for the purpose of selling the same."

(2) "The court instructs the jury, for the defendant, that the defendant is presumed by law to be absolutely and entirely innocent of the crime charged, and of every act and intent composing the crime, and that this presumption acts as a witness for the defendant, testifying for the defendant throughout the trial, until the jury reach their verdict, that the defendant is innocent; and unless you believe from the evidence beyond every reasonable doubt that the defendant is guilty, it is your solemn duty to find the defendant not guilty."

(3) "The court instructs the jury, for the defendant, that the crime of keeping intoxicating liquors for sale is composed of two separate and distinct elements: First, the physical act of keeping the liquor; and, second, the mental intent to sell the liquor—and that, although the defendant may have had the liquor, yet unless you believe beyond every reasonable doubt that she intended to sell the liquor, and that she kept it there for the purpose of selling the same, it is your duty to find the defendant not guilty."

(4) "It is the right of all persons to keep as much intoxicating liquor in their possession as they may wish, whether it be kept concealed or unconcealed, and to order just as much and just as often as they may wish, provided they do not keep the same for the purpose of selling it; and in this case, if you believe that the defendant ordered the liquor or kept the liquor for her own use, or if you have a reasonable doubt as to whether she did or did not, it is your duty to find the defendant 'not guilty.'"

(5) "The court instructs the jury, for the defendant, that you may believe from the evidence beyond every reasonable doubt that the defendant in this case had in her possession various quantities of intoxicating liquors, and had received numerous shipments of such liquors at numerous times through the express company, yet the receipt and possession of such liquors is not to be received by you as sufficient evidence of the defendant's guilt, and raises no legal presumption of the defendant's guilt, but is on the contrary, wholly consistent with the defendant's innocence, for the simple reason that she might have received and had such liquors for any one of a number of purposes, and that before you can convict the defendant you must believe beyond every reasonable doubt that the defendant had the liquors for the

purposes charged in the affidavit, and for no other."

W. J. Croom and Hamilton, Burch & Hamilton, for appellant. Jas. R. McDowell, Asst. Atty. Gen., and Louis C. Hallam, City Pros. Atty., for appellee.

MAYES, C. J. Appellant was prosecuted by the city of Jackson for keeping vinous, spirituous, malt, and intoxicating liquors for sale, in violation of an ordinance framed under chapter 115 of the Acts of 1908 amending section 1749 of the Code of 1906. The proof consists in the fact that appellant is shown to have received a cask containing 72 quarts of beer a day or two prior to the time a "raid" was made on her house by the police authorities of the city of Jackson. When the police authorities raided appellant's house, they found about 36 quarts of beer, and the other 36 empty quart bottles. It seems that the police also found a few whisky bottles, a cork screw, a waiter, and some tumblers containing the leavings of fresh beer. Appellant did not take the stand, but a witness testified that four girls, friends of appellant, drank the 36 bottles the night before. It appears from the testimony that only a part of the beer belonged to Jennie Minter; the other belonging to another woman who lived in the house with her. A bottle with a little whisky in it was found. This is all the evidence in reference to Jennie Minter keeping this whisky in violation of the law.

As this court has repeatedly said, there is no law which prohibits a person from keeping whisky, no matter what the quantity, unless it is kept for some unlawful purpose, and when the above charge is made the proof must not only show that the person charged had intoxicating liquors, but that the liquor was kept for an unlawful purpose. The testimony in this case does no more than create a suspicion that the beer found was kept for an unlawful purpose, if it can be said to do that. That a person ordered a cask of beer raises no presumption that he ordered it for an unlawful purpose. When a house is searched, and it is discovered that the beer has been put to the use which it might be supposed the party ordering it intended it should be, and for which it is made, and when it additionally appears that the beer had been opened with a corkscrew and drunk from a glass, this is not sufficient to warrant the presumption that it was kept for an unlawful purpose. When section 1747 of the Code of 1906, as amended by Acts 1908, p. 117, provides that the fact that any person has in possession appliances adapted to the retailing of liquor shall be presumptive evidence that the person having the appliances is engaged in keeping intoxicating liquors for sale, or for the purpose of giving same away in violation of law, it does not and cannot mean that when a home is invaded and searched, and glasses, and a waiter, and a

corkscrew, and intoxicating liquors are found, that these things alone shall warrant the conviction of any person under this statute. The glasses, waiter, corkscrew, and sometimes intoxicating liquors, are found in many innocent homes. In fact, a home cannot be properly furnished without glasses and waiters. If these things be found in a storehouse, or in and about a person's place of business, this fact may be a stronger circumstance of guilt than when found in a home; but in all cases these things alone cannot be said to be such appliances, within the meaning of the statute, as to warrant a conviction in themselves. It may be difficult to prove the crime charged in this affidavit, and it should be. The Legislature has not said that it shall be unlawful to keep whisky for any purpose, and, when a person is found with intoxicating liquors at his home, this fact should not, in itself, warrant the presumption that such person has liquors for an unlawful purpose, unless other facts are sufficient to justify a conclusion that the having of the liquors is for some unlawful purpose. This case falls within the principles declared by the case of *McComb City v. Hill*, 56 South. 346, and *Stansberry v. State*, 53 South. 783.

The case is reversed and remanded.

McLEAN, J. (dissenting). I regret exceedingly that I cannot see my way clear to agree with my Brethren in this cause. The majority of the court concede that there were no errors of law committed in the court below. They must concede that the only question which the record presents is a question of fact, and this question of fact, having been properly submitted to and passed upon by the jury, should not be disturbed, except in extreme cases—in other words, the record should overwhelmingly convince this court that the verdict of the jury was wrong upon the facts. In my humble judgment this is not done; but, upon the other hand, there is ample testimony to sustain this verdict. The reporter will set out in full the instructions given for both the state and the defense, in order that it may be seen that the jury were not only properly charged, but that they were instructed on behalf of the defendant from every conceivable viewpoint that the evidence would permit.

Section 1747 of the Code, as amended by chapter 115 of the Acts of 1908, provides, among other things, as follows: "The fact that any person shall be found in possession of appliances adapted to retailing such liquors shall be presumptive evidence that the person is engaged in keeping for sale * * * intoxicating liquors contrary to law." I am unable to draw any distinction between the instant case and *Gillespie v. State*, 96 Miss. 856, 51 South. 811, 926. I have carefully read the record in the *Gillespie Case*, and the facts in that case are strikingly identical with the facts in the in-

stant case. In both cases a portion of the intoxicating liquors were kept concealed; empty beer bottles were found in large numbers; empty glasses with fresh beer in them were found; corkscrews and beer openers were at hand, and the places where they were—in fact, everything well calculated to convince a jury, composed of reasonable men, that the defendant did not have this large quantity of intoxicating liquors on hand for her sole use and benefit, but, upon the other hand, is presumptive evidence of guilt under that portion of the statute hereinbefore quoted, and placed upon the defendant the burden, at least, of making some explanation.

In the first place, the defendant in the instant case, when the officer first appeared with his search warrant, and after he had found 10 quarts of beer in the ice box, denied that she had any other intoxicating liquors on the premises; but the officer of the law found an additional quantity in a tub in the yard, covered up with old clothes and weighted down with coal. The proof shows that 72 quarts of beer reached this house on Saturday night, about 10 or 11 o'clock, and that on the following morning 36 quarts had been consumed by the inmates of that establishment, consisting of four girls. In other words, each girl had consumed 9 quarts of beer and was sober—not intoxicated; and everything about this establishment indicated that this large quantity of intoxicating liquors was not kept for private use. It does not require a very great stretch of the imagination to conclude that this house was a bawdyhouse. However all this may be, this court is encroaching upon the province of the jury when it undertakes to reverse this case upon the facts shown in the record. It is respectfully insisted that the majority opinion of this court (and it must be borne in mind that this is simply a court of review) is not at all consistent with the course of a court of review. The rule in such cases is that if there is any evidence at all to support the findings of the jury, there being no error in the record, the verdict should not be disturbed.

No one questions the right of an individual to purchase, for his own use, as many quarts of beer or as many gallons of whisky as his thirst demands. There is very little danger that any "gentleman of standing," in whose possession may be found quantities of beer and whisky, is apt to be convicted of violating the liquor laws by a jury. A person's standing in the community has a great deal to do in forming, and in shaping, and leading to a conclusion, the judgment of a jury. It is not usual for the innocent to keep hid out in the back yard intoxicating liquors, in a tub covered with old clothes, and weighted down so as to conceal the same from the passer-by; nor is it usual and customary to find empty beer glasses, with

fresh beer in them, in every room in the house. While "wine, women, and song" are frequently found together, yet, at the same time, we are not authorized, innocent though we may be, to shut our eyes to a matter of common knowledge, and that is that bawdy-house keepers are not in the habit of furnishing beer and other intoxicating liquors free of charge to their inmates, but, upon the other hand, such things are kept as additional revenues to these dens of infamy; and those who go there are expected, "while they enjoy the songs of the sirens," to pay the fiddler by purchasing beer and paying exorbitant prices for these "incidental" amusements. These "incidentals" are a part of the traffic. They assist largely in maintaining the "dignity" of the establishment. It is true there is no direct evidence in this record that the appellant kept a bawdyhouse, yet here and there through the record are seen glimpses of those things which indicate that such is the case. At all events, the jury in this case, so far as the record shows, fairly and impartially considered the facts; and it should be a very extreme case in order to justify this court in setting aside the verdict of a jury.

This court need not be at all sensitive about a violator of the liquor laws being unjustly punished. Long experience and observation of the writer of this opinion, in the nisi prius courts, convinces him that a large percentage of those who violate the prohibition laws escape punishment. The courts cannot be too rigid in the enforcement of a law, the violation of which is the mother of so much evil and crime—the ruin and degradation of so many of our people.

On Suggestion of Error.

SMITH, J. An examination of the original record in the case of Gillespie v. State discloses that it is, if anything, a weaker case for the state than the one at bar, and, consequently, I am of the opinion that we erred in reversing the judgment of the court below. That case, which will be found reported in 98 Miss. 856, 51 South. 811, decided three propositions: First, that the statute in question was constitutional; second, that the evidence of the appliances found in appellant's possession was sufficient to raise the presumption of guilt created by the statute; and, third, that the court below complied with the statute in granting the instructions to the jury. As reported in each of these reports, the case is of no value on the second proposition, for the reason that neither of them contain a statement of the facts. In that case appellant was found in possession of intoxicating liquor in bottles of convenient size, and, in the language of the witness, "there were whisky glasses and common tumblers setting around." In one room of the house empty beer bottles, with a little beer and

foam remaining in them, were found on the table. In the case at bar appellant was found in possession of intoxicating liquor in bottles of convenient size, glasses, waiters, a beer opener, and an ice box containing beer on ice. Empty beer glasses, with fresh beer in them, were found in every room in the house. There was also some other evidence in each of these cases indicating that beer had been recently drunk on the premises, and in each case, after appellant had denied having intoxicating liquor in possession, such liquor was found on the premises, appellant's residence, some of it concealed in the yard.

It is true that the possession of the appliances found on appellant's premises is consistent with her innocence, and, were it not for the statute in question, no inference of guilt could be drawn therefrom alone; but, since the Legislature has made such possession evidence of guilt, it is ordinarily for the jury, and not the court, to say whether it is sufficient to constitute proof thereof. Of course, the presumption of guilt raised by the statute will be stronger or weaker, according to the character of appliances found and the circumstances surrounding their possession. The evidence introduced by appellant, if true, was sufficient to overthrow the prima facie case she was called upon to meet; but the credibility of the witness delivering it was for the determination of the jury, and an examination of this testimony will disclose that they were well warranted in rejecting it.

As I am in accord with the views heretofore expressed by my Brother McLEAN, it follows that the former judgment herein must be set aside, and the judgment of the court below affirmed.

MAYES, C. J. (dissenting on the sustaining of the suggestion of error). In the original opinion filed in this case I have substantially stated the facts. There is no hint in this record, falling from the lips of any witness, that Jennie Minter was keeping a house of bad character. As was stated in the opinion, the proof in the case only shows that 36 bottles of beer belonged to and were found in the room of appellant. She is charged with keeping intoxicating liquors for sale. Ten bottles were found in an ice cooler in her house, and 26 bottles were found in the yard in a tub. Where the liquors were found seems to me to be immaterial, since mere possession did not constitute guilt. We must interpret human nature as we find it, and not as we would have it. When homes are to be raided in the search for intoxicating liquors, we may expect the timid and the fearful to hide it from the officers of the law. Since the statute does not condemn the mere having of the intoxicating liquor in possession, it cannot matter where it is kept. In the Stansberry Case, 53 South. 783, and the Hill Case,

56 South. 346, this court has held that mere quantity, in the absence of proof of other unlawful purposes, even under the statute, cannot justify a conviction of having intoxicating liquors for purpose of sale or giving away in violation of law. In the Stansberry Case, Stansberry had a gallon of gin and four quarts, or a gallon, of whisky. This court said a conviction could not stand, even under the statute in the case. In the Hill Case the court said the same on facts which showed about the same quantity of whisky.

What is this statute, to which such strong appeal is made? When the statute is examined and analyzed, it is narrower than the scope given it by this opinion of the court in this case. The Legislature designed to keep it within constitutional limits, but the court is about to press it beyond those limits. The statute does not say what the court has construed it to mean, in my judgment. The statute in question is section 1747 of the Code of 1906, as amended by Acts 1908, p. 117, § 1, and it provides, in substance, that the having of a revenue license from the United States government, authorizing the selling of intoxicating liquors, shall be prima facie evidence that any person having such license is engaged in keeping for sale, or to be given away to induce trade, or in selling liquors, in violation of law. No proof warranting a conviction under this clause of the statute is found in the record. Again, the statute provides that any person "who shall be found in possession of appliances adapted to retailing" shall be presumed to be engaged in violating the liquor laws, as above stated. If this conviction is to stand, it must rest alone on the fact that when this home was raided the policemen found a waiter, a corkscrew, and some tumblers. These were the only "appliances" that any witness says were found in this house. These cannot be said to be "appliances adapted to retailing liquors" in any sense of the statute, because they are articles of necessary household utility, and not a single householder but that could be prosecuted and convicted under the statute. The finding of 36 bottles of beer at this house is not proof of anything, because this court has so held in two cases.

My own view is that the statute making the having of appliances adapted to retailing prima facie evidence of guilt strains the constitutional power of the Legislature to its utmost limit. It is possibly within the constitutional power of the Legislature to prohibit whisky from being imported into this state or kept in any home; but, if it be conceded that the Legislature have this power, they have not done it, and until they have exerted the power intoxicating liquors may be kept in a home in moderate quantities, without being any kind of proof of a violation of the liquor laws of the state.

However much it may be desirable to enforce the prohibitory laws of the state, this court cannot allow itself to be swept from its judicial poise, and affirm convictions on facts which neither prove nor tend to prove any violation of the law.

It is my judgment that in this case there was no proof to go to the jury.

FORRESTER v. FORRESTER. (No. 15,009.)
(Supreme Court of Mississippi. Feb. 12, 1912.)
DIVORCE (§ 49*)—DEFENSES—CONDONATION—FRIENDLY CORRESPONDENCE.

In an action by a wife for divorce, where there is sufficient evidence of cruel treatment extending over several years, a divorce should not be denied merely because, after plaintiff left defendant, she wrote him a friendly letter.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 171-179; Dec. Dig. § 49.*]

Appeal from Chancery Court, Monroe County; J. Q. Robins, Chancellor.

"To be officially reported."

Action for divorce by Maggie Hall Forrester against William Forrester. From decrees vacating a decree of divorce theretofore rendered, and dismissing the bill, complainant appeals. Affirmed in part, and reversed in part.

The appellant brought suit against appellee for divorce, and obtained a decree in her favor carrying alimony. Afterwards a petition was filed by appellee to set aside the decree on the ground that appellee had never been served with summons. After hearing proof, the court set aside the decree and proceeded to a new hearing of the case. Upon hearing the proof, the court denied appellant a divorce. The letter alleged to have been written by appellant to appellee January 7, 1910, referred to in the opinion, is as follows:

"My address is Aberdeen, Miss., R. # 5.

"Aberdeen, Miss., Jan. 7, 1910.

"Dear Bill: I will write you a few lines; Allie said you said write you so I will, it is so bad I can't take the baby to town but when the weather gets good I am going to Aunt Julia Gallop's to stay few days and I will let you know so you can come and see her and me if you want to, don't ever come over here any more. You know how Papa is when he gets mad at any one so you shall see the baby and I will talk to you. Also write me if you got home alright and don't tell nobody I wrote this to you and when I know I can be in town I will also let you know, don't ever come till I let you know. God in heaven knows if you only had done right we would have been together now and none of this would ever happened. I pray for you night after night but don't think of the past and nothing that happened over here. I want to talk to you

and will if I ever have the chance. Write me if you got home, I hated to see you go back but I could not help it. Reba said for me to write and see if her dady got home that night, it was so bad. So be good and write to me soon. May God bless you. M. F. Burn this up and don't let nobody see it for my sake."

Paine & Paine, for appellant. Leftwich & Tubb, for appellee.

WHITFIELD, C. We concur in the conclusion reached by the chancellor that the first decree for divorce should be set aside; but, after careful consideration of the whole record on the merits, we are constrained to differ from him in denying the divorce and dismissing complainant's bill. The marked ability of the learned chancellor would constrain an affirmance, if we were not thoroughly satisfied from the whole evidence and by the deductions to be drawn from it that the complainant has satisfactorily made out her case. The testimony is not limited to a single act of violence, but covers their relations and his treatment of her for several years. That he struck her is certainly clearly established, and the blow was so severe as to blacken the arm and cause it to remain so for about a week or more. It seems clear, too, that in his rage he broke up and destroyed certain trinkets and toys that had belonged to their dead child. She had left him once before, but had returned in the hope of being able to live with him; and the evidence, we think, makes it plain that she left the second time in great fear of what he might do to her if she should remain. All the testimony relative to his cursing her, and his conduct in respect to taking home things which belonged to her, and the return of which she secured only after a vigorous suit at law, coupled with many other circumstances scattered through the record, such as, for example, making her work barefooted in the field, makes it seem to us certain that justice required the granting of the divorce.

We are impressed with the idea that the chancellor must have given too much weight to the letter which the wife was alleged to have written to her husband. The sum and substance of her testimony as to whether she wrote the letter was that she would not testify positively that she wrote it, or did not write it; that she may have written it, but she did not believe she had done so. Even if she had written the letter, as seems most probable, that fact does not negative the treatment of her by him in the past, which the evidence abundantly shows. That treatment is not such as holds out much hope of better relations in the future, should the divorce be denied and the parties united again. The question is, not whether that

letter was written or not, but whether, on the whole case, she was entitled under the statute to the divorce. We think she was.

As the bill calls for alimony, no decree will be entered here, but the cause will be remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the decree setting aside the first decree for divorce is affirmed; but the decree denying the divorce on the second hearing and dismissing complainant's bill is reversed, and the cause is remanded, to be proceeded with in accordance with this opinion.

OANDLER v. CROMWELL et al.
(No. 15,347.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

1. CHATTEL MORTGAGES (§ 138*)—JUDGMENTS—PRIORITY.

A judgment lien attaches to a growing crop only from the time it has an actual existence, while a mortgage on a crop to be made takes effect from the date of the mortgage, thereby taking precedence over the lien of the prior judgment.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 228-236; Dec. Dig. § 138.*]

2. CHATTEL MORTGAGES (§ 109*)—MORTGAGES ON GROWING CROPS—DEBTS SECURED.

A mortgage on crops to be grown by the mortgagor to secure a note and an open running account for \$50, "more or less," does not definitely fix the amount of the running account secured; and where the parties subsequently agree on such amount, and there is no fraud, a judgment creditor may not complain merely because the amount exceeds \$50.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 190-193; Dec. Dig. § 109.*]

3. CONTRACTS (§ 170*) — CONSTRUCTION — RIGHTS OF PARTIES.

The court will construe a doubtful contract, when the parties thereto cannot agree as to its meaning; but when the parties agree, and the contract is made certain thereby, there is no field for inference by the court.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 753; Dec. Dig. § 170.*]

4. JUDGMENT (§ 666*)—RIGHT OF JUDGMENT CREDITOR.

A judgment creditor is barred by all equities which bar the judgment debtor, and he can assert no demand that the judgment debtor is precluded from asserting.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1180; Dec. Dig. § 666.*]

5. CHATTEL MORTGAGES (§ 22*) — DEFINITENESS—FUTURE ADVANCES.

A mortgage to secure future advances may merely specify that it is given to secure such future advances as may be agreed on, and it need not specify definitely the amount to be advanced.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 68; Dec. Dig. § 22.*]

Appeal from Circuit Court, Alcorn County; J. H. Mitchell, Judge.

For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

Action by M. A. Candler against King Cromwell and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Bennett & Sweat, for appellant. W. J. Lamb, for appellees.

MAYES, C. J. Briefly stating this case, it is about as follows: In 1908 M. A. Candler recovered a judgment against King Cromwell for \$72.23 in a justice of the peace court. In November of that year, the judgment was enrolled in the office of the circuit clerk of Alcorn county, in compliance with section 2742 of the Code of 1906, and became a lien on all the property owned by King Cromwell, if he owned any. On March 28, 1910, King Cromwell executed a mortgage to one C. Ayers, with W. B. Wilson as trustee, on all live stock and on all crops of corn and cotton to be grown by Cromwell during the year 1910, in Alcorn county, on certain lands described in the mortgage. The controversy over the particular cotton involved in this case is conceded to have been grown during the year 1910 on the land described in the mortgage, and is covered by the mortgage, unless excepted therefrom for reasons to be subsequently stated. The consideration of the mortgage recites that it is given because Cromwell "is justly indebted to the third party [Ayers] in the sum of \$184.95, more or less, as evidenced by note of even date for \$134.95, and an open and running account for \$50, more or less, as shown on the books of the third party, which indebtedness the first party desires and intends by this deed more effectually to secure and make certain payment thereof." The above quotation shows that the trust deed was given for the purpose of securing a note for \$134.95, and open and running account for \$50, more or less, making in total the sum of \$184.95, specified in the face of the trust deed. Under this trust deed it is argued that Ayers furnished Cromwell, not only the \$50 specified in the open and running account, but furnished \$87 additional, making a total amount furnished of \$137, instead of \$50, which, when added to the note of \$134.95, makes a total indebtedness due Ayers for the year 1910 of about \$271. Cromwell raised about 5½ bales of cotton, the value of which is conceded to be less than the amount owing Ayers. The contention of Candler is that his judgment lien is superior to the claim of Ayers under the mortgage for all value of the cotton in excess of \$184.95, or about that sum. In other words, Candler claims that the open account was to be for \$50, more or less, and that in the use of this term the amount which Ayers had the right to furnish Cromwell was limited to a sum approximating nearly the sum of \$50; that is to say, about \$52 or \$53, or \$47 or \$48. Candler denies the right of Ayers to assert his mortgage to the full amount furnished under the trust deed, and claims that his judgment lien is superior

to the mortgage for the excess. Accordingly, Candler had an execution issued under his judgment and levied on the cotton, whereupon Wilson, trustee in the trust deed, propounds a claim for same. Candler offered to pay Ayers' claim to the extent that the trust deed shows on its face the amount actually named therein; that is, Candler proposed to pay Ayers the note of \$134.95, and the account of \$50. On the trial in the court below, the court held that Ayers could hold the cotton for the actual amount furnished by him under the trust deed to Cromwell, and awarded the value of the property to the trustee, from which judgment Candler appeals.

[1] In the cases of Cayce v. Stovall, 50 Miss. 402, and Cooper v. Turnage, 52 Miss. 431, this court held that, while a judgment lien takes effect on a growing crop only from the time it has an actual existence, the lien does not relate back to the rendition or enrollment of the judgment; but a lien or mortgage on a growing crop relates back to the date of its creation, and takes effect from the date of the execution of the mortgage, thereby taking precedence of a judgment lien.

[2, 3] When a trust deed specifies that the mortgagee will furnish a specified sum, followed by the words "more or less," it does not fix any limitation on the lien which is created by the mortgagee, in case the mortgagee, with the assent of the mortgagor, exceeded the amount actually named in the face of the mortgage. The mortgage expressly says that the mortgagor and mortgagee agree that the mortgagee shall furnish to the mortgagor the sum of \$50, "more or less." How much more or how much less may be the subject of agreement between them according to the terms of the mortgage, and when they have agreed, by the mortgagee furnishing and the mortgagor accepting the excess furnished, there is no field for speculation as to what was meant in the contract by the use of the words "more or less," because the parties to the contract have definitely settled it, and when no fraud is charged third parties have no right to complain. The courts construe doubtful contracts, when the parties themselves cannot agree as to the true meaning; but when the parties agree, and the contract is made certain, there is no field for inference by the court.

[4] Let us see where the contention of counsel for appellant would lead us. A judgment creditor succeeds to only such rights in the judgment debtor's property as the judgment debtor actually has. The judgment creditor merely succeeds the judgment debtor; that is, takes his place and subjects the actual interest of the judgment debtor to his demand. The judgment creditor is barred by all the equities which bar the judgment debtor, and can assert no demand that the judgment debtor is precluded from asserting. Harris v. Hazlehurst Oil Mill, 78

Miss. 603, 80 South. 273; *Fouts v. Fairman*, 48 Miss. 536; *Miss. Val. Co. v. Chicago, etc., R. R. Co.*, 58 Miss. 846. It needs no argument to show that Cromwell could not defeat the lien of this mortgage after accepting advances under it of more than \$50, and for the same reason that he cannot do so his judgment creditor, who merely succeeds to his rights, is also precluded from doing so. The words "more or less" may have have a different meaning when applied to different instruments, and depending upon the way in which the controversy arises. If a person make a deed to another, containing by accurate description so many acres, "more or less," and a controversy should arise as to what was meant, the court might be called upon to construe what was meant. If a person should contract to sell to another 1,000 bales of cotton, "more or less," the court might again be called upon to construe what was meant by the use of the words, etc.; but in a mortgage which shows that the parties intended to furnish so much money, "more or less," and when, in fact, by the actual amount furnished under the contract, they make certain how much more shall be furnished, third parties cannot force the court to place any limitation on the meaning of the words different from that which the parties themselves have fixed.

[5] A mortgage need not specify definitely the amount to be furnished. This has been frequently held. The mortgage might have merely specified that it was given to secure such future advances as might be agreed upon. In the case of *Witczinski v. Everman*, 51 Miss. 841, this court has said: "A mortgage to secure future advances, which on its face gives information as to the extent and purpose of the contract, so that a purchaser or junior creditor may, by an inspection of the record, and by ordinary diligence and prudence, ascertain the extent of the incumbrance, will prevail over the supervening claim of such purchaser or creditor as to all advances made by the mortgagee within the terms of such mortgage, whether made before or after the claim of such purchaser or creditor arose. It is not necessary for a mortgage for future advances to specify any particular or definite sum which it is to secure. It is not necessary for it to be so completely certain as to preclude the necessity of all extraneous inquiry. If it contains enough to show a contract that it is to stand as a security to the mortgagee for such indebtedness as may arise from future dealings between the parties, it is sufficient to put a purchaser or incumbrancer on inquiry, and, if he fails to make it in the proper quarter, he cannot claim protection as a bona fide purchaser. The law requires mortgages to be recorded for the protection of creditors and purchasers. When recorded, a mortgage is notice of its con-

tents. If it gives information that it is to stand as security for all future indebtedness to accrue from the mortgagor to the mortgagee, a person examining the record is put upon inquiry as to the state of dealings between the parties and the amount of indebtedness covered by the mortgage, and is duly advised of the right of the mortgagee by the terms of the mortgage to hold the mortgaged property as security to him for such indebtedness as may accrue to him. Thus informed, it is the folly of any one to buy the mortgaged property, or take a mortgage on it, or give credit on it; and, if he does so, his claim must be subordinated to the paramount right of the senior mortgagee, who in thus securing himself by mortgage, and filing it for record, as required by law, has advertised the world of his paramount claim on the property covered by his mortgage, and is entitled to advance money and extend credit according to the terms of his contract thus made with the mortgagor, who cannot complain, for such is his contract; and third persons afterwards dealing with him cannot be heard to complain, for they are affected with full notice, by the record, of what has been agreed on by the mortgagor and mortgagee." See, also, *Melton v. Williams Co.*, 83 Miss. 624, 86 South. 152.

The *Witczinski Case* expressly holds that it is not necessary for a mortgage to specify any particular or definite sum which it is to secure. The meaning of the mortgage, when it says an open account furnished under it shall be \$50, more or less, can become of importance, in the absence of fraud, only to the parties themselves, when there is a controversy between them as to its meaning. In other words, if the mortgagor had failed to furnish the mortgage more than \$25, and the mortgagee was suing him for a breach of this contract, the use of the words "\$50, more or less," might become of importance; but it can never be brought in to question by third parties, when the parties to the contract have themselves interpreted it by actually furnishing in a certain amount, and when there is no dispute between the parties as to this.

Affirmed.

NEW ORLEANS, M. & O. R. CO. v. COLE
et al. (No. 15,386.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

1. RAILROADS (§ 396*)—INJURIES TO PERSONS ON TRACKS—ACTIONS—BURDEN OF PROOF—"NEGLIGENCE."

Under Code 1906, § 1985, providing that, in all actions against railroad companies for injury to persons or property, proof of injury inflicted by the running of locomotives or cars shall be prima facie evidence of a lack of reasonable skill and care on the part of the servants of the company, proof of an injury raises a presumption of negligence, casting the

burden of proof on the railroad company; and as "negligence" is a failure to observe, for the protection of another person, that degree of care which the circumstances justly demand, proof that the equipment of a train was proper and that the servants of the company kept a vigilant lookout is, in the absence of any proof as to the condition of the person injured, insufficient to rebut the statutory presumption.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1341-1347, 1357; Dec. Dig. § 396.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

2. CONSTITUTIONAL LAW (§§ 249, 311*)—RAILROADS (§ 396*)—EQUAL PROTECTION OF LAW—DUE PROCESS OF LAW—REGULATION OF RAILROADS.

Code 1906, § 1985, which raises a presumption of negligence upon the proof of an injury received from a running train, and casts upon the railroad company the burden of rebutting that presumption, is not in violation of Const. U. S. Amend. 14, in depriving railroads of the equal protection of the laws or depriving them of property without due process of law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 710, 932; Dec. Dig. §§ 249, 311;* *Railroads*, Dec. Dig. § 396.*]

3. APPEAL AND ERROR (§ 1062*)—REVIEW—HARMLESS ERROR.

A plaintiff, who received a verdict, cannot complain that the court refused its request for a peremptory instruction.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

4. APPEAL AND ERROR (§ 882*)—REVIEW—HARMLESS ERROR.

A party cannot complain of an erroneous instruction, where instructions embodying the same principle were given at his request.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

Appeal from Circuit Court, Newton County; C. L. Dobbs, Judge.

Action by Ann Cole and another against the New Orleans, Mobile & Chicago Railroad Company. From a judgment for plaintiffs, defendant appeals, and plaintiffs prosecute a cross-appeal. Affirmed on both appeals.

Flowers, Alexander & Whitfield, for appellant. J. D. Jones and R. N. & H. B. Miller, for appellees.

SMITH, J. Joe Cole having been struck and killed, as it is alleged, by one of appellant's trains, this suit was instituted by his widow and daughter to recover damages therefor. Neither side being satisfied with the verdict and judgment for \$1,000 rendered against appellant in the court below, each filed a motion for a new trial, both of which were overruled, and the case comes to us on direct appeal by appellant and on cross-appeal by appellees.

The evidence introduced in behalf of appellees was to the effect that on the night of the accident, between 8 and 9 o'clock, Cole was seen walking down the track a short distance ahead of one of appellant's trains, and that just after it had passed him he was

found lying near the track with both feet, which had been cut off, lying between the rails, as was also a sack of watermelons which he had with him at the time. The evidence introduced in behalf of appellant was to the effect that Cole was under the effect of intoxicating liquor at the time of the accident; that the train was running slowly, and was carefully handled; that the bell was ringing, and that the whistle had been blown several times for a railroad crossing just a few moments before the accident occurred; that the engine was equipped with an electric headlight, then burning brightly; that the engineer and fireman were each keeping a proper lookout; and that neither of them saw Cole on the track. Other witnesses also testified that they were watching the train as it passed, and that no one was on the track at the place where the accident occurred just before or at the time the engine passed it; that the pilot of the engine was of standard form, and was elevated only four inches above the track; and that there were no bruises on Cole's body, his only injury being the amputation of his feet. From these two last facts it is argued that Cole was not struck by the pilot of the engine, and, consequently, could not have been on the track in front of the train, but fell under the wheels of the cars thereof after the engine had passed. There was also evidence for appellees in contradiction of appellant's evidence relative to the blowing of the whistle and the ringing of the bell.

Appellant complains of the action of the court below in refusing to grant it a peremptory instruction, on the theory that, although the evidence does not show how the accident in fact occurred, it does show that appellant's train was properly equipped that its servants were guilty of no negligence in handling it, and that, consequently, the accident, however it occurred, was not caused by any default on the part of appellant or its servants. In *Railroad Company v. Brooks*, 85 Miss. 275, 38 South. 40, this court laid down the rule governing cases of this character in plain and unmistakable language; this language being as follows: "There is yet another principle of law, well settled in this state, which required the submission of the case to the jury. It was shown beyond peradventure that the injury was inflicted by the running of the train. This was prima facie proof of negligence, authorizing a recovery by plaintiff. To overcome this statutory presumption, it devolved upon the appellant to exculpate itself by establishing to the satisfaction of the jury such circumstances of excuse as would relieve it from liability. But this statutory presumption cannot be overthrown by conjecture. The circumstances of the accident must be clearly shown, and the facts so proven must exonerate the company from blame. If the

facts be not proven, and the attendant circumstances of the accident remain doubtful, the company is not relieved from liability, and the presumption controls." Since this language has several times been quoted with approval by this court (*Yazoo Railroad Co. v. Landrum*, 89 Miss. 399, 42 South. 675; *Easley v. Railroad Co.*, 96 Miss. 399, 50 South. 491; *Railroad Co. v. Hunnicutt*, 53 South. 617; *Fuller v. Railroad Co.*, 56 South. 783), it would seem that argument relative thereto should now be closed; but, out of deference to counsel, we have again taken the matter up for consideration.

[1] Negligence, as defined by Judge Cooley, is "the failure to observe, for the protection of the interest of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury." 29 Cyc. p. 415. Under section 1985 of the Code, when proof is made of injury inflicted by the running of a locomotive or cars of a railroad company, the presumption arises that such company had failed to observe for the protection of the interest of the person injured that degree of care, precaution, and vigilance which the circumstances justly demanded; and it then devolves upon such company to exculpate itself by establishing to the satisfaction of the jury that it did not fail to observe that degree of care, precaution, and vigilance which the circumstances justly demanded. Unless the circumstances surrounding the parties at the time of the infliction of the injury be known, it cannot be ascertained what degree of care, precaution, and vigilance, if any, was due from the company to the party injured; consequently, it cannot be determined whether the company failed to observe the necessary degree of care, precaution, and vigilance. We may know exactly what the situation of the servants of the company was at the time of the infliction of the injury, and exactly what they did; but, unless we also know what the situation of the party injured was, and what he was doing, at the time, we cannot know the degree of care, precaution, and vigilance, if any, which the company, or its servants, owed to him, and consequently cannot know whether or not they neglected to observe such degree of care, precaution, and vigilance.

In suits to recover damages for an injury alleged to have been inflicted by reason of the negligence of a defendant, except in cases where a presumption of negligence arises from the proof of certain facts, the plaintiff must show the circumstances attending the infliction of the injury, so that it may be known what degree of care, precaution, and vigilance, if any, the defendant owed to the plaintiff, and whether or not this degree of care, precaution, and vigilance was observed by the defendant. In other words, that it may appear whether or not the injury was inflicted by reason of the defendant's negligence. Under section 1985

of the Code the plaintiff is relieved of this burden in certain cases, and under it, in all actions against a railroad company for damage done to persons or property, when proof is made of injury inflicted by the running of a defendant's locomotive or cars, the presumption arises that such company, or its servants, failed to exercise that degree of care, precaution, and vigilance which, under the circumstances, the company owed to the party injured, and, in order to overthrow this presumption, the company (defendant) must then do what the plaintiff must have done in the absence of the statute; that is, show the circumstances attending the infliction of the injury, so that it may appear what degree of care, precaution, and vigilance, if any, was due from the company to the plaintiff, and whether or not this degree of care, precaution, and vigilance was by the company, or its servants, observed—in other words, whether or not the injury was, in fact, inflicted by reason of defendant's negligence. *Railroad Co. v. Brooks*, supra, simply announces in clear and concise language the rule which had been foreshadowed, if not definitely announced, in *Railroad Company v. Phillips*, 64 Miss. 704, 2 South. 537.

Appellant contends that, if the rule which we have herein reannounced and approved is sound, then *Railroad Co. v. Hunnicutt*, 53 South. 617, was improperly decided. In this appellant is in error. The *Hunnicutt* Case followed and approved the *Brooks* Case, supra, and the only new feature therein contained is the announcement that it is not necessary to prove how the injury occurred by eyewitnesses; but that this proof may be made by circumstantial evidence.

[2] Appellant further contends that, if section 1985 of the Code is to be construed as we have herein construed it, then it is in conflict with the fourteenth amendment to the federal Constitution, in that it deprives a railroad company of the equal protection of the laws and of its property without due process of law. This contention has been disposed of by the opinion of the Supreme Court of the United States in the case of *M., J. & K. C. R. R. Co. v. Turnipseed*, 219 U. S. 38, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, in which the court upheld the constitutionality of the statute with the construction put upon it by this court in the *Brooks* Case before it. The court below, therefore, committed no error in refusing to grant appellant the instruction requested.

Appellant also complains of several instructions granted by the court at the request of the appellees, which, in effect, charged the jury to find for the plaintiff, unless it was clearly shown by a preponderance of the evidence, and not by mere surmise and conjecture, not only how the injury occurred, but that it was unavoidable by the exercise of reasonable care and prudence on the part of the defendant. What we have

heretofore said disposes of this complaint of appellant, and shows that the court below committed no error in granting the instructions.

[3] Appellees complain because the court below refused them a peremptory instruction, and claim that for that reason they are entitled to a reversal of the judgment of the court below. Since the verdict of the jury was in favor of appellees, it is immaterial whether or not the court erred in refusing to grant this instruction, for the jury have simply done what appellees requested the court to peremptorily charge them to do.

[4] Appellees also complain that in several instructions granted appellant the jury were charged that if Cole's own negligence contributed to his injury they should find for appellant, which instructions they say may have accounted for the small verdict rendered. Conceding this action of the court to be error, it cannot be complained of by appellees; for this same principle was embodied in several instructions to the jury granted at their request.

The judgment of the court below is therefore affirmed.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. WILLIAMSON et al.

(No. 14,534.)

(Supreme Court of Mississippi. Feb. 28, 1912.)

1. INJUNCTION (§ 26*) — JURISDICTION—MULTIPLICITY OF SUITS.

Four persons brought separate suits against complainant telephone company, alleging that they were each subscribers to a rural telephone company whose plant complainant purchased, and that after continuing service for some time complainant willfully and oppressively removed the telephone from the residence of each subscriber, and has since refused to give such subscriber service. The telephone company filed a bill praying an injunction to restrain such actions at law on the ground of multiplicity of suits. *Held*, that equity would not enjoin the several actions on the ground relied on, there being merely a community of interests in the principles of law and facts involved.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. § 26.*]

2. EQUITY (§ 51*) — JURISDICTION — MULTIPLICITY OF SUITS.

To give equity jurisdiction on the ground of multiplicity of suits, there must exist some recognized ground of equitable interference, or some community of interests in the subject-matter, or a common right or title be involved, or there must be a common purpose against a common adversary, where each may resort to equity; it not being sufficient merely that a multiplicity of suits may be prevented.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 167-171; Dec. Dig. § 51.*]

3. INJUNCTION (§ 26*) — JURISDICTION—MULTIPLICITY OF SUITS.

Equity may interfere to prevent a multiplicity of suits, where an injury is continuing in its nature, so as to result in bringing numer-

ous actions against the same person relating to the same subject-matter.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. § 26.*]

Appeal from Chancery Court, Panola County; I. T. Blount, Chancellor.

Suit by the Cumberland Telephone & Telegraph Company against J. F. Williamson and others. From a decree dismissing the bill, complainant appeals. Affirmed.

Tim E. Cooper and Harris & Potter, for appellant. Shands & Montgomery, for appellees.

McLEAN, J. J. F. Williamson and three other parties each brought separate and independent suits against the Cumberland Telephone & Telegraph Company. These were actions of tort, brought at law, for the recovery of damages, both actual and punitive. Each declaration alleged that the plaintiff therein was a subscriber to a local telephone company, doing business in Sardis, Panola county, known as the "Rural Telephone Company"; that the Cumberland Telephone Company purchased the plant of the Rural Telephone Company, and that then the Rural Company went into liquidation, and that subsequently the Cumberland Telephone Company continued to serve the plaintiff as before; that later it willfully, wantonly, oppressively, and in reckless disregard of the plaintiff's rights, removed the telephone from the residence of the plaintiff, disconnected the plaintiff with the Sardis exchange, and has since refused to give the plaintiff telephone service. The Cumberland Telephone Company filed its bill of complaint in the chancery court of Panola county, praying for an injunction against the suits at law, on the ground that there was a community of interest in the principles of law and fact involved in the controversy, and that equity would take jurisdiction in order to prevent a multiplicity of suits. The injunction was granted, and thereafter, upon motion, the injunction was dissolved, and at a subsequent term of the chancery court the bill was dismissed. From a dismissal of the bill, this appeal is prosecuted.

[1] Within comparatively recent years there have grown up in this country what may be termed two schools upon the subject of the jurisdiction of equity relative to a multiplicity of suits. One may be termed the "school of Pomeroy," and, with great deference to Prof. Pomeroy and his disciples, it may be said that this school in many instances, while disclaiming, yet has confounded and confused the doctrine of a "multitude" with a "multiplicity" of suits. They have ignored entirely the fundamental principle that, in order for a court of equity to acquire jurisdiction in such cases, there must be something more than a community

of interest in the questions of law and fact involved in the judicial controversy. The question has been so fully and ably discussed by the respective adherents that nothing new upon the subject can be added, and we will content ourselves by simply referring to a few of the many leading decisions upon this question.

The leading case in America combating what may be termed the heresy of Prof. Pomeroy, is *Tribette v. Railroad Co.*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, wherein Chief Justice Campbell enters fully into the subject, and demonstrates conclusively the unsoundness of Prof. Pomeroy's doctrine—not only by showing that the authorities relied upon by Prof. Pomeroy do not support and sustain him, but that this author's reasoning is totally unsound. We have taken the pains to examine all of the cases relied upon by that author and cited in the second edition of his most valuable and excellent treatise, and we unhesitatingly concur with Judge Campbell, as stated in the *Tribette Case*, supra, that "every case he cited to support his text will be found to be either where each party might have resorted to chancery or be proceeded against in that forum, or to rest on some recognized ground of equitable interference other than to avoid a multiplicity of suits." In notes to *Southern Steel Co. v. Hopkins*, reported in 20 L. R. A. (N. S.) 850, the annotator, referring to Pomeroy's statement, says that, "a search fails to reveal any case which on the facts sustains the proposition, if applied to actions for breach of contract or the commission of a tort, and Pomeroy cites no such case." While Prof. Pomeroy is not the originator of the doctrine of a multiplicity of suits, he is certainly the expounder and expander of this doctrine, and has certainly carried this most desirable and salutary principle beyond the limits and scope of the judges who first conceived the idea.

The opinion in *Tribette's Case*, supra, has received the unqualified approval of the leading text-writers, among them being High on Injunctions, Beach on Injunctions, and Bliss on Code Pleading, and of many courts of last resort, and it may justly be regarded as the leading case upon the subject, and is in accord with the weight of judicial authority, both ancient and modern. Owing to the great reputation of Prof. Pomeroy, and the profound impression which his work on Equity Jurisprudence produced upon the judiciary and the legal profession generally, it seemed at one time as if the doctrine which he advocates so ably and forcefully would be generally accepted; but the second, sober thought of the profession was arrested by the masterful and unanswerable opinion of Chief Justice Campbell in the *Tribette Case*, supra, and, from the present trend of judicial thought, the judicial compass once more points in the right

direction. In fact, in the third edition of Pomeroy's Equity there are added two new sections, 251½ and 251¾, wherein there is quite a recession from the unqualified statements made in the former editions. A full discussion of this question may be found in the valuable notes in the following authorities: 14 L. R. A. (N. S.) 239; 28 L. R. A. (N. S.) 743; 32 L. R. A. (N. S.) 940; 34 L. R. A. (N. S.) 897. An examination of these notes will disclose that the cases which Mr. Pomeroy relied upon as supporting his text do not justify such a conclusion.

It is certainly a very difficult question to decide when equity will enjoin actions at law, in order to prevent a multiplicity of suits. The rule seems to be well settled in the federal courts that there is no hard and fast rule upon the subject. *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, and authorities cited. And it is settled beyond all controversy by these authorities that "the single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not enough in all cases to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended by more and deeper inconvenience to the defendant than would be compensated for by the convenience of a single plaintiff; and where the case is not covered by any controlling precedent, the convenience might constitute good ground for denying jurisdiction." The origin of the doctrine of a multiplicity of suits can be traced to what are called "bills of peace," and those in the nature of bills of peace. *Bishpam's Principles of Equity* (7th Ed.) p. 573; *Kerr on Injunctions*, 586; *Adams' Equity*, 199; *Pomeroy's Equity Jurisprudence*, § 246; *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532. To enter into a discussion of these bills of peace would simply be a rehearsal of what can be learned from any treatise on the subject of Equity Jurisprudence, and hence we refrain from doing so.

[2] Our conclusion is that, in order for equity to take jurisdiction upon the ground of a multiplicity of suits, there must be some recognized ground of equitable interference, or some community of interest in the subject-matter, or a common right or title involved, to warrant the joinder of all in one suit, or there must be some common purpose in pursuit of a common adversary, where each may resort to equity in order to be joined in one suit. What is and what is not a community of interest is well settled in *Tribette v. Railroad Co.*, supra, quoting from Bliss on Code Pleading as follows: "Two or more owners of mills propelled by water are interested in preventing an obstruction above that shall interfere with the downflow of water, and may unite to restrain or abate it; but they cannot unite in

an action for damages, for as to the injury suffered there is no community of interest." In *Madison v. Ducktown Iron Co.*, 113 Tenn. 331, 83 S. W. 658, it is said that, where several persons acting independently combine to produce a nuisance, such persons may be joined as defendants in a suit for injunction. 14 Ency. Pl. & Pr. 1141; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *People v. Gold Run Mining Co.*, 66 Cal. 138, 4 Pac. 1152, 66 Am. Rep. 80; *Kingsbury v. Flowers*, 65 Ala. 479, 39 Am. Rep. 14. But there can be a joinder neither of complainants nor defendants for the purpose of recovering damages for the injuries by the nuisance. *Saddler v. Great Western R. R. Co.*, 2 Q. B. 688, and *Adams' Equity*, 199. In 2 *Story's Equity Jurisprudence*, 855 et seq., it is said that this right must be a common right, enjoyed in common by several persons, and in such a manner that the invasion of the right of one is really an invasion of the rights of all, such as a right of fishery. See *Vandalia Co. v. Lawson*, 43 Ind. App. 226, 87 N. E. 47, for a full discussion, in which it is said: "Such strict community of interest in the subject-matter in these cases (referring to instances where the injury is a continuing one) is not required, and they must be taken as stating a qualification to the general rule that a community of interest in the subject-matter is necessary or harmonized therewith by considering that the continuing nature of the injury as against them all constitutes such community of interest."

[3] Where there is an injury *continuing* in its nature, which results in the bringing of numerous actions against a person, equity has intervened to prevent a multiplicity of suits. This is illustrated by the opinion of this court in *Illinois Central R. R. Co. v. Garrison*, 81 Miss. 257, 32 South. 996, 95 Am. St. Rep. 469, which is expressly distinguished from the principle laid down in *Tribette v. Illinois Central R. Co.*, *supra*—the distinguishing difference being the *continuing nature of the injury*, and the principle announced in *Tribette's Case* was expressly recognized. This distinction was also clearly drawn by this court in *Mills v. New Orleans Seed Co.*, 65 Miss. 391, 4 South. 298, 7 Am. St. Rep. 671, wherein the court says: "Where trespass to property is the single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere. But if the trespass is continuous in its nature, and repeated acts of trespass are done or threatened, although each of such acts taken by itself may not be destructive or inflict irreparable injury, and the legal remedy therefor be adequate for each single act if it stood alone, the entire wrong may be prevented or stopped by injunction." In *Ducktown Sulphur Co. v. Fain*, 109 Tenn. 56, 70 S. W. 813, the *Tribette Case* was considered by that court and

approved; and the Tennessee court held that a court of equity should not take jurisdiction to restrain actions at law by different property owners for damages for a nuisance, and dispose of the matters involved in such suits in a single action on the ground of preventing a multiplicity of suits. In *Boise Artesian Co. v. Boise City*, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796, it is said: "A court of equity ought not to interfere upon the ground of a multiplicity of suits by the same person against the complainant arising out of the same facts and legal principles, unless it is clearly necessary to protect the complainant against *continued* and vexatious litigation." See also, *Boston & M. R. R. v. Sullivan*, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275.

One of the most illuminating decisions upon this question rendered in recent times is *Turner v. Mobile*, 135 Ala. 73, 33 South. 132. After giving to this question a searching and exhaustive investigation, Chief Justice McClellan says: "It would seem to be an elementary and fundamental proposition that a party who seeks to come into equity must himself have an equity. His equity may be derivative. It may rest in him because of privity between him and others by force of contract or in estate; but, however it comes to him, it must exist in him, or he cannot maintain a bill. Where his title is legal, where his defense is at law, where all his rights, remedies, and defenses are answerable in a legal forum, and he therefore has in his own capacity and right no standing in a court of chancery, it is altogether plain and clear to us, Mr. Pomeroy and some courts to the contrary notwithstanding, that the wholly fortuitous, accidental, and collateral fact that numerous persons have like, but entirely independent and disconnected, legal rights or defenses, cannot, upon any conceivable principle, invest him with any right, legal or equitable, and that his rights, whatever they may be, are precisely the same as if no other person had similar rights. It is palpably illogical to say that one man may acquire rights of any sort from others with whom he has absolutely no connection or relationship by blood, in estate, or by convention. It is a palpable non sequitur to say that, when numerous persons have like, but independent, legal estates or legal rights, in respect of which severally they have no right to invoke the jurisdiction of chancery, yet, because they are numerous, the separate legal right of each is metamorphosed into an equity right in all, or in one for all. Jurisdiction in equity is not entertained on any notion that the court has an equity—that it will take jurisdiction to prevent a multiplicity of suits, in order to lessen its own labors or those of other courts. The equity upon which the invocation is made must reside in the party making it. When numerous par-

ties have each the same equity, they may in a proper case unite in one bill for its declaration and effectuation. Each having the separate right to come into equity upon an identical ground, they will be allowed to come in together, on the theory of preventing a multiplicity of suits." It is true that this case was subsequently overruled by the same court in *Southern Steel Co. v. Hopkins*, 157 Ala. 175, 47 South. 274, 20 L. R. A. (N. S.) 848, 131 Am. St. Rep. 20; but it must be conceded that the court in the later case signally failed to refute the unanswerable argument made by the court in *Turner v. Mobile*, supra. Another recent and unusually well considered case is *Vandalla Coal Co. v. Lawson*, 43 Ind. App. 226, 87 N. E. 47, et seq. wherein this question is taken up and discussed in its various phases, and the principle in the *Tribette Case* affirmed. We feel that we can add nothing to what has been said in the cases hereinbefore referred to.

The case of *Crawford v. M., J. & K. C. R. Co.*, 83 Miss. 708; 36 South. 82, 102 Am. St. Rep. 476, is not at all inconsistent either with the *Tribette Case*, supra, or with the opinion which we herein announce. In that case 57 different persons joined in executing notes for the amount of \$35,000. The execution of the notes grew out of the same transaction, but their validity depended upon the same identical principles of law, and the bill specifically charged that those notes were procured through fraud, and prayed that the notes be surrendered and canceled. The allegation that the notes were procured through fraud, and the prayer for surrender and cancellation thereof, gave the court of equity jurisdiction. The same may be said of *Pollock v. Okolona Savings Institution*, 61 Miss. 293. It is true that the court in that case seemed to rest its decision upon the authority of Mr. Pomeroy, yet the real ground upon which the court of equity assumed jurisdiction was that that was a case peculiarly of equity jurisdiction, independently of the question of a multiplicity of suits. *Murdock & Parchman*, a mercantile firm, becoming insolvent, executed a deed of general assignment, wherein they transferred to the assignee all of their property, real and personal, with directions to sell the same and with the proceeds to pay off their debts, making some of their creditors preferred and others unpreferred. Several of the unpreferred creditors sued out attachments at law against the assignors, upon the ground that the deed of assignment was fraudulent, and had the same levied on the goods in the hands of the assignee, and had writs of garnishment served for the *Okolona Company*, and upon *Black*, the assignee. The *Savings Bank of Mobile*, which was one of the creditors, in addition to suing out its attachment and garnishment writs, also filed a bill in the chancery court attacking the deed of assignment as fraudulent in law upon its

face. The *Okolona Savings Bank*, the garnishee in all these attachment proceedings and the defendant in the chancery suit brought by the *Mobile Bank*, under these circumstances filed a bill in chancery, the object of which was to enjoin the further prosecution of the attachments at law, the adjudication of the rights of all the parties by one decree, and the establishment of its own right to set off against the deposit standing on its books to the credit of *Black*, assignee, its own debt against *Murdock & Parchman*, the assignors, which exceeded in amount the sum of the deposit. This is a statement of the case as found in the opinion of the court. It is clear and manifest from this statement that a court of equity had jurisdiction of these matters, independently of any question of a multiplicity of suits.

The erroneous doctrine of Prof. Pomeroy finds its apotheosis in *Whitlock v. Railroad Co.*, 91 Miss. 779, 45 South. 861. In that case the court says: "It is clearly and thoroughly settled by the best-considered modern decisions in this state and elsewhere that such jurisdiction extends in all cases of this character, referring alone to the following: *Railroad v. Garrison*, 81 Miss. 264, 32 South. 996, 95 Am. St. Rep. 469; *Crawford v. M., J. & K. C. R. Co.*, 83 Miss. 708, 36 South. 82, 102 Am. St. Rep. 476; *Pollock v. Okolona Savings Bank*, 61 Miss. 293." We have heretofore shown in this opinion that neither of these cases referred to in the *Whitlock Case* is an authority for the principle so announced. The facts in the *Whitlock Case* were these: Some 50-odd persons each brought separate and distinct suits for damages against a railroad company. These were actions of tort, wherein both actual and punitive damages were claimed. The railroad company filed its bill of injunction, praying the chancery court to take jurisdiction upon the ground that the same principles of law and the same state of facts existed in each case, and the court sustained the bill in order to prevent a multiplicity of suits. After a careful and exhaustive research we have found but one case like it, and that is the case of *Southern Steel Co. v. Hopkins*, 157 Ala. 175, 47 South. 274, 20 L. R. A. (N. S.) 848, 131 Am. St. Rep. 20. In both of these cases the court entirely ignored the rights of each of these plaintiffs in the suits at law to have his suit determined upon its own merits, free and untrammelled, and independent of the suits of the other plaintiffs. The damages of each of the plaintiffs were necessarily different, and each plaintiff was necessarily compelled to establish his damage by altogether different testimony. In the chancery court, therefore, there was one suit, with a multitude of issues, these issues being separate and distinct, so far as the damages of the several plaintiffs at law were concerned, and a court of chancery is not the forum in which such damages should be ascertained. As is said in *Tribette*

v. R. Co., supra: "The recovery of damages for a tort or breach of contract does not pertain to courts of chancery, which decree damages only in a very limited class of cases and under peculiar circumstances, or as an incident to some other relief." 1 Pomeroy's Equity Jurisprudence, § 112; Story's Equity, § 790. The machinery of a court of equity is totally inadequate in such cases to further the ends of justice. The giving to chancery courts of the power to enjoin actions at law upon the sole ground of preventing a multiplicity of suits has opened up a perfect Pandora's box, and the practice has become quite common in this state that when one person is sued by two or more persons in actions of tort, where there is merely a community of interest in the questions of law and fact involved, and where there is no common title, and no community of interest or of right in the subject-matter, for the court of chancery to acquire jurisdiction. The evils resulting from this practice are too numerous to mention.

The usurpation upon the part of the chancery court is too flagrant for further discussion.

Since the preparation of the foregoing opinion, we have read with profit the recent opinion of the Supreme Court of Alabama in *Southern Steel Co. v. Hopkins*, 57 South. 11, wherein the Alabama court reconsiders its former opinion in this case as found reported in 157 Ala. 175, 47 South. 274, 20 L. R. A. (N. S.) 848, 131 Am. St. Rep. 20, and overrules the former opinion, and re-establishes in Alabama the doctrine announced in *Turner v. Mobile*, 135 Ala. 73, 33 South. 132. This recent opinion of the Alabama court is not only an exceedingly able one, and a valuable contribution to this subject, but it squarely affirms the rulings of this court in *Tribette v. Railroad Co.*, supra, and we quote from that opinion the following: "We base our conclusion chiefly upon the *Tribette Case*, which we concede to be the leading authority in the world upon the question of the jurisdiction of equity to prevent a multiplicity of suits. It has been reprinted time and again, and copied into the latest editions of most of the text-books upon the subject as stating the true doctrine."

Affirmed.

FISHER v. WESTMORELAND. (No. 15,383.)

(Supreme Court of Mississippi. Dec. 18, 1911.)

1. MALICIOUS PROSECUTION (§ 42*)—ACTIONS —PRINCIPAL'S LIABILITY FOR AGENT.

A principal is liable for the act of his agent in instituting a criminal prosecution maliciously and without probable cause, if such prosecution was expressly authorized, or sub-

sequently ratified, or was within the scope of the agent's employment.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 83-86; Dec. Dig. § 42.*]

2. MALICIOUS PROSECUTION (§ 42*)—ACTIONS —PRINCIPALS—LIABILITY FOR AGENT.

The operator of a sawmill broke his circular saw, and sent a negro to an unoccupied mill nearby to get a saw and bring it to the mill, and when it was brought he broke a part of it while attempting to attach it to his mill. At the suggestion of the agent of the owner of the mill from which the saw had been taken, the operator saw the owner and talked with him about the purchase of the mill, and the owner afterwards wrote his agent his terms for the mill, and stated: "If this does not suit him, this is authority for you to swear out warrant for the negro that took the stuff, as my agent." Held, that the letter did not expressly authorize the agent to prosecute for a theft, and excluded authority to prosecute any person other than the negro.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 83-86; Dec. Dig. § 42.*]

3. MALICIOUS PROSECUTION (§ 42*)—ACTIONS —PRINCIPAL'S LIABILITY FOR AGENT.

An agent, who has care and charge of an unused sawmill, which was for sale, while authorized to cause the arrest of a person to prevent theft of the property, had no implied authority to prosecute after an alleged theft had been committed.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 83-86; Dec. Dig. § 42.*]

Appeal from Circuit Court, Noxubee County; T. B. Carroll, Judge.

Action by J. T. Westmoreland against Walter S. Fisher and another. Judgment for plaintiff, and defendant Fisher appeals. Reversed and remanded.

The appellee was running a sawmill. He broke his circular saw, and, being in a hurry to get out a bill of lumber, he sent a negro in his employ to an old, abandoned mill in the neighborhood, which he knew was for sale, and which belonged to Walter S. Fisher, and instructed him to get a saw, and bring it to appellee's mill, and see if they could use it. The negro brought the saw, and appellee tried to fit it on his mill, but found he could not use it, and directed the negro to take it back to Fisher's mill. The negro carried it to his own house, where it remained for several days. Fisher lived in another county. In the meantime Fisher's agent, T. W. Crigler, who had been for some time trying to sell the mill, made inquiry about the missing saw, and was informed that Westmoreland had taken it to his mill. While Westmoreland was endeavoring to attach it to his mill, he broke a part called the "mandrel." Upon ascertaining the whereabouts of the saw, Crigler went to the appellee, and told him that Fisher would be mad about it, as he was endeavoring to sell the mill, and advised appellee to go to West Point and see Fisher about it. Appellee did so, and explained the circumstances to Fish-

er, who then proposed to sell him the machinery for a price which Westmoreland thought too high. Fisher then told appellee that he would write him later.

Thereafter Fisher wrote his agent, Crigler, at Macon, Miss., the following letter: "West Point, Miss., 6/22, 1910. Mr. T. W. Crigler, Macon—Dear Crigler: Mr. Westmoreland has been up here, and we had a talk about the stuff gone from the mill, and while I want to do the right thing by Mr. Westmoreland, still I have lost the sale of the mill, that can only be attributable to him, and I know that I am treating him as I would want to be treated when I sell him the outfit at what I have in it, which is \$678. I am sure this is fair, and if not I cannot see why, as I am loser in the transaction, as I would have gotten \$800 if it had not been tampered with. I also told him to pay \$100 down and balance by Dec. 15th in notes to suit his convenience, and if this does not suit him this is authority for you to swear out warrant for the negro that took the stuff as my agt. I think Mr. Westmoreland a fair fellow and I anticipate no trouble. Yours, W. S. Fisher." Thereafter Crigler swore out an affidavit against the negro and Westmoreland, charging them with grand larceny. The case was dismissed by the court after hearing the statements of the defendants. Westmoreland then brought suit against Fisher and Crigler for malicious prosecution, which resulted in a judgment against both defendants jointly for the sum of \$500, from which each defendant prosecutes a separate appeal.

The declaration contains the following language: "The said affidavit was made by the said Crigler as the agent for and at the instance and request and upon the direction of the defendant Fisher; both the said Crigler and the said Fisher knowing full well at the time same was made and directed to be made that the said charge was not true that plaintiff had committed the crime of larceny or any other crime with respect to the said Fisher's property; but the affidavit was made by the said Crigler for the said Fisher upon his (the said Fisher's) request and direction, and as the agent of the said Fisher, without probable cause and with malice," etc.

Gates T. Ivy and A. F. Fox, for appellant. Geo. Richardson and Flowers, Alexander & Whitfield, for appellee.

SMITH, J. [1] The principal is liable for the act of his agent in instituting a criminal prosecution maliciously and without probable cause, if the institution of such pros-

ecution was expressly authorized or subsequently ratified by the principal, or was within the scope of the agent's employment. In the case at bar the act of Crigler in instituting the prosecution complained of was never ratified by appellant, and he had no express authority to institute such a prosecution, unless it is contained in the letter written to him by appellant on June 22, 1910, which the reporter will set out in full.

[2] A mere inspection of this letter demonstrates that it contains no such authority. A proposition looking to the sale of the mill to appellee, as an adjustment of the damage sustained by appellant by reason of the taking of the saw and the breaking of the mandrel, was pending between appellant and appellee, and this letter advised Crigler, who was assisting appellant in this negotiation, on what terms appellant would sell the mill, and authorized him, in event the terms of sale were not satisfactory to appellee, to institute a prosecution against the negro, who, at the request of appellee, had taken the saw. Granting, therefore, that this letter authorized Crigler to sell the mill to appellee upon certain terms, authority to sell property does not include authority to prosecute for a theft. And, moreover, the letter, by reason of its express direction to prosecute the negro, excluded any authority to prosecute any other person. "*Expressio unius est exclusio alterius.*"

[3] Unless, therefore, the institution of such prosecution comes within the general authority conferred upon Crigler by reason of his being in charge of the mill as caretaker, appellant is not liable therefor. As such caretaker Crigler was authorized to do any and all things necessary to enable him to take care of and preserve the property; but his authority extended no further. If necessary to prevent a person from stealing the property, he was authorized to cause the arrest of such person, not in order to punish him, but to prevent the theft. The prosecution complained of was not instituted in order to prevent a theft of the property; for appellee's act, whatever it amounted to, upon which the charge of theft was based, had been committed some time before, and the prosecution could only have resulted in punishing him therefor.

It follows, from the foregoing views, that Crigler's act, in instituting the prosecution, was clearly without the scope of his authority. *Markely v. Snow*, 207 Pa. 447, 56 Atl. 999, 64 L. R. A. 685; *Daniel v. Railroad Co.*, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, 1 Ann. Cas. 718.

Reversed and remanded.

GURLEY v. STATE. (No. 15,543.)
(Supreme Court of Mississippi. Feb. 26, 1912.)

1. HOMICIDE (§ 218*)—EVIDENCE—DYING DECLARATIONS—ADMISSIBILITY.

The competency of dying declarations is exclusively for the court.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 458, 459; Dec. Dig. § 218.*]

2. CRIMINAL LAW (§§ 763, 764*)—DYING DECLARATIONS—INSTRUCTIONS.

Where the court admitted in evidence dying declarations, the jury must decide on the credibility thereof, and may consider the circumstances under which they were made; and it is improper to charge that if the dying declarations admitted in evidence are legal evidence, and made shortly before decedent's death and at a time when he was conscious and believing that death was imminent, the jury must weigh them with the other testimony in determining the guilt of accused.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. §§ 763, 764.*]

3. CRIMINAL LAW (§ 1111*)—APPEAL—RECORD—CONCLUSIVENESS.

The court, on appeal, must accept as true the statements of the trial court of its recollection of the proceedings sought to be reviewed.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1111.*]

4. CRIMINAL LAW (§ 721*)—IMPROPER ARGUMENT OF COUNSEL—REFERENCE TO FAILURE OF ACCUSED TO TESTIFY.

Where, in the altercation, accused was shot by decedent, and the evidence of the eyewitnesses was conflicting, and the dying declaration of decedent was the most material part of the evidence, and accused did not testify, and counsel for accused in his argument commented on the fact that, if decedent had recovered and accused had died, decedent would have been on trial instead of accused, the argument of counsel for the state that in that event decedent would have testified as to how the killing occurred was objectionable, as a comment on the failure of accused to testify, and violative of Code 1906, § 1918, necessitating a reversal of the conviction, though the court, on objection, directed the jury to disregard it.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1672; Dec. Dig. § 721.*]

Appeal from Circuit Court, Neshoba County; Geo. H. Ethridge, Special Judge.

W. H. Gurley was convicted of manslaughter, and he appeals. Reversed.

Among other instructions granted by the court for the state is the following: "No. 6. The court charges the jury, for the state, that the dying declaration is legal testimony, and if they believe beyond a reasonable doubt in this case that shortly before the death of the deceased, and at a time when he was conscious and believing that death was imminent and impending, he made statements to Morgan Parker, P. G. Tinsley, and J. T. Monroe, and other witnesses who testified in this case, as to how the difficulty occurred, then it is the duty of the jury to consider and weigh the same, along with the other testimony in the case, in determining the guilt or innocence of the defendant."

Flowers, Alexander & Whitfield, for appellant. Claude Clayton, Asst. Atty. Gen., for the State.

McLEAN, J. The appellant was indicted for murder, convicted of manslaughter, and sentenced to the penitentiary. The appellant was an employé of the Deemer Lumber Company, and one Dr. Davis was the surgeon or physician of the company. It was the rule or custom of the company to deduct from the wages of its employés the sum that might be due its surgeon. The appellant was indebted to Dr. Davis in the sum of \$10, and the lumber company held up the payment of this sum of money for the purpose of permitting the settlement between its surgeon and the appellant as to what was due Dr. Davis. This seemed to be the cause or origin of the difficulty. As to what occurred immediately before and just at the time of the killing, which terminated in the appellant shooting Dr. Davis and Dr. Davis shooting appellant, the evidence is conflicting. In view of the fact that the case is to be reversed, we do not deem it proper to express any opinion one way or the other upon this evidence.

In order to support the theory of the state as to what occurred at the time of the fatal encounter, the dying declarations of Dr. Davis were admitted in evidence. As stated, and as argued by counsel for both the state and the appellant, the case hinges on the question: (1) Whether or not the dying declarations were admissible (this may be termed "a dying declaration case"); (2) The reference of counsel for the state, in his closing argument, to the failure of the defendant to testify. It is altogether unnecessary for us to consider the action of the court below relative to the dying declarations, or as to any of the instructions which were given or refused, except to say that instruction No. 6, given for the state (which the reporter will copy in full), should not have been given. As to whether this instruction, standing alone, would be sufficient to reverse the case, it is not now necessary to decide.

[1] The competency of dying declarations is exclusively for the consideration of the court. Having once decided that it is competent, that the party was of the frame of mind required by the law to authorize the admission of his dying declarations, the power of the court over that question is at an end.

[2] It then becomes the province of the jury to decide upon the credibility, who are at liberty, in doing so, to take into consideration all the circumstances under which the declarations were made, including those already proved to the court, and to give to the evidence only such credit or force as,

upon the whole, they might think it deserves. But, when the court has once passed upon the competency of the evidence, its duty then ends. As was said by this court in *Thompson v. State*, 73 Miss. 584, 19 South. 204: "We have never perceived upon what principle the trial courts have acted in singling out particular portions of the evidence in a cause, and telling the jury that it ought or might consider this, that, or another part of the evidence, in connection with the other evidence in reaching a verdict. By admitting the evidence the court has declared its competency, and the jury should be left to its function of determining the weight and effect to be given to it."

[3] Careful, protracted, and repeated examinations of the voluminous record have satisfied us that there is reversible error relative to the argument made by the prosecuting counsel. During the closing argument of the counsel representing the state, the counsel referred to the failure of the defendant to testify. There is some controversy between the counsel for the state and counsel for the defendant as to just exactly what this statement was. The court, however, puts in the record what his recollection of this was, and we are bound to accept the statement of the court as being the true and correct interpretation and language of counsel.

[4] The record shows this: "The court recollects the matters referred to in the testimony, and was watching the arguments of counsel very close; and I recollect that defendant's counsel had commented on the fact that, if Dr. Davis had gotten well and defendant had died, Dr. Davis would have been on trial, perhaps, instead of the defendant, on a similar charge, and that counsel for the state, Mr. Byrd, in alluding to that, quoted from counsel for the defendant and said: 'If that was true, he would have put Blankenship and other witnesses up, and Dr. Davis would have mounted the stand and told how that occurred.' This statement being objected to, the court promptly sustained the objection and instructed the jury not to regard it; and the court also instructed the jury not to regard any statement as to the defendant not testifying. And I will also state that the instructions asked for by the defendant on that point were given prior to the opening of the arguments by counsel, and those instructions were read by counsel for the defendant to the jury, and they were fully informed thereby, by defendant's counsel, that no prejudice could result from the defendant's failure to testify."

It is urgently and forcefully insisted by appellant that this was error, and reversible error. It must be borne in mind that, in the altercation between Dr. Davis and the defendant, both were shot, that there was a conflict in the evidence of the eyewitnesses as to what occurred at the time of the shoot-

ing, and that the dying declarations of Dr. Davis were material—in fact, the dying declarations constituted perhaps the most important and material part of the evidence for the state. Section 1918 of the Code provides that: "The accused shall be a competent witness for himself in any prosecution for crime against him; but the failure of the accused in any case to testify shall not operate to his prejudice or be commented on by counsel." This court, in *Yarbrough v. State*, 70 Miss. 503, 12 South. 551, in condemning any reference whatever by the prosecution for the failure of the defendant to testify, says that: "The word 'comment,' as employed in the statute, does not mean to criticize or condemn or anathematize the accused on his failure to testify. It forbids in unmistakable language any comment, friendly or unfriendly. It forbids any remark of any character in any words upon the failure of the accused to testify. The attention of the jury is not to be called to the fact at all by counsel"—and for the reason, alone, that comment was made by the counsel upon the failure of the defendant to testify, a new trial was granted.

In *Reddick v. State*, 72 Miss. 1008, 16 South. 490, the question was again before this court, and in that case this court says: "The counsel for the state himself admits that, referring to the alleged admission made by the prisoner to the state's witness Swayze, he used this language, viz.: 'And he has not denied it.' He further admits that when the prisoner's counsel interrupted him, suggesting the impropriety of his comment, he corrected himself, and said: 'It has not been denied.' The counsel making the comment, on the hearing of a motion for a new trial, testified that it was not his intention to refer to the fact that the defendant failed to take the stand in his own behalf; but his intention was immaterial, if in fact he used such language as could be reasonably construed to be a comment, and an unfriendly one, too, upon the failure of the accused to testify. The court below so construed the remark. We so construe it, and the jury without doubt so understood it. It is true that, immediately on the prisoner's counsel excepting to the language of the counsel for the state, the court instructed the jury that the district attorney was prohibited from commenting on the defendant's failure to take the stand in his own behalf, and that the jury must not consider any such comment. But this action of the court could not and did not undo the wrong already done. The statute forbids absolutely any comment on the failure of the accused to testify, and it is the right of every person charged with crime to insist that he enjoy this statutory immunity from criticism by hostile counsel; and the disregard of this plain statute, and the decisions of this court upon it, by the state's own counsel must reverse the judgment appealed from in this case"—referring

to Yarbrough v. State, 70 Miss. 593, 12 South. 551.

In Sanders v. State, 73 Miss. 444, 18 South. 541, this question was again before the court, and for the third time this court, in the most positive language, condemned any reference whatever by counsel for the state to the failure of the defendant to testify, and on that ground alone reversed the case. In this latter case the court said: "It is true the court promptly rebuked counsel, and directed the jury to disregard the fact alluded to, and counsel then asked that his remarks be considered as withdrawn; but the court, for the second time, held that this did not cure the error." In Boyd v. State, 84 Miss. 414, 36 South. 525, this court held that it was reversible error for the state to prove upon the trial in the circuit court that the defendant did not testify before the justice of the peace who conducted the preliminary investigation.

No ingenuity, however artful, no subtlety, however refined, can escape the conclusion that this statement made by the prosecuting counsel held up to the jury the failure of the defendant to testify. It was a thrust, sharp and incisive as a rapier, at the appellant that he should be condemned for his failure to testify. If the other man, Dr. Davis, were on trial, he would be more frank, and not be afraid of a full disclosure; but this defendant was afraid of a full disclosure, and hence dared not testify. This was the necessary and inevitable effect produced upon the mind of the jury. If prosecuting counsel expect this court to punish violators of the law, they themselves must obey the law, the plain and positive requirements of the statute. In their zeal and earnestness to secure convictions they must confine themselves to legitimate argument, such, at least, as has not been expressly prohibited by the Legislature, and also condemned by the court of last resort.

For this error the judgment is reversed.

COMANS et al. v. TAPLEY et al.
(No. 14,786.)

(Supreme Court of Mississippi. April 17, 1911. On Suggestion of Error, Feb. 26, 1912.)

1. EQUITY (§ 431*) — RECITALS — CONCLUSIVENESS.

A recital in a decree that a person was a defendant in the suit is conclusive that he was a party defendant, in the absence of evidence to the contrary.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1048-1051; Dec. Dig. § 431.*]

2. ABATEMENT AND REVIVAL (§ 74*)—TIME FOR REVIVAL—"FINAL DECREE"—"INTERLOCUTORY DECREE."

A decree in a suit to cancel a sale by a mortgagee in possession, and a sale by him as administrator of the purchaser, and for an accounting, which cancels the sale, orders an ac-

counting, appoints a commissioner to take an accounting, and reserves other questions until the coming in of the report of the commissioner, is not a final decree, from which an appeal should have been taken within the time limited by law, so that a failure to appeal would bar a right to revive the action after the death of parties thereto, but was an interlocutory decree only; a "final decree" being one which disposes of the cause, either by sending it out of court before a hearing on the merits, or after a hearing on the merits, decreeing either in favor of or against the prayer of the bill, and an "interlocutory decree" being one made pending the cause, and before a final hearing on the merits.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 429-444; Dec. Dig. § 74.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2774-2798; vol. 8, p. 7663; vol. 4, pp. 3712-3715; vol. 8, p. 7692.]

On Suggestion of Error.

3. EQUITY (§ 67*)—"LACHES."

"Laches" is not mere delay, but delay working a disadvantage to another, and, so long as parties are in the same condition, it matters little whether one presses a right promptly or slowly within limits allowed by law; and the doctrine of laches is founded on the maxims of equity that he who seeks equity must do equity, and that he who comes into equity must come with clean hands, and that the law serves the vigilant, and its object is to exact of a party fair dealing with his adversary.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191-196; Dec. Dig. § 67.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3960-3972; vol. 8, p. 7700.]

4. ABATEMENT AND REVIVAL (§ 74*)—LACHES—DELAY IN REVIVING SUIT.

A delay of 40 years in reviving a suit to cancel a sale by a mortgagee in possession, and a sale by him as administrator of the purchaser, and for an accounting, bars relief, especially where the property has passed for value into hands of an innocent third person, who had no actual knowledge of the pendency of the suit, and who was not guilty of negligence in not obtaining such knowledge, though he had constructive notice, and where it is doubtful whether the parties may obtain the necessary evidence to a fair presentation of the case.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 437; Dec. Dig. § 74.*]

Appeal from Chancery Court, Hinds County; G. G. Lyell, Chancellor.

Bill by Mary Ann Comans and others against Iola Tapley and others to revive a suit. From a decree denying relief, complainants appeal. Affirmed on suggestion of error in former opinion.

Greaves, Easterling & Stricker and Allen Thompson, for appellants. Green & Green, for appellees.

WHITFIELD, C. A statement of the facts of this case is necessary to an intelligent comprehension of the opinion of the court in deciding it. The facts which we deem it essential to state are as follows:

About the year 1842, one Norman Baldwin was the owner of a residence lot in South

Jackson, on which he resided with his wife, Mary Ann, until about the year 1845, when he went West on a trading expedition. Before leaving, he carried his wife and children to Holmes county, and left them in the care of her people. Baldwin never returned, but died some time later in Texas, as his wife learned. About the year 1849 Mary Ann Baldwin, his widow, married Daniel Comans. Comans was afterwards appointed administrator of the estate of Baldwin, and instituted the proceedings in the original suit, which suit is, by the present bill, sought to be revived. Baldwin and his wife had three children, Normanda, who married E. A. Smith, Mary Lavinia, who married John Byrne, and William B., who died a minor without issue. Comans, as administrator, filed a report in the probate court in 1858, Exhibit A to the bill of revivor herein, in which he states that he took out letters of administration for the sole purpose of recovering the residence house and lot owned by Baldwin. On May 17, 1858, Comans filed a suit in the superior court of chancery against E. M. Avery and T. S. Tapley, the husband of Martha C. Tapley; and on December 2, 1858, an amended bill was filed, by which it seems certain new parties were introduced. The case was then transferred to the chancery court, First district, of Hinds county. The said case was submitted on bill, amended bill, answer, exhibits, and proofs, and was taken under advisement by the court, and at the May term, 1868, the court rendered a decree, which is as follows:

"This cause having been submitted on a former term, on bill, amended bill, exhibits, answers, and proofs, and the court now being sufficiently advised, and because it appearing that Norman Baldwin, deceased, in his lifetime was seised and possessed of a certain town lot in the city of Jackson, Mississippi, known as lot 18, south, and that on the 22d day of October, 1845, he borrowed from defendant Avery the sum of \$400, and executed his note for the same due 1st of April, 1846, and also a mortgage on said house and lot to secure the payment of said note, said mortgage being dated on the 22d of October, 1845; that said Baldwin went on a trading expedition to the states of Texas, Arkansas, and California, and during the time of his absence departed this life, leaving a wife, who afterwards married the plaintiff, Comans, and the children named in the bill in this cause, to wit, Lavinia, William, and Normanda Baldwin, all of them minors, etc., represented by said Daniel Comans in said bill; that since the filing of said bill said Willie has died, and the said Lavinia has married one John Burns, and the said Normanda has married one E. A. Smith, both of said husbands having been made parties by the amended bill; that during the absence of said Norman Baldwin

said defendant Avery took possession of said land and lot, rented the same, received large sums for said rent, which he has appropriated, as he claims, to the payment of said note and mortgage, and that after the death of said Norman Baldwin the said Avery sold the said house and lot at public sale without authority of law, and without having administered on his estate and obtained authority to sell the same, and without having taken any steps to foreclose said mortgage, and that at said sale one Thos. A. Isler became purchaser, also that the amount received by said Avery for rent is alleged to have been sufficient to discharge the said note and mortgage, besides what he received from said sale from Thos. A. Isler; that said Isler afterwards died, and said Avery became his administrator, and as such under order of the probate court sold said lot and house to the defendant Martha C. Tapley. And it appearing to the court that the said sales made by the said Avery were null and void, they are therefore so declared, and the court doth order and adjudge and decree that the title to said house and lot, not having been divested by said sales by said Avery, remained in the said Norman Baldwin, and at his death vested in his said widow, now the wife of plaintiff, Comans, and his three children; the said Willie having died a minor, and since the original bill was filed, his interest having descended to his two sisters. It is therefore ordered, adjudged, and decreed that the said sales made by the said Avery are null and void, that the title to said house and lot is in the said widow and children of the said Norman Baldwin, and that an account shall be taken of all moneys received by the said Avery for rent of said house and lot at any and all times, and what was a reasonable rent for the same during the time, how much was expended by him, and what was a reasonable amount to be expended in necessary repairs on said building, what sums were received by him from the sale of said house and lot, when made by him, what amount was due on said note and mortgage of said Norman Baldwin, due said Avery at the date of sale made by him of said house and lot to said Isler as stated in his answer; that Geo. A. Smythe be appointed commissioner to take and state such account with all due and convenient speed, giving to the defendants or their solicitors of record notice of the time and place of taking said account, and that he report the same to the court; that in taking said account he may refer to the pleadings and proofs on file in this office, and call witnesses before him, and send up their testimony with his report, and all other questions are reserved until the coming in of said report."

Smythe, the commissioner, took no steps toward making the account, and filed no report. It would seem that the late Judge

Wharton, counsel for Comans, wrote him a letter on November 4, 1870, saying that he had previously written him that the case had been decided in favor of the heirs of Baldwin, and the court had appointed Mr. Smythe to state an account, etc.; but he did not know whether Mr. Smythe would take the account unless paid in advance. About this time, 1870, Comans seems to have been murdered. Nothing further is shown to have ever been done in the original suit, filed by Daniel Comans, administrator, from the date of the decree, May, 1868, until the filing of this bill on the 29th day of December, 1908. In the meantime Commissioner Smythe died, and no other was appointed. In other words, neither the complainants nor the defendants in said original suit have taken any steps to bring that litigation to a close, from the date of the said decree, until the filing of this present bill of revivor. Mrs. Martha C. Tapley, recited by the decree to be a defendant, was in possession of this property in 1858, when the original suit was filed, and continued in possession during the progress of the trial and until the time of her death in 1897, and after that her heirs at law continued in possession of said property until 1900, when the property was sold for division of the proceeds among said heirs, and was purchased by Mrs. S. S. Brame, and the said property was afterwards conveyed by Mrs. S. S. Brame by a special warranty deed, October 25, 1902, to Miss Iola Tapley, a daughter of Chas. P. Tapley, one of the parties to said partition suit, and a son of Mrs. Martha C. Tapley, defendant in the original suit here sought to be revived.

The only defense set up by the defendants is adverse possession and various other statutes of limitation. But there is nothing in any of these contentions, unless the case is saved for them by adverse possession for the time required by law to confer title. The prayer of the bill in this present case is that said original suit be revived, a new commissioner appointed, and the cause proceeded with. The original decree, made at the May term, 1868, above set out in full, shows all the material facts as to the dealing with this property by Avery, and how Mrs. Martha C. Tapley came into possession. A most material part of the testimony in respect to the claim set up that the defendants had adverse possession is the testimony of Mrs. Comans, the wife of Daniel Comans, and the testimony of Mrs. Normanda Constanta Smith, in which they both positively testify that some 20 years before the taking of their depositions, which seem to have been done some time in May or June, 1910, Mr. Chas. P. Tapley, the son of Mrs. Martha C. Tapley, went from Jackson to the home of Mrs. Comans, who appears to have been about 86 years old at the time of the taking of the depositions, in Neshoba county,

Miss., where she lived at the time of the taking of these depositions. It appears that Mrs. Comans remained about five or six years in Holmes county with her people, and then went to this place in Neshoba county. It appears that this home of Mrs. Comans in Neshoba county was, at the time of the visit of Tapley, about 25 miles from any railroad. Mrs. Smith seems to have lived in Neshoba county, about one mile from her mother, Mrs. Comans. The testimony of Mrs. Comans and Mrs. Smith is to this effect: That Chas. P. Tapley and a Mr. Hatcher came to Mrs. Comans' house for the sole purpose of buying this property, and that Mr. Tapley told Mrs. Comans, that his (Tapley's) mother was a poor woman, and that his mother would give Mrs. Comans \$1,800 or \$1,400 for this property in Jackson, but that Mrs. Comans declined to take less than \$2,000, saying, however, that she would come over to Jackson before long to see about it; that Tapley left, and they never saw him or heard from him any more. They further testified that the sole business of Tapley at Mrs. Comans' house on that occasion, where he stayed just a little while, was to make this offer to buy this property. It is due to Tapley to state that he denies that he had any conversation with Mrs. Comans on the subject. He states that he and Mr. Reese Hatcher, a neighbor, did go to Neshoba county about 1872 or 1873; but he states that he did not go to see Mrs. Comans at all, and never had a conversation with her in his life. Hatcher is dead. Chas. P. Tapley further testifies that his mother was generally recognized as the owner, and that he never heard of any claim otherwise, except that Judge Wharton, who it will be remembered was the counsel for Comans in the original suit, said to a cousin of Tapley's, Mr. Dick Hardy, in 1868, that he (Judge Wharton) could "take the property," and that this remark was repeated to his mother, but that he (Tapley) paid no attention to the remark.

The object of appellants in introducing the testimony of Mrs. Comans and Mrs. Smith was to show a permissive holding and knowledge on the part of Mrs. Martha C. Tapley that the property belonged to the Comans heirs. In our view of the case, however, it does not become material to discuss this testimony further. It is merely stated as a part of the history of the case. We regard this case as turning solely upon the answer to the question whether the original suit filed by Daniel Comans, in which the decree was rendered at the May term, 1868, is still a pending suit. If it is a pending suit, then, of course, no plea of adverse possession can avail, and the possession, though continued from 1868 until the institution of this suit in 1908, affords no protection to the defendants. It is certainly a most extraordinary fact that no steps were taken by either the

complainants or the defendants in this original suit for such an unusual length of time. But it was as much the duty of the defendants as the duty of the complainants to have that suit proceeded with and ended, and our only duty is to declare the law governing the case, having nothing to do with the consequences.

Courts cannot afford, on account of the hardship of cases, to announce bad law. All persons are charged with a knowledge of the law, and it was the duty of both complainants and the defendants to have seen that this litigation was prosecuted to a conclusion and definitely terminated. Either party could have moved in the cause, and set the machinery of law in action, and had their respective rights determined, and all the equities of the original cause, as to the debt to Avery, and whether it was paid or overpaid, and as to the rents that were collected, and as to the amounts necessarily expended in repairs and improvements, and as to any sums that may have been paid by way of purchase money definitely adjudicated, very soon after the decree of May, 1868. It is the fault, not of the law, but of the parties, that this was not done.

Coming, then, to the determining question in the case, let us note what this decree did, and required to be done. In the first place, it canceled the sales from Avery to Isler, and from Avery, administrator of Isler's estate, to Martha C. Tapley, and declared them to be null and void. In the second place, it declared an accounting between the parties essential to the proper settlement of the various equities existing between them. It directed the commissioner to take said account, covering all the equities which we have above mentioned, and to report its action to the court. In the third place, the court expressly in the decree reserved all the other questions until the coming in of the commissioner's report. In the fourth place, there was no decree for costs, a matter not in itself determinative, but to be noted carefully. Mrs. Martha C. Tapley, in the settlement of the equities, would certainly have been entitled to be subrogated to the extent of the \$400 due by Baldwin to Avery, and secured by the mortgage and the interest thereon, and she would also be entitled to the amount of any improvements made by her, and all taxes paid by her, and she would be liable to account for the amount of the rent of said property received by her, during the whole period of her possession. It is impossible to see how an intelligent final decree could have been rendered in the case until the coming in and consideration and settlement of the commissioner's report.

[1] One point should just here be disposed of. It is earnestly insisted by appellees that Mrs. Martha C. Tapley never was a defendant to this original bill filed by Comans, and it is stated with earnestness that the answer denies under oath that she ever was

such a party. So far as this last point is concerned, however, we have answer under oath expressly waived, and there is not a particle of testimony in the case to show that Mrs. Martha C. Tapley was not a party defendant to that suit. On the other hand, the said decree at the May term, 1868, expressly recites on its face that Mrs. Martha C. Tapley was a defendant. In the absence of evidence to the contrary, this solemn recital in the decree is conclusive that she was a party defendant to that suit. In the case of *Germania Fire Insurance Company v. Francis*, 52 Miss. 457, 24 Am. Rep. 674, it was expressly held that a technical discontinuance of a suit, as known at common law, has been abrogated by our statutes, and does not here exist. We think that the principle announced in the case of *Tucker v. Wilson*, 68 Miss. 693, 9 South. 898, controls this case. That opinion was so clear and directly in point, that we set it out in full. It is as follows:

"The suit begun by the complainants in 1870 was not abated by the death of the next friend by whom they sued, nor by the fact that the complainants attained their majority after suit brought. There was no necessity for a bill of revivor. All that was required was for them to appear in the suit as adults and prosecute it. The paper exhibited by them as a bill of revivor was a very proper mode of bringing to the notice of the court their wish to appear in their own behalf as adults, and continue the suit begun in their behalf by their next friend, and it was fit that the defendants should be aroused from their long sleep, be advised of the purpose of complainants, and notified to answer the original bill, as ordered by the Supreme Court. The suit has been a pending suit all the time, as between the parties to it certainly, and is to be proceeded with as if a long time had not elapsed, and because of this no statute of limitations is applicable. 1 Dan. Ch. Pl. & Pr. pp. 77, 78. The sale of the land by the trustee, and its purchase by the defendant, made no change in the rights of parties. Mrs. Wilson, as a party, was bound to know that the blunder by which case No. 636 was dismissed did not in any manner affect the real case, No. 564, which was properly before the Supreme Court, and was disposed of by it by reversing the decree, overruling the demurrer, and requiring an answer in 40 days. If a stranger to the record should claim to have been misled by the mandate sent out after the dismissal mentioned, she could not. The suit brought by the complainants in Union county, and which upon demurrer was dismissed without prejudice, and the action of ejectment they instituted and dismissed, had no effect whatever on this suit. These fruitless efforts show a want of a proper conception of the right course for the complainants to pursue for their advantage, but do not furnish a reason for precluding them from

proceeding in the right way they have now discovered and undertaken to pursue. The case is to be proceeded with just as if the judgment of this court, rendered March 24, 1873, had been promptly certified to the chancery court of Lee county. Mrs. Wilson will be allowed to answer the original bill, as she might have done 18 years ago. She might then have paid the costs of this court adjudged against her and codefendants, and have speeded the cause; but, having allowed it to remain in statu quo so long, she must now meet the case made by the bill."

There was a lapse of time there of some 18 years. Of course, length of time is immaterial, if it remains true that the suit has always been pending.

[2] It is further earnestly contended in the very able brief of learned counsel for appellees, however, that the suit is not pending, because, as is said, the decree rendered in May, 1868, was a final decree, and not an interlocutory decree. The argument is that the decree was final in so far as it affected the title, and that the rest of the decree, appointing a commissioner and directing him to state an account as indicated above, so that the equities between the parties might be settled, as also indicated above, though admittedly interlocutory in its character, did not prevent an appeal from that part of the decree finally settling the title to the property. In other words, it is said that a decree may be in part final and in part interlocutory, and that in such case that part which is final may be appealed from, and that the decree in this case as to title was final, and that part of the decree could have been appealed from, and hence this present bill is barred by the statute of limitations on that subject. We have given a most careful consideration to the authorities cited by the learned counsel on both sides touching this point. The best and clearest statement we have been able to find, is set out in sections 29 and 32 of volume 1 of Freeman on Judgments.

We quote a part of section 29 as follows: "An interlocutory decree is one made 'pending the cause, and before a final hearing on the merits. A final decree is one which disposes of the cause, either by sending it out of the court before a hearing is had on the merits, or after a hearing on the merits, decreeing either in favor of or against the prayer of the bill.' But no order or decree which does not preclude further proceedings in the case in the court below should be considered final. A decree is interlocutory which makes no provision for costs, and in which the right is reserved to the parties to set the cause down for further direction not inconsistent with the decree already made; and so is a decree which contains a provision for a reference of certain matters, and that all further questions and directions be reserved until the coming in of the report of the referee. An order or decree pro con-

fesso for an injunction restraining the use of an invention is interlocutory merely; but a decree dismissing a bill, or dissolving an injunction and passing definitely on all the essential points in issue, is final. Interlocutory decrees are entered under an infinite variety of circumstances, and the relief afforded corresponds in variety to the circumstances demanding it. It is therefore difficult, and perhaps impossible, to formulate any classification which will include every order or interlocutory judgment or decree. By far the greater number of those which are at all likely to be mistaken for final judgments or decrees fall within the following classification: (3) Those which, while they determine the rights of the parties, either in respect to the whole controversy or some branch of it, merely ascertain and settle something without which the court could not proceed to a final adjudication, and the settlement of which is obviously but preliminary to a final judgment or decree."

We quote as follows from section 32: "Instances of interlocutory decrees of the third class are very numerous. Thus if the suit is for the dissolution of a partnership, and for an accounting and a settlement of the partnership business and the division of its assets, the court may be required to determine whether any partnership existed, and, if so, whether it ought to be dissolved, and what were the respective interests of the several parties before the court therein. The determination of these questions, accompanied with a direction that an account be taken, will not be deemed a final adjudication, unless the decree is so complete that nothing remains to be done except to follow its directions. In suits for partition, the courts must determine the interests of the cotenants, and whether partition shall be made by a sale of the property, or otherwise; but it is not until the confirmation of the partition, whether by sale or allotment, that a final decree exists. A decree that parties account is another familiar instance of a determination preliminary to, but not constituting, a final judgment. A decree declaring that complainant is entitled to have lands sold to pay purchase money or a mortgage debt due him is not final, if a reference is ordered to ascertain what sum remained unpaid. An action was commenced to enforce certain liens against real estate, and a judgment therein was entered, directing that a sale of the premises be made, and that from the proceeds a sum specified should be paid to discharge one of the liens, and that the plaintiff should be paid an additional sum, less the amount due from him to the defendant for rent of the premises, and that a reference be had to ascertain the amount of such rent. An appeal was taken from this judgment. The appellate court, on motion to dismiss the appeal, considered that as the object of the action was to ascertain to whom the whole proceeds to be deriv-

ed from a sale of the premises should belong, and as this could not be ascertained until it was known what amount ought to be deducted from the plaintiff's claim for rents, the judgment entered by the court below was not a final judgment. Obviously a decree of foreclosure cannot be final, if it neither determines the amount to be paid nor ascertains or describes the property to be sold, nor if it merely declares the amount due, without awarding to plaintiff the only relief to which he is entitled in the suit, to wit, a direction or judgment that the property be sold and the proceeds applied to the satisfaction of the mortgage debt. While the question of costs can hardly be regarded as forming a distinct issue in the case, nor its reservation as necessarily preventing a final determination of the rights of the parties, yet in some states a judgment or decree, otherwise final, reserving this question, is treated as interlocutory."

Another most admirable statement of the law on this subject is found in the very able opinion of Baldwin, Justice, in the case of *Cocke's Administrator v. Gilpin*, 40 Va. 20. In the course of that opinion, the court said: "It will be seen from an examination of the numerous decisions of this court on the subject of the finality of decrees, in reference to appeals, bills of review, etc., that they have all been founded upon the idea that a decree is not final unless the cause itself has been thereby terminated in the court below. Thus, though a decree decides upon the question of title, or otherwise settles the principles of the cause (*Young v. Skipwith*, 2 Va. 300; *Grymes v. Pendleton*, 5 Va. 54; *McCall v. Peachy*, 5 Va. 55; *Bowyer v. Lewis*, 11 Va. 553), though it dismisses the plaintiff's bill as to one of two separate subjects of controversy, and as to the other also determines the right of the parties (*Templeman v. Steptoe*, 15 Va. 339), though a decree nisi directs that the tract of land in the bill mentioned be surveyed and part thereof allotted to the plaintiff, and that the defendant shall execute to him a conveyance for such part, and pay the costs of the suit (*Albridge v. Giles*, 13 Va. 136), though the decree directs the defendant to pay to the plaintiff hires to be ascertained by commissioners, and to deliver up the property, to be sold by the commissioners, and the proceeds applied to payment of the plaintiff's claim and the costs of suit, and the residue, if any, to be paid to the defendant (*Mackey v. Bell*, 16 Va. 523), though, at the suit of creditors against executors and devisees, it empowers the executors to sell such of the lands held by the devisees as, after application of the testator's goods and credits, shall be necessary for the payment of his debts (*Goodwin v. Miller*, 16 Va. 42), though it awards to the plaintiff his principal money, interest, and costs, if it directs, in the event of an unproductive execution, that certain trust property shall be delivered

by the defendant to the marshal to be sold, and the proceeds, after deducting a sum to be deposited for another, to be applied to the satisfaction of the plaintiff (*Hill's Ex'r v. Fox's Adm'r*, 37 Va. 587), though in a mortgage suit it forecloses the mortgage and directs the sale of the property (*Fairfax v. Muse's Ex'rs*, 12 Va. 558; *Ellzey v. Lane's Ex'x*, 12 Va. 592; *Allen v. Belcher*, 12 Va. 595), yet in all these cases the decree is only interlocutory, if something yet remains to be done in the cause, and so the parties are not put out of court." And, at page 27, the court lays down this test: "For my own part, I am aware of no proper criterion but this: Where the further action of the court in the cause is necessary to give completely the relief contemplated by the court, there the decree upon which the question arises is to be regarded, not as final, but interlocutory. I say the further action of the court in the cause to distinguish it from that action of the court which is common to both final and interlocutory decrees, to wit, those measures which are necessary for the execution of a decree that has been pronounced, and which are properly to be regarded as adopted, not in, but beyond, the cause, and is founded on the decree itself, or mandate of the court, without respect to the relief to which the party was previously entitled upon the merits of his case. Any other criterion than this seems to me liable to the objection of ambiguity or uncertainty."

And this court held on the concrete case as follows (see syllabus, 40 Va. 20): "In a suit by one partner against his copartner, for a settlement of the partnership accounts, and for a moiety of a tract of land purchased by the defendant in his own name, and paid for out of the partnership funds, a decree having been made declaring the land partnership property, and directing a settlement of the accounts, and the cause afterwards coming on to be further heard upon the report of the commissioner, the court decrees that the plaintiff pay to the defendant the sum of money appearing due by the report, and that the defendant thereupon convey to the plaintiff a moiety of the land; but if the plaintiff shall not, within six months from the date of the decree, pay the said money, that the marshal sell the moiety of the land, and out of the proceeds of sale, after defraying the expenses, pay to the defendant the money so decreed, and the residue, if any, to the plaintiff. And the court further decrees that the outstanding debts due to the firm be equally divided between the parties, and that the cost of the suit be equally borne by them. Held, this decree is interlocutory, and it may be reviewed upon an appeal, although there has been such lapse of time between the rendition of the decree and the appeal as would preclude it being reviewed if the decree was final."

In the light of these decisions, applying the

principles therein announced to the said original decree rendered at the May term, 1868, in the suit brought by Daniel Comans, administrator, we are clearly of the opinion that the said decree was not a final, but an interlocutory, decree only.

It follows, from these views, that the contentions of the learned counsel for the appellees cannot be sustained.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the decree of the court below is reversed, and the cause remanded, to be proceeded with in accordance with the said opinion.

On Suggestion of Error.

SMITH, J. We do not think this case is controlled by the case of *Goff v. Robins*, 33 Miss. 153, for the reason that in that case the decree which it was sought to revive, amend, and execute was a final decree, while here the decree which it is sought to amend and execute is an interlocutory decree. After a most thorough consideration, however, of this most extraordinary case, we are of the opinion that we erred in reversing the decree of the court below, and that the same should be affirmed, on account of the inexcusable delay of appellants in proceeding to obtain the amendment and execution of the decree rendered May, 1868, coupled with the great hardship which would now result to an innocent party, should that decree be now enforced. The power of a court of equity to enforce the doctrine of laches, where the delay is for a period less than the time required by the statute of limitations, is not here involved, for the reason that the longest period of time prescribed by any statute of limitations has four times passed since this decree was rendered.

[3] The doctrine of laches is founded principally upon the equity maxims "He who seeks equity must do equity," "He who comes into equity must come with clean hands," and "The laws serve the vigilant, and not those who sleep over their rights." Its object is to exact of the complainant fair dealing with his adversary. According to Mr. Pomeroy, with whom we fully agree, this doctrine cannot be more concisely and accurately stated than in the language of Stiness, J., in *Chase v. Chase*, 20 R. I. 202, 37 Atl. 804: "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right.

The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side and injury therefrom on the other it is a ground for denial of relief." 1 Pomeroy's *Equitable Remedies*, § 21, and authorities there cited, particularly *Wilson v. Wilson*, 41 Or. 459, 69 Pac. 923; *Lindsey Petroleum Co. v. Hurd*, L. R. 5, P. C. 221; *Naddo v. Bardon*, 51 Fed. 493, 2 C. C. A. 335; *Ryason v. Dunten*, 164 Ind. 85, 73 N. E. 74; *Neppach v. Jones*, 20 Or. 491, 26 Pac. 569, 849, 23 Am. St. Rep. 145.

In *Wilson v. Wilson*, supra, 41 Or. 463, 69 Pac. 924, it was said: "Several conditions may combine to render a claim or demand stale in equity. If by the laches and delay of the complainant it has become doubtful whether adverse parties can command the evidence necessary to a fair presentation of the case on their part, or if it appears that they have been deprived of any such advantages they might have had if the claim had been seasonably insisted upon, or before it became antiquated, or if they be subjected to any hardship that might have been avoided by reasonably prompt proceedings, a court of equity will not interfere to give relief, but will remain passive. * * * If, however, upon the other hand, it clearly appears that lapse of time has not in fact changed the conditions and relative position of the parties, and that they are not materially impaired, and there are peculiar circumstances entitled to consideration as excusing the delay, the court will not deny the appropriate relief, although a strict and unqualified application of the rule of limitations would seem to require it. Every case is governed chiefly by its own circumstances." In *Lindsey Petroleum Co. v. Hurd*, supra, the language of the court, at page 239, was as follows: "Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay, of course, not amounting to a bar by any statute of limitations, the validity of that defense must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." In *Buckner and Stanton v.*

Calcote, 28 Miss., at page 596, the court approved the statement by Lord Camden in *Smith v. Clay, Ambler*, 645, that: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, when the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced." As was said by the late Mr. Justice Brewer while on the circuit: "No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many." *Naddo v. Bardon*, 53 Fed. 493, 2 C. C. A. 335.

[4] Now, let us see what the conditions are which combine to render the claim of appellants stale in equity. When the present bill was filed in the court below 40 years had elapsed since the rendition of the decree which it is now sought to amend and enforce. It is doubtful whether the different parties can now obtain the evidence necessary to a fair presentation of the case on their part. If there be witnesses still living cognizant of the facts originally in dispute, their recollections thereof must now be so imperfect as to forbid the court from relying with confidence thereon. The land has now passed, for value, into the hands of an innocent third party, who had constructive, but no actual, knowledge that such a suit was pending, and who was not in fact guilty of any negligence in not obtaining this knowledge. Should this suit be now proceeded with, she will be very greatly damaged, without any power in this court to grant her any adequate compensation therefor. All of this would have been avoided, had appellants proceeded with reasonable diligence to bring this case to a final determination. Appellee is in no fault in the matter, for the reason that she was not a party to the cause until the filing of the present bill, and prior to that time knew nothing whatever of it. The conduct of the original parties hereto is consistent only with the theory that the matters in dispute had been settled, or the suit abandoned. We

are not unmindful of the fact that in *Taylor v. Chickasaw County*, 70 Miss. 87, 12 South. 210, the claims allowed to be enforced were "very old"; but the views herein expressed are not in conflict with that case, for the reason that the other conditions which here combine with the lapse of time to render appellants' claim stale in equity did not in that case exist.

The suggestion of error is sustained, the judgment heretofore rendered is set aside, and the decree of the court below is affirmed.

MCKINZIE v. FELLOWS. (No. 15,735.)
(Supreme Court of Mississippi. Feb. 26, 1912.)
APPEAL AND ERROR (§ 628*) — DISMISSAL — FAILURE TO FILE TRANSCRIPT.

A decree was rendered on April 26, 1911, and the appeal bond executed and filed on June 12, 1911. Under Code 1906, §§ 4902, 4906, the transcript should have been filed in the Supreme Court on or before the third Monday in January, 1912, which was January 15th. It was not filed within that time, and on January 27, 1912, appellee moved to docket and dismiss the appeal; but the transcript was thereafter filed on January 31st. Held that, as a writ of certiorari sued out by appellant after the date it should have been filed would not have obtained the record from the clerk much, if any, sooner than it was in fact filed with the Supreme Court, appellant was not at fault, so that the motion by appellee to docket and dismiss would be denied.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2750-2764; Dec. Dig. § 628.*]

Appeal from Chancery Court, Jones County; Sam Whitman, Jr., Chancellor.

Action between A. M. McKinzie and Mrs. H. C. Fellows. From the judgment, McKinzie appeals. On motion to docket and dismiss the appeal. Motion overruled.

Henry Hilbun and Shannon & Street, for the motion. R. E. Halsell, opposed.

SMITH, J. The decree in this case was rendered on the 26th day of April, 1911, and the appeal bond was executed and filed on the 12th day of June, 1911. Under sections 4902 and 4906 of the Code of 1906, the transcript of the record should have been filed in this court on or before the third Monday (15th) of January, 1912. This the clerk of the lower court failed to do, and on the 27th day of January, 1912, this motion to docket and dismiss was filed. Thereafter, on the 31st day of January, 1912, the transcript of the record was filed with the clerk of this court. The clerk of the lower court had until the third Monday of January, 1912, in which to file the transcript of the record in this court, and appellant could have done nothing to compel him to file it earlier than that date. When he failed to file the transcript of the record on the third Monday of January, appellant could then

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

have moved for a writ of certiorari directing him to send up the record; but such a writ would not have obtained the record much, if any, earlier than the date on which it was, in fact, filed in this court.

Consequently appellant was not in fault in the matter, and the motion to docket and dismiss is overruled. See McAlester v. Richardson, 57 South. 547, this day decided.

THOMAS v. STATE. (No. 15,395.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

Appeal from District Court, Desoto County; N. A. Taylor, Judge.

Chester Thomas was convicted of murder, and appeals. Affirmed.

R. L. Dabney, for appellant. Jack Thompson, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

WILLIAMS v. STATE. (No. 15,540.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

Appeal from Circuit Court, Harrison County; T. H. Barrett, Judge.

Jim Williams was convicted of murder, and he appeals. Affirmed.

D. M. Graham, for appellant. Claude Clayton, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

McMAHON v. YAZOO & M. V. R. CO.

(No. 15,189.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

Appeal from Circuit Court, Leflore County; J. M. Cashin, Judge.

Action between M. McMahon and the Yazoo & Mississippi Valley Railroad Company. From the judgment, McMahon appeals. Affirmed.

S. R. Coleman, for appellant. Mayes & Longstreet, for appellee.

PER CURIAM. Affirmed.

MOBILE & O. R. CO. v. MOORE.

(No. 15,345.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

Appeal from Circuit Court, Prentiss County; J. H. Mitchell, Judge.

Action between the Mobile & Ohio Railroad Company and J. M. Moore. From the judgment, the Railroad Company appeals. Affirmed.

J. M. Boone, for appellant. Cunningham & Berry, for appellee.

PER CURIAM. Affirmed.

EHRMAN v. GIBBS. (No. 15,456.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

Appeal from Circuit Court, Yazoo County; W. A. Henry, Judge.

Action between H. M. Ehrman and M. F.

Gibbs. From the judgment, Ehrman appeals. Affirmed.

Barbour & Henry, for appellant. Campbell & Campbell, for appellee.

PER CURIAM. Affirmed.

HARTIG-BECKER PLOW CO. v. NEVILLE et al. (No. 15,442.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action between the Hartig-Becker Plow Company and S. A. Neville and others. From the judgment, the Plow Company appeals. Affirmed.

McBeath & Miller, for appellant. Neville & Stone and Amis & Dunn, for appellee.

PER CURIAM. Affirmed.

PETTY v. STATE. (No. 15,414.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

J. B. Petty was convicted of selling liquor, and appeals. Affirmed.

Powell & Thompson for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

MYERS v. KENNEDY. (No. 15,424.)

(Supreme Court of Mississippi. Feb. 27, 1912.)

Appeal from Circuit Court, Smith County; W. H. Hughes, Judge.

Action between Anse Myers and Nola Kennedy. From the judgment, Anse Myers appeals. Dismissed.

PER CURIAM. Appeal dismissed.

REED v. WELLS. (No. 15,433.)

(Supreme Court of Mississippi. Feb. 27, 1912.)

Appeal from Chancery Court, Pike County; J. S. Hicks, Chancellor.

Action by Florence Reed and Henry Wells. From the judgment, Reed appeals. Dismissed.

PER CURIAM. Appeal dismissed.

DAVENPORT v. STATE. (No. 15,622.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

Appeal from Circuit Court, Newton County; C. L. Dobbs, Judge.

Lucinda Davenport was convicted of selling liquor, and appeals. Affirmed.

Jesse D. Jones, for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

RIDING v. ISBELL. (No. 15,572.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

Appeal from Circuit Court, Pontotoc County; J. H. Mitchell, Judge.

Action between T. A. Riding and Add Is-

bell. From the judgment, Riding appeals. Affirmed.

Mitchell & Roberson, for appellant.

PER CURIAM. Affirmed.

WHITE-WILSON-DREW CO. v. BEAN.
(No. 15,201.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

Appeal from Circuit Court, Monroe County; J. H. Mitchell, Judge.

Action between White-Wilson-Drew Company and W. A. Bean. From the judgment, the company appeals. Affirmed.

Paine & Paine, for appellant. Wiley H. Clifton, for appellee.

PER CURIAM. Affirmed.

CRIGLER v. WESTMORELAND.
(No. 15,384.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

Appeal from Circuit Court, Noxubee County; T. B. Carroll, Judge.

Action between T. W. Crigler and J. T. Westmoreland. From the judgment, Crigler appeals. Affirmed.

Brooks & Bush, for appellant. Geo. Richardson and Flowers, Alexander & Whitfield, for appellee.

PER CURIAM. Affirmed. See Fisher v. Westmoreland (No. 15,383) 57 South. 563.

(180 La.)

No. 19,210.

STATE ex rel. WILLIAMS v. EVERETT,
Secretary of State.

In re EVERETT, Secretary of State.

(Supreme Court of Louisiana. Jan. 9, 1912.)

(Syllabus by the Court.)

ELECTIONS (§ 123*)—MANDAMUS (§ 151*)—

PRIMARY ELECTIONS—MANDAMUS—PARTIES.

Section 26 of Act 49 of 1906 provides that members of state central committees of all political parties shall be elected by the voters of the party at a direct primary. This requirement necessarily prohibits political committees from declaring unopposed candidates to be elected before the holding of the primary election. The names of all candidates for members of political committees, whether opposed or not, must be placed on the official ballots to be voted in the primary election. The right of candidates to have their names printed on the official ballots cannot be adjudicated in a mandamus proceeding to which they are not parties.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 114½; Dec. Dig. § 123; Mandamus, Cent. Dig. §§ 291, 292; Dec. Dig. § 151.*]

Mandamus by the State, on the relation of Frank B. Williams, chairman of the Republican State Central Committee, to Edward Everett, Secretary of State. Application by the defendant for a writ of certiorari. Judgment reversed, and petition for mandamus dismissed.

Walter Gulon, Atty Gen., and R. G. Pleasant, Asst. Atty. Gen. (Dinkelspiel, Hart & Davey, of counsel), for petitioner. W. J. Waguespack and Armand Romain, for Williams.

LAND, J. Plaintiff, as chairman of and in behalf of the Republican state central committee, applied to the court a qua for a writ of mandamus commanding the Secretary of State to receive, accept, and file, and carry out the resolution of the said committee, adopted October 31, 1911, declaring certain persons elected as members of the Republican state committee, and leaving but one contest in the state of Louisiana, to wit, in the Seventh ward of the city of New Orleans. The mandamus was made peremptory, and the case is before us on a writ of certiorari granted on the application of the Secretary of State. In the court below the respondent filed a number of technical exceptions to the proceedings, which were overruled, and the case decided on its merits. The mandamus was made peremptory.

On October 3, 1911, the Republican state central committee met and adopted resolutions ordering a primary election for January 24, 1912, to nominate candidates for state officers and to elect a new Republican state central committee, and providing that candidates for members of said committee must file with the chairman notices of their candidacy in duplicate, one copy for the Secretary of State and one copy for the committee. The committee then adjourned to meet on October 31, 1911. In the interim some 98 persons filed their respective duplicate declarations of candidacy with the chairman, who forwarded one copy of each declaration to the Secretary of State. When the committee met on October 31, 1911, they found that all the positions on the committee, except two, were uncontested.

The committee, thereupon, by resolution declared the unopposed candidate to be the nominees of the Republican party for members of the Republican state central committee to serve for the next four years, and ordered that the two contests be decided at the primary election. In the meantime 68 persons, ignoring the resolution of the committee of date October 3, 1911, filed their declaration of candidacy for membership with the Secretary of State. When that official was called upon by the committee to recognize and enforce the resolution of October 31, 1911, he declined to do so, on the ground that the committee had no jurisdiction to receive declarations of candidates, and to recognize candidates as nominated or elected as members of the committee. In other words, the contention of the Secretary of State was that all candidates for membership were bound to file their respective declarations in his office, and that he was bound

to print on the ballots for the primary election the names of all the candidates who had so filed their declarations. Section 26 of Act 49 reads as follows:

"The state central committees and all other subordinate or local committees of all the political parties coming within the provisions of this act, as now constituted, are hereby recognized as the legal committees and the governing authorities of the said political parties. That the members thereof shall hold their offices as members of said committees for the term for which they have been already elected. That they are authorized to make any rules and regulations for their government not in conflict with any provisions of this act. That the state central committees of all political parties, as now constituted, shall direct and order how all subordinate or local committees shall be organized or constituted, fix their number, regulate their term of office, provided same shall not be for a longer term than four years, and the time of their election, provided, however, that the members of all committees shall be elected in a direct primary. That the state central committee of all political parties in this state shall consist of one member from each parish and one member from each of the wards of the parish of Orleans, and three members at large from each congressional district to be voted for within their respective congressional districts, and shall be voted for by the voters of the party at the same primary election held to nominate candidates for Governor and other state officers who are to be voted for throughout the entire state."

This is the only section of the primary law that mentions or refers to members of political committees, and it provides for their election, and is silent as to their nomination. It is evident that a statute, which requires members of political committees to be elected, by the voters of the party, by necessary implication forbids their selection in any other mode. Hence there is no difficulty in reaching the conclusion that the Republican state committee had no authority to declare that the unopposed candidates were elected as members. Counsel for plaintiff in their brief say:

"The making of the writ peremptory will mean that the Secretary of State must receive, accept, and file and carry out the resolution declaring the nominations for members of the state central committee by not preparing and distributing any ballots for a Republican primary on January 24, 1912."

In other words, the court is requested to hold that all the members of the new central committee have already been elected. The Secretary of State proposes to print on the ballots for said primary election the names of all candidates for members of the central committee whose declarations have been filed in his office. It appears that, besides the candidates recognized by the state central committee, 68 other persons have filed with the Secretary of State their respective declarations of candidacy for membership. These 68 persons are not parties to this proceeding, and the court therefore cannot ad-

judicate their claims to be placed upon the ballots to be voted in the next Republican primary.

We are therefore constrained to deny the specific relief sought in this proceeding, without passing upon other interesting questions discussed by counsel.

It is therefore ordered that the judgment below be reversed, and it is now ordered that the petition for a mandamus be dismissed, with costs in both courts.

(130 La.)

No. 18,644.

BAUCUM v. PINE WOODS LUMBER CO.
et al.

(Supreme Court of Louisiana. Jan. 29, 1912.)

(Syllabus by Editorial Staff.)

1. NEGLIGENCE (§ 32*)—INJURIES TO INVITEE—LIABILITY OF OWNER—DEFECTIVE ROAD.

Defendant sawmill company agreed to buy as much of plaintiff's timber as he delivered to its millpond, the timber being on one side of a railroad track and the mill on the other side, so that plaintiff had to cross the track in delivering it, which he could do either by a public road or by a private road maintained by defendants, the latter being the nearer way to the millpond, and in a better condition, and plaintiff used defendants' road for 11 days with its knowledge and implied consent, and in crossing a bridge over the approach to the railroad tracks the feet of one of his mules broke through, and the mule fell on plaintiff. Held, that defendant was liable for the injuries resulting from its negligent maintenance of its road and bridge, being under obligation to plaintiff and others of the public using it with its knowledge to see that it was in a reasonably safe condition.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. § 32.*]

2. DAMAGES (§ 130*)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

Plaintiff was injured by his mule falling upon him and severely bruising him and fracturing his leg close to the ankle joint. He was confined to his bed for six weeks, and had to use crutches for four or five months, suffering considerably, but the only permanent injury was the loss of half the mobility in the ankle joint, with slight hope of improvement. Held, that a verdict for \$3,000 was excessive, and will be reduced to \$2,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370, 371; Dec. Dig. § 130.*]

Appeal from Second Judicial District Court, Parish of Webster; R. C. Drew, Judge.

Action by Oscar F. Baucum against the Pine Woods Lumber Company and another. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

Henry Moore, H. H. White, and White, Thornton & Holloman, for appellants. Stewart & Stewart, for appellee.

PROVOSTY, J. The defendant company agreed to buy as much of plaintiff's timber as plaintiff could deliver in the pond of its sawmill. The timber was on the east side

of the track of the Louisiana & Arkansas Railway, and the defendant's sawmill was on the west side, so that for delivering the timber the plaintiff had to travel west and across the railroad. The public road goes due west until it reaches a point about 500 feet from the railroad, and then turns towards the right, or northwesterly, and crosses the railroad about 1,000 feet further north; and then resumes its course due west. At the point where it thus turns towards the right, or northwesterly, a private road of the defendant company for the use of its sawmill branches off towards the left or southwesterly, and goes direct to the millpond. Plaintiff could have crossed the railroad by either of these routes; for on the other, or sawmill, side of the railroad, paralleling the railroad at a distance of about 300 feet, another private road of the defendant company's for the use of the sawmill leads to the same pond. Plaintiff used the private road going direct to the pond. It was 1,450 feet shorter, and in better condition. He had been doing so for 11 days, to the full knowledge, and with the implied consent, of defendant when the accident happened out of which the present suit has grown. The railroad track is on a raised roadbed, and the said wagon roads across it are elevated to its level by means of inclined bridges. Plaintiff had delivered a load of logs, and was returning home with his empty four-mule wagon, astride one of the hind mules, and traveling no faster than usual, when the foot of the mule he was on broke through the floor of one of the bridges, and the mule fell on him, and both he and the prostrate mule were dragged some 25 feet. He was severely bruised, and his leg was fractured close to the ankle joint. He was confined to his bed for six weeks, and had to use crutches for some four or five months; and naturally suffered a great deal. The only permanent injury, however, consists in the ankle joint having lost about half its mobility, with little chance of improvement. The bridge was less than two years old, and therefore comparatively new. The reason of the mule's breaking through was that the material of the floor was weak. It consisted of discarded odds and ends of tongued and grooved flooring, such as is used for car decking, 8 inches wide by 1½ inches thick, too thin for bridge timber, and more or less sap and worm-eaten at that. There was absolutely nothing to reveal to plaintiff the defective condition of the bridge, or to put him on notice.

[1] That the responsibility rests on defendant is plain. Defendant opened this road and constructed this bridge, and held this route out for use by those having business with the sawmill, and knew perfectly well that plaintiff was using it. This case is not distinguishable from *Cristadore v. Van Behren*, 119 La. 1025, 44 South. 852, 17 L. R.

A. (N. S.) 1161, where this court held, quoting from syllabus:

"The owner of a wharf which has collapsed while being put to the use for which it was intended is responsible in damages to those who were legitimately on it at the time and were injured."

In *Lawson v. Shreveport*, 111 La. 73, 35 South. 390, this court held the owner of a bridge responsible under circumstances very much less aggravated than those of the present case on the principle that, quoting syllabus:

"Where one knowingly leaves open his property under circumstances calculated to lead others to think that they are invited to use it, he impliedly licenses its use by the public, and assumes the obligation to see that it is kept in a reasonably safe condition."

[2] Defendant contends that plaintiff should have used the public road for crossing the railroad, and in using this private road was a mere licensee to whom no duty to have this bridge in safe condition was due; and, again, that the public road was safe, and plaintiff has but himself to blame for having chosen the unsafe way when there was a safe one. Defendant further contends that the defective condition of this bridge was so evident that the plaintiff should have known of it, and that it was so hidden that the defendant could not have known of it. The case admits of no defense, and these defenses, we assume, are made simply perfunctorily; the real defense being that the amount of \$3,000 allowed by the jury is excessive, with which we agree.

Judgment reduced to \$2,000, and as thus reduced, affirmed, plaintiff to pay the costs of appeal.

(130 La.)

No. 18,715.

BECK v. PROGRESSIVE REALTY CO.,
Limited.

(Supreme Court of Louisiana. Oct. 30, 1911.
On Rehearing, Feb. 12, 1912.)

(Syllabus by the Court.)

1. MORTGAGES (§ 515*)—FORECLOSURE—SALE—TERMS.

The contract right of a mortgagee to cause the mortgaged premises to be seized and sold, without appraisal, to the highest bidder for cash, does not warrant an order of foreclosure directing the sale of the property for cash payable at the moment of adjudication.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1517; Dec. Dig. § 515.*]

2. JUDICIAL SALES (§ 16*)—TERMS OF SALE—STATUTORY PROVISIONS.

Where an immovable is sold at public auction for cash, the purchaser may retain the price until the act of sale is passed. C. C. 2610.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. §§ 38, 39; Dec. Dig. § 16.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

3. JUDICIAL SALES (§ 16*)—TERMS—STATUTORY PROVISIONS.

Act No. 316 of 1908 predicates the existence of a judgment or order directing the sale of real estate in the parish of Orleans for cash according to law, but on its face has no application where a judgment or order of court directs that the whole price be paid in cash at the moment of adjudication.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. §§ 38, 39; Dec. Dig. § 16.*]

On Rehearing.**4. JUDICIAL SALES (§ 22*)—PERFORMANCE—PAYMENT OF PRICE.**

Where real estate is adjudicated for cash at a judicial sale, the purchaser cannot retain the price until the act of sale is passed, as provided in case of a voluntary sale at public auction, but must comply with his bid on the demand of the officer making the sale.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 47; Dec. Dig. § 22.*]

5. JUDICIAL SALES (§ 16*)—TERMS—STATUTORY PROVISIONS.

Act No. 316 of 1908 has no application, where the court orders, or the seizing creditor instructs, the sheriff to sell for cash payable at the time of the adjudication.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. §§ 38, 39; Dec. Dig. § 16.*]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Theodore A. Beck against the Progressive Realty Company, Limited. From a judgment dismissing an injunction suit by defendant against plaintiff on an exception of no cause of action, defendant appeals. **Affirmed.**

Dinkelspiel, Hart & Davey, Zengel, Thomas & Sutton, J. R. Loomis, and John Watt, for appellant. Legier & Gleason, for appellee.

LAND, J. Plaintiff sued out executory process on an authentic act of mortgage in the usual form executed by the defendant to secure the payment of its note for \$2,000, with interest, attorney fees, and costs.

Defendant enjoined the execution of the writ on the grounds that the property could not be lawfully sold for spot cash as ordered by the plaintiff, that the title of the defendant to the property was in litigation, and that a sale for spot cash would deter bidders and cause the property to be sacrificed, and that the notice of the demand was illegal, in that payment demanded at the clerk's office, courthouse, Jackson Square, a place where there is no clerk's office.

The injunction suit was dismissed on an exception of no cause of action; and the defendant has appealed.

[1] It is admitted that the plaintiff notified the sheriff to sell the property for cash on the spot.

The act of mortgage stipulated that, in the event the mortgage note was not promptly paid at maturity, the holder thereof should have the right to cause the property

to be seized and sold without appraisalment to the highest bidder for cash. The prayer of the petition for executory process was for a sale at public auction to the highest bidder payable cash at the moment of adjudication and without appraisalment. The court ordered that executory process issue as prayed for. The writ directed the sheriff to seize and sell for cash to the highest bidder without appraisalment.

The act of mortgage authorized a sale for cash without the benefit of appraisalment.

[2] Where an immovable is sold at public auction for cash, the purchaser may retain the price, and the seller the possession of the thing until the act of sale be passed. C. C. 2610. It follows that the order directing a sale for cash payable at the moment of adjudication was clearly illegal, and was not warranted by the stipulation in the act of mortgage.

[3] The act of mortgage in question was executed in November, 1906. In 1908 Act No. 316, was passed in reference to judicial sales of real estate in the parish of Orleans. Section 1 reads as follows:

"That in all sales of real property by sheriffs or constables where the terms of sale are not fixed in the judgment or order of sale, or writ, it shall be competent for the party provoking the sale or controlling the writ to instruct the sheriff or constable before the advertisement as to what portion of the purchase price shall be paid at the moment of the adjudication, or in default of such instructions the sheriff or constable may fix the amount, which shall not in any case be less than 10 per cent., and this shall be stated in the advertisement."

[5] This statute, even if it has a retroactive effect, does not authorize any court to order immovables sold for cash payable at the moment of adjudication, or any plaintiff in execution to so instruct the officer directed to make the sale. The statute predicates the existence of a judgment or order directing a sale for cash according to law, and authorizes the party controlling the writ, or in his default the officer holding the writ, to fix the portion of the price to be paid at the moment of adjudication. This statute practically forbids a sale for cash payable at the moment of adjudication, unless so ordered by the court. In the case at bar the court so ordered, and therefore the statute has no application. The only question before us is as to the legality of the order for executory process.

As the case is not at issue on the merits, we are compelled to remand it for further proceedings.

It is therefore ordered that the judgment below be reversed, and it is now ordered that the exceptions filed by defendant in injunction be overruled, and that the cause be remanded for further proceedings according to law; said defendant to pay all costs up to date.

On Rehearing.

On the original hearing, no authorities were cited by counsel for appellee in support of the validity of the order of sale for cash at the moment of adjudication, and the court assumed that the question was *res nova*.

[4] On the rehearing cases have been cited which show that our predecessors have held that article 2610 of the Civil Code did not govern in cases of judicial sales. But none of the cases go to the extent of holding that the purchaser must pay cash at the moment of adjudication. In *Lafon v. Smith*, 3 La. 475, the court held that there is no law that authorized the sheriff to wait three days for the bidder to find security, and that "the sheriff was not authorized to postpone the sale over the day it was announced to be sold."

In *Stoute v. Voorhies*, 4 La. 392, the property was adjudicated to defendant in execution, who failed to comply with his bid, and the sheriff thereupon, after the hours of sale, reoffered the property, which was adjudicated to a third person. Article 689 of the Code of Practice reads as follows:

"If the party to whom the property has been adjudged shall refuse to pay to the sheriff the price of the adjudication or to offer the proper sureties when the sale has been made on a credit, the sheriff shall expose to sale anew the thing seized, and adjudge it to another person."

Hence the purchaser must pay on the demand of the sheriff, and not at the moment of adjudication. The writ in this case commanded the sheriff to sell according to law, and the seizing creditor notified the sheriff to sell the property for cash on the spot, as he had a right to do under Act No. 316 of 1908.

It is therefore ordered that our former decree herein be vacated, and it is now ordered that the judgment below be affirmed, appellant to pay costs of appeal.

(130 La.)

No. 18,566.

TOLBERT v. FREEMAN, Sheriff, et al.
(Supreme Court of Louisiana. Jan. 29, 1912.)

(Syllabus by the Court.)

1. EXEMPTIONS (§ 43*)—PROPERTY EXEMPT—CORN FOR CURRENT YEAR.

Under article 244 of the Constitution, "the necessary quantity of corn for the current year" was exempt from seizure, and in this case 300 barrels of corn was sufficient.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 42, 43; Dec. Dig. § 43.*]

2. EXEMPTIONS (§ 43*)—PROPERTY EXEMPT—MULES.

Under the quoted article of the Constitution, two work horses were exempt from seizure, and therefore the seizing creditor was not entitled to seize the mules which the sher-

iff took; nor could the plaintiff be charged, as part of his homestead, with the price of a mule which he sold without the least objection. [Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 43.*]

Appeal from Eleventh Judicial District Court, Parish of Natchitoches; Samuel J. Henry, Judge.

Action by Jeff D. Tolbert against J. W. Freeman, Sheriff, and others. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Jack & Fleming and Williams, Weaver & O'Quinn Co., for appellants. Smith & Dismukes, for appellee.

BREAUX, C. J. Plaintiff brought this suit for a judgment recognizing him as the owner of property exempt under the homestead law.

Tolbert, the plaintiff, depends on farming to support himself and his wife and children, who reside with him and depend upon him. His wife has no property, neither have his children, and Tolbert has only the property protected by the beneficent homestead statute.

Williams, Weaver & O'Quinn Co., Limited, obtained, several years ago, a judgment against Tolbert, the plaintiff, for \$290. A writ of *fi. fa.* was issued under the judgment, and cotton and seed and about 500 barrels of corn and 2 mules were seized. Tolbert enjoined the sale of the 2 mules and the corn, and claimed that they were exempt from seizure under article 244 of the Constitution. The seizing creditor enjoined, and contests on the ground that 500 barrels of corn is an excessive quantity for exemption, and also opposes the seizure because the debtor, Tolbert, had 3 mules at the date of the seizure.

[2] The pair of mules claimed under the homestead law were well matched and generally worked together; the other mule was small and of little value, as the defendant's attorney asserted.

They were in a lot together when the two were seized, and defendant's counsel pointed out the property to be seized. This is of no importance in deciding the issues, except that it shows that the seizing creditor might have avoided the annoyance of a lawsuit about a mule by seizing it; and, again, it goes to sustain the position that the creditor cannot very well avoid seizing property and afterward be heard to plead that the property which might easily have been seized must be charged up against the one who has the benefit of exemption.

This property was left to the debtor, and he availed himself of the right of the owner and sold it for a small amount. We do not understand that there was any fraud practiced. The little animal of small value was left, and the debtor testified, that some

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

time after the seizure, being in need of money, he sold the mule for \$87.50; that he thought it was his right to sell it. The mule was left with him about the time that it must have been evident that he would avail himself of the homestead law, in order to enable him to support the family dependent upon him.

Even in case the debtor has fraudulently disposed of property, it will not affect the exemption of the homestead if his condition is within the operation of the exemption law. *White v. Givens*, 29 La. Ann. 571. The just cited case is directly pertinent. Again, in *St. Mary Bank & Trust Co. v. Daigle*, 128 La. 758, 55 South. 845, it was held the debtor can, after seizure, select the property which he claims under the homestead law.

[1] As to the 500 barrels of corn, according to Mr. P. L. Prudhomme, a planter, the number of barrels was larger than needed. In fact, all the witnesses (except plaintiff, as a witness on his own behalf) testified that the number was too large, basing their estimates upon the intended use of this corn. It follows that the necessary quantity of corn should be allowed, and that was allowed by the district court.

The judgment is amended by reducing the number of barrels of corn from 500 to 300, and, as amended, the judgment is affirmed. Appellee to pay the costs of appeal.

(130 La.)

No. 19,254.

BABCOCK v. BALL, Registrar.

(Supreme Court of Louisiana. Jan. 20, 1912.)

(*Syllabus by Editorial Staff.*)

ELECTIONS (§ 83*)—RIGHT OF SUFFRAGE—CONSTITUTIONAL PROVISIONS.

Under Const. art. 197, § 4, providing that a person shall be entitled to register and vote if he be the bona fide owner of property assessed to him in this state at a valuation of not less than \$300 on the assessment roll of the current year, or of the preceding year, if the roll for the current year shall not have been completed, a person is not entitled to register and vote who owns and pays taxes on property of the value of more than \$300 which has not been assessed to him on the assessment roll; and hence, an injunction to restrain the registrar of voters from canceling his registration is properly denied.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 77-81; Dec. Dig. § 83.*]

Appeal from Civil District Court, Parish of Orleans; George E. Théard, Judge.

Action by Charles E. Babcock against William P. Ball, Registrar of Voters for Parish of Orleans. From a judgment dismissing plaintiff's suit, he appeals. Affirmed.

George W. Flynn, for appellant. Walter Guion, Atty. Gen., for appellee.

PROVOSTY, J. After the plaintiff had been registered as a voter for some years, and had voted at several elections, the registrar of voters, discovering that he had been so registered on the basis of the property qualification, although he had not then and never had any property assessed to him for taxation, proceeded in the manner prescribed by section 9 of Act 98 of 1908 for canceling the name of plaintiff from the books of registration, and plaintiff, after vainly attempting to justify his said registration by showing that he was the bona fide owner of property of more than \$300 in value, although none was ever assessed to his name, had recourse to the present suit to enjoin the registrar from canceling his said registration. The sole question presented is whether the mere owning of property of over \$300 in value, irrespective of whether assessed or not for taxation, is a sufficient qualification for registration. The answer to that question is found in the text of the Constitution. Article 197, § 4, prescribing the qualification of voters:

"He shall be entitled to register and vote if he shall, at the time he offers to register, be the bona fide owner of property assessed to him in this state at a valuation of not less than \$300 on the assessment roll of the current year in which he offers to register, or on the roll of the preceding year, if the roll of the current year shall not then have been completed and filed."

Thus it is seen that the property must not only be owned by the voter, but must also be assessed to him. Plaintiff contends that the property need not be assessed to him; that it suffices if he owns it and has paid taxes on it. The requirement of assessment being as clear and positive as that of ownership, there is no better ground for contending that the property need not be assessed to plaintiff than there would be for contending that it need not be owned by him.

The learned trial judge held that the assessment of the property was sacramental, and dismissed plaintiff's suit.

Judgment affirmed.

(130 La.)

No. 18,689.

GULF REFINING CO. OF LOUISIANA v. HART et al.

(Supreme Court of Louisiana. Jan. 15, 1912. Rehearing Denied Feb. 12, 1912.)

(*Syllabus by the Court.*)

1. EVIDENCE (§ 208*)—JUDICIAL ADMISSIONS—PLEADING DISMISSED.

One who brings suit, praying to be recognized as heir at law of another, and in that capacity alone put in possession of the estate of such other person, making the inventory thereof part of his petition, as designating or describing the property of which the estate consists, and whose suit is dismissed, whether as in case of nonsuit or otherwise, is bound by his judicial admissions as to the title of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indices

property so claimed; and neither he nor a person claiming under him can be heard, years afterwards, to allege that he owned such property, at the time the suit was brought, by a title other than that set up.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 713-725; Dec. Dig. § 208.*]

2. TENANCY IN COMMON (§ 20*) — MUTUAL RIGHTS OF COTENANTS—ACQUISITION OF ADVERSE TITLE.

One who invokes the rule that a co-owner, who acquires common property sold for taxes, does so for the benefit of his co-owners, as well as himself, must come with clean hands and present a case calling for the interposition of a court of equity, since the rule so invoked finds its support in equity alone.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 60, 61; Dec. Dig. § 20.*]

Appeal from First Judicial District Court, Parish of Caddo; Thomas F. Bell, Judge.

Action by the Gulf Refining Company of Louisiana against Tycus Hart, Jr., and others. From a judgment for plaintiff, defendants appeal. Judgment amended so as to reject demands of plaintiff in toto.

John B. Files, for appellant Tycus Hart, Jr. Wise, Randolph & Rendall, for appellant J. C. Trees Oil Co. Blanchard & Barret & Smith and D. Edward Greer, for appellee.

Statement of the Case.

MONROE, J. This is a petitory action for the recovery of an undivided nineteen-twentieths interest in a tract of land described as W. $\frac{1}{2}$ of W. $\frac{1}{2}$ of south 21, township 21, range 16 W., parish of Caddo, and in which plaintiff prays that Tycus Hart, Jr., and the "J. C. Trees Oil Company" be cited, and that it have judgment decreeing it to be the owner of said tract and put in possession thereof, and that certain oil and mineral leases from Hart to his codefendant be annulled, in so far as they may affect its interest. Defendant Hart sets up title to and possession of the whole tract, and pleads estoppel, res judicata, and the prescription of three, five, and ten years. The oil company alleges that it has rights under a recorded lease, and further defends on the grounds set up by its lessor. The main facts of the case, as disclosed by the evidence, are as follows:

The land in dispute was entered in 1872 as a homestead by Mrs. Letitia Nunn, a widow, and at her death in 1877 devolved upon her five children, to wit, Samuel, Thomas, John, Richard, and Cynthia (Mrs. Butterfield). Thomas had remained on the place with his mother; but the others had moved a few miles away, across the state line, into Texas, or did so after their mother's death. In December, 1885, Samuel sold his interest in the land to Richard, and on May 4, 1886, Richard sold his interest, as also the interest which he had thus acquired from Samuel, to Thomas. And by the same act Mrs. Butterfield appears to have sold her interest to Thomas; but she denies that she signed the

act, and we shall consider the facts in that connection, as, also, those connected with the disposition of John's interest, a little later. On May 7, 1886, the property was sold for unpaid taxes, assessed in the name of Letitia Nunn, to Leon M. Carter, who, on April 12, 1889, sold it to A. H. Leonard, who, on May 24, 1890, sold it to Thomas Nunn. On May 11, 1900, Thomas Nunn died, leaving no forced heirs, and leaving a will, whereby he bequeathed his entire estate to Tycus Hart, Jr., and Elizabeth Watson, in the proportions of four-fifths to Hart and one-fifth to Watson, and the will was shortly afterwards presented to the district court for probate and ordered to be executed, and other steps, preliminary to putting the universal legatees in possession, were taken, as will appear. On September 17th following, Samuel and John Nunn and Mrs. Butterfield brought suit, alleging that the testator had left "but a small estate, consisting of real estate and personal property"; that the will had, ex parte, been ordered executed; that Hart had been confirmed and had "qualified as executor of said estate, and that an inventory had been made according to law;" that, for reasons which are set forth, the will was null, and praying that it be so decreed; and that they be recognized as the heirs at law and "put in possession of the estate of the said Thomas Nunn according to law." The case was put at issue by the answer of Hart and Watson, and was fixed on October 31, 1900, upon and after which date the following entries appear upon the clerk's docket, to wit:

"Oct. 31, 1900. Dis. at plff.'s cost.

"Nov. 3, 1900. Motion to tax costs filed and fixed for Monday."

On the same day (October 31, 1900), there was judgment recognizing Hart and Watson as the universal legatees of the decedent, and ordering that they "be placed in possession of all the property, real and personal, belonging to the succession, * * * as shown by inventory on file," and that Hart be discharged as executor. The only real property appearing on the inventory thus referred to is that shown as follows, to wit:

160 acres of land @ \$11.50..... \$240 00
* * * * *

Recapitulation.

Real estate..... 240 00
Personal property..... 327 78

Total \$567 78

On December 26, 1900, by notarial act recorded January 10, 1901, Hart acquired, by purchase, the one-fifth interest in said real estate of his colegatee, Elizabeth Watson. On December 6, 1907, he made an oil and mineral lease of the whole of said property, for a term of 10 years, to Benedum, Glenn & Thomas, who, on January 15, 1908,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

assigned their interest in the lease to "J. C. Trees Oil Company," defendant herein, by an instrument which was placed of record January 20, 1908; and in September, 1910, Hart entered into a contract with said company, amendatory of said lease, which contract was recorded September 23, 1910.

In the meanwhile, Samuel Nunn having died in 1905, leaving, as his heirs, his four children, Oscar, Jackson, Fred, and Cassie, and Richard having died in (or about) 1887, unmarried and intestate, a Mr. Matthews, acting in behalf of William Hamilton, called on the surviving members of the family—that is to say, Mrs. Butterfield, John, and the heirs of Samuel—and obtained from them, at different dates in February, 1910, deeds purporting to convey their interests in the land in dispute, as inherited from Letitia, Samuel, Thomas, and Richard Nunn, and hereafter, on March 26, 1910, Hamilton instituted suit against Hart, alleging that he had, in the manner stated, acquired a three-fourths interest in said land, and praying that his title be recognized, to which suit Hart answered; whereupon testimony was taken, and the case was fixed for trial. Upon the day upon which it was fixed, however, it was discontinued, on plaintiff's motion, as in case of nonsuit. Hart then brought suit against Hamilton for slander of title, and, Hamilton having conveyed his interest in the land to plaintiff, the latter at once instituted this petitory action.

By an act apparently acknowledged before S. J. White, a notary public of Marion county, Tex. (which adjoins Caddo parish, La., and has been the home of plaintiff's authors for many years), Richard Nunn and Mrs. Butterfield appear to have sold their interest in the land in dispute, including the interest of Samuel, which had been acquired by Richard, to their brother Thomas. The deed is dated May 4, 1886, and is supplemented by what purports to be a receipt, signed by Mrs. Butterfield, reading as follows:

"10.00.

June 1, 1886.

"Received of Thomas Nunn ten dollars part pay on land sold to Thomas Nunn by me.

"C. A. Butterfield."

This is further supplemented by the testimony of J. J. Gray, a witness called by defendants, who says that he has been a neighbor of the Nuns, and has known them nearly all his life; that shortly after the death of Thomas Nunn, Samuel and Mrs. Butterfield came to his house separately, and, complaining that their brother Thomas had left his property to strangers, said that the will ought to be broken, and asked whether he would be willing to testify that Thomas was crazy.

"Mrs. Butterfield [says the witness] came there and says: 'You know brother Tom was crazy. Do you know whether he was crazy or not?' and I says: 'What! I did not know it.' And she said: 'It looks like it was hard that he would will his stuff off to an individual, to

disinterested party.' The sum and substance of what she said was, a stranger. Q. But what did she say about selling her interest? A. I says: 'Didn't you all sell your interest to Tom?', and she says: 'Yes; we sold to Tom, but we ought to get it at his death. He had no issue; but he ought not to give the stuff to a stranger.' That is what she told me."

The witness also testified that Samuel and John Nunn had likewise told him that they had "all" sold their interests to Tom.

Mrs. Butterfield denies that she signed either the deed or the receipt, or that she told Gray that she had sold her interest to Tom. Her testimony concerning the two documents, as exhibited to her, and concerning other matters of interest, reads, in part, as follows:

"Q. Mrs. Butterfield, is that your signature to that deed? A. No, sir; it is not. Q. Do you know the writing of your brother, R. A. Nunn? A. I think I would mighty near know it, anyhow. Q. Did you often see him write his name? A. Yes; often. He lived with me for years. Q. How many years did he live with you? A. Well, he lived with me several times, four or five months at a time, for five or six years. Q. He lived at your home? A. Yes, sir. Q. He was your younger brother? A. Yes, sir. Q. Youngest in the family? A. Yes, sir; and I nearly raised him. Q. How old was he when he died? A. I do not know whether I know exactly, but he was about 23 or 24 years old, I reckon. I cannot say exactly. Q. Mrs. Butterfield, in the deed which I have heretofore exhibited to you appears the signature of R. A. Nunn. I will ask you if you recognize that to be his signature to it? [Showing witness document referred to.] A. It looks mighty familiar like, just like it; and I feel certain that is his signature. That is all I can say. I didn't see him write it. I feel sure that is his writing. Q. Who signed your name to that deed? A. Well, I found out afterwards—(Objected to as hearsay; objection sustained by the court; exception.) Q. In whose handwriting, if you know, state is 'C. A. Butterfield' signed to this deed? You have testified that 'C. A. Butterfield' was not signed by you; in whose handwriting is that 'C. A. Butterfield' signed to that deed? A. The same one wrote both. * * * Q. Mrs. Butterfield, did you afterwards learn that R. A. Nunn had signed your name to that deed? (Objection; ruling and exception.) * * * Q. I will ask you if you can state in whose handwriting that signature is? [Exhibiting the receipt to the witness.] A. No; I do not recognize this one; this is not like that on the other one—on the deed."

On cross-examination, she said:

"He [her brother, R. A. Nunn] lived in the house with me; my house was considered his home. He did not stay there all the time. Q. Made that house his home as much as any place? A. Yes, sir. Q. You were all close together? A. Yes, sir; I reckon we were when living in the same house. Q. You had an affection for him? A. Yes, sir; I have yet. Q. You had confidence in him? A. Yes, sir. * * * Q. Did you know Mr. White, the justice of the peace that used to be there? [Referring to the notary before whom the act of sale in question appears to have been acknowledged.] A. Yes, sir. Q. Where is he? A. Dead. * * * Q. You knew him well? A. Yes, sir. Q. He was considered a good man? A. Yes, sir. * * * No; I do not know anything about the land that Letitia Nunn owned being sold for taxes; but it was the un-

derstanding that Thomas Nunn was to keep up the taxes for the use of the place. Thomas Nunn was acting for all the heirs. (Admitted subject to objection.)"

The witness further testifies that she sold her interest in the land to Hamilton for \$80, because she was needy, and was not able to prosecute a lawsuit.

There were called to the stand two witnesses who testified as experts in handwriting. One of them was of opinion that the signatures to the receipt and deed and the admitted signature of Mrs. Butterfield (affixed to her depositions in the case of Hamilton v. Hart) were written by the same hand. The other witness had had submitted to him, out of court, the signature to the deed (executed in 1886) and the signature to the depositions (executed some 24 years later), and had expressed the opinion that they were not written by the same hand. When, upon the trial, he was shown the signature to the receipt, and compared it with the others, he said that he thought that it and the signature to the depositions had been written by the same hand. Whether he still adhered to the view, as previously expressed, with regard to the signature to the deed, is not made clear.

Defendants have produced no deed from John to Thomas Nunn, and certain testimony, probably bearing upon the existence of such a deed, was excluded as follows: The defendant Hart had testified that Thomas Nunn, at a time when he was very sick, and not long before his death, had handed him the deeds from Samuel to Richard and from Richard and (apparently) Mrs. Butterfield to him (Thomas), and that he (the witness) had deposited them in the safe of a gentleman at Vivian. He was then asked, and he answered, as follows:

"Q. They were handed to you by Mr. Tom Nunn? A. Yes, sir; he told me he had another deed. (Objected to and excluded as hearsay.)"

Defendants, however, produced a receipt, the signature of John Nunn to which is admitted, and which reads as follows:

"\$19.77.

Caddo Parish, La.,

"October the 9th, 1886.

"Received of T. P. Nunn the sum of nineteen dollars and seventy-seven cents in full of all demands up to date. [Signed] J. E. Nunn."

John Nunn was examined, under commission, for the purposes of the case of Hamilton v. Hart (to which we have referred), and his testimony so given was offered in this case. Included in the examination in chief, we find the following interrogatory and answer (they having been admitted, subject to defendants' objection that parol evidence was inadmissible), to wit:

"Q. Do you know anything about the land Letitia A. Nunn owned in Caddo parish having been sold, after her death, for taxes, and having been bought in at tax sale by Leon M. Carter; if so, state all you know about the

matter. Carter transferred the tax title to A. H. Leonard, and the latter transferred it to Thomas Nunn. What do you know about that transaction? State all the facts. Was Thomas Nunn acting for himself solely, or for all the heirs, in thus taking back the title from Carter and Leonard? Tell all you know about this fully. Was not Thomas Nunn redeeming the land for all the heirs; was not this the understanding between Thomas Nunn and the other heirs? A. I know nothing about this question, further than that the only agreement I had with Thomas Nunn was that he was to keep up the property for the use of the place. This agreement was had at the time that he paid me the \$19.77 in balance of settlement, same being due me for rent on the place."

Opinion.

Plaintiff has abandoned its claim as to the interests in the land described in the petition which were inherited from Letitia Nunn by her sons, Samuel and Richard, and, having obtained judgment recognizing it as the owner of the two-fifths interest so inherited by Mrs. Butterfield and John E. Nunn, is asking only for the affirmation of that judgment. Mrs. Butterfield, as we have seen, intimated in her testimony that she "found out afterwards" that her brother Richard had signed her name to the deed, whereby her said interest appears to have been conveyed to her brother Thomas; and in the course of the trial plaintiff offered John Nunn to testify that Richard had told him so, from which, though the testimony was excluded, we infer that, if it be true that Richard did sign his sister's name, she knew it before he died, which was about 24 years ago, and the question which suggests itself is: If she was unwilling to make the charge of forgery against him while he was alive, and while Nunn, whom she knew to have paid his money for, and to be relying on, a forged deed, was alive, why should she bring such a charge at this late day? The charge would appear, also, to involve the memory of another person, whom death has rendered incapable of defending himself, since the notary, "a good man," Mrs. Butterfield says, whom she knew and who knew her, unless a party to the fraud, could not have certified that he examined her apart from her husband, and that she acknowledged her signature to the deed, if the person who appeared before him was her brother, a young man, 23 years of age. It would appear, too, if the theory propounded be correct, that there was still another person who was willing to risk a term in the penitentiary upon a very uncertain chance of gaining the sum of \$10 by forging Mrs. Butterfield's signature to the receipt for that amount; and that in the one case, as in the other, the victim, Thomas Nunn, suspected no evil. If, however, Mrs. Butterfield found out—no matter when—that her signature to the deed had been forged, it would have been the natural thing for her, in her own interest, and would have been her plain duty to the victim of the forgery, to have in-

formed him of the fact. Beyond that, if, during the 24 years that elapsed between the date of the deed in question and her sale to plaintiff, Thomas Nunn and those claiming under him held and enjoyed the property, with no better title than a forged deed, why did she remain silent and make no demand for an accounting? It is true she says that there was an understanding between Thomas and all the other heirs to the effect that he should use the property in consideration of his keeping it up; but on that point John Nunn seems to contradict her and to contradict himself, since, in one breath, he says:

"The only agreement that I had with Thomas Nunn was that he was to keep up the property for the use of the place. This agreement was had at the time that he paid me the \$18.77 in balance of settlement."

And, in the next breath, he says:

"Same being due me for rent of the place."

We say that the witness drew his breath between these utterances, because his statement, including a period after the word "settlement," is typewritten, and the rest, including the change of the period into a comma, is done with a pen, apparently as an afterthought.

Moreover, if Samuel and Richard were able to convert their unproductive interests into cash, and John was receiving an income from his interest, why should Mrs. Butterfield have been contented with a less profitable arrangement? But more conclusive still was the course pursued by Mrs. Butterfield after the death of her brother Thomas. The evidence shows that she bitterly resented his having left his property to Hart and Watson; that she joined her brothers, Samuel and John, in bringing a suit to annul the will by which that was done; that they claimed the estate of the testator, including the 160 acres of land inventoried as part of that estate, not as the co-owners of any portion of it, but as the heirs at law of the testator, whose disposition of it they attacked solely on the ground that it was informal (their attempt to obtain evidence that he was incompetent to make a will having, apparently, failed); and that they prayed to be put in possession of said estate, and the whole of it, as such heirs, and by no other right or title. And the evidence entirely fails to show that, during the period that elapsed between October 31, 1900 (when the suit thus referred to was dismissed, at plaintiff's cost, and Hart and Watson were put in possession of the estate, including the land, as universal legatees of Thomas Nunn), and February 16, 1910—nearly 10 years—either Mrs. Butterfield or any one else ever disputed the title of the parties so put in possession, or demanded of them an accounting, though it is not pretended that there was any understanding with those parties that they should

have the use of the property of the estate, or any of it, in consideration of their "keeping it up."

The learned counsel for the present plaintiff argue that, in claiming and praying to be put in possession of the estate of Thomas Nunn as his legal heirs, Mrs. Butterfield and her coplaintiffs referred only to the movable property and to such interest as Thomas Nunn owned in the land, which they now say was three-fifths. Thus, in the latest brief filed on behalf of plaintiff, we find the following:

"The suit to break the will, if successful, would have debarred Tycus Hart and the colored person [referring to Watson] from taking under the will as universal legatees, and would have left Thomas Nunn's estate to be inherited by his legal heirs, who were the three parties figuring as plaintiffs in suit No. 3722; that is to say, they would have taken all the personal property that Nunn died possessed of and his three-fifths interest in the land—the other two-fifths being already owned, one-fifth by J. E. Nunn, and one-fifth by Mrs. Cynthia Butterfield. S. A. Nunn [one of the plaintiffs in that suit] had no interest in the land as heir of Letitia Nunn, because he had transferred his interest to his brother, R. A. Nunn, who later had sold it, along with his own one-fifth interest, to Thomas Nunn; but, if the will could have been annulled, S. A. Nunn, as one of the legal heirs of Thomas Nunn, his dead brother, would have come in for his share of the three-fifths interest in the land that Thomas Nunn owned when he died, and his share of the personal property which Thomas Nunn owned."

When, however, Samuel, John, and Mrs. Butterfield instituted the suit for the recovery of the estate of Thomas, the two last named knew that Samuel had sold his interest in the land constituting part of that estate to Richard, by whom it had been conveyed to Thomas, and yet they appear to have proceeded upon the theory that they all occupied the same relation to the subject-matter of the litigation. At all events, the petition which they filed made no distinction between them, nor did it suggest that there was any distinction to be made, upon the ground that they, or either of them, already owned part of the property, the whole of which they were claiming as the heirs of Thomas Nunn. Their allegations read, in part, as follows:

"They are the legal heirs of Thomas Nunn, who recently died, * * * leaving * * * a small estate, consisting of real and personal property; * * * that Tycus Hart, Jr., was confirmed and qualified as executor of said estate, and an inventory made according to law, all of which will more fully appear by reference to the record of said succession, * * * which is made part hereof. * * * Wherefore petitioners pray * * * for judgment recognizing petitioners as the heirs at law of the said Thomas Nunn, * * * ordering petitioners to be put in possession of the estate of the said Thomas Nunn, according to law."

It will thus be observed that, instead of giving a detailed description of the property for which they were suing, they allege that an inventory had been made of it "accord-

ing to law," and they refer, for the description, to the inventory, which they make part of their petition. It is said that the inventory does not describe the land; but it shows but one item of real estate, which calls for "160 acres"; and Mrs. Butterfield, as a witness in the case of *Hamilton v. Hart*, was interrogated and answered as follows:

"Q. Did Thomas Nunn own any real estate, other than that claimed by plaintiff in the present suit; if so, where was it located, and give some definite idea of the amount and extent of the land thus owned? A. No; he owned no other lands."

[1] Our conclusion as to Mrs. Butterfield then is that she signed the instrument showing that she had received \$10, "part pay for the land," and that she either signed the deed, or authorized her brother to sign it, and, in either case, acknowledged the signature to be hers, and authorized the notary so to certify. "But," say the learned counsel for plaintiff, "conceding arguendo, that she did sign the deed, she was a married woman, domiciled in Texas, and, under the law of that state, as under the law of Louisiana, she was not bound by her act, because it was not concurred in by her husband"—which is quite true. But there are other factors in the case. When Mrs. Butterfield sued, as the heir at law of Thomas Nunn, to recover, as part of his estate, the property here in dispute, she was authorized by her husband, and we are of opinion that she and the plaintiff, claiming under her, are estopped now to contradict the judicial admission so made, and so understood and acted on by Mrs. Butterfield herself during the (nearly) 10 years which followed. *Delacroix v. Prevost's Ex'r*, 6 Mart. (O. S.) 280; *Gridley et al. v. Conner*, 4 La. Ann. 416; *Denton v. Erwin et al.*, 5 La. Ann. 18; *Shepherd v. Phillips*, 7 La. Ann. 461; *Edson, Curator, v. Freret Bros.*, 11 La. Ann. 711; *Reed et al. v. Crocker, Ex'r*, 12 La. Ann. 445; *Girault v. Zuntz*, 15 La. Ann. 684; *Gaudet v. Gauthreaux*, 40 La. Ann. 189, 3 South. 645; *Williams et al. v. Gilkeson-Sloss Co.*, 45 La. Ann. 1013, 13 South. 394; *Johnson v. Marx Levy & Bro.*, 109 La. 1047, 34 South. 68; *O. C. 1956*; *Wells v. Compton*, 3 Rob. 183; *Milikin v. Minnis*, 12 La. 546.

We are not prepared to say that the judgment rendered in the suit above referred to is a sufficient basis upon which to rest a plea of *res judicata*, because we do not know enough about it. Where the plaintiff in a case fails to appear and prosecute, the only judgment that can be rendered is one of nonsuit, and, for aught we know, that may have been the situation in this instance. *O. P. art. 536*; *Saunders v. Mangham*, 42 La. Ann. 770, 7 South. 715.

[2] But that does not affect the question here presented, for a party is none the less bound by his judicial admissions, whether he prosecutes the suit in which they are made to a definitive judgment, discontinues without reservation, or takes a nonsuit. *Byrne v. Hibernia Nat. Bank*, 31 La. Ann. 83. Even, however, if Mrs. Butterfield, and the plaintiff herein, claiming under her, were not estopped by the judicial averments mentioned to bring this suit, there could be no recovery; for Mrs. Butterfield, a married woman, selling her property without the concurrence of her husband, though she may have been, nevertheless sold the property and received the money for it, and for that reason, and also because she allowed more than 20 years to elapse after the acquisition by Thomas Nunn of the tax title, without asserting the claim which is here set up, neither she nor her subsequent vendee is in a position to invoke, as against Nunn or those holding under him, the rule that a co-owner, who acquires common property sold for taxes, does so for the benefit of his co-owners, as well as himself, for that rule is founded in equity, and those who seek equity must come with clean hands and present a case calling for the interposition of a court of equity. *Duson v. Roos*, 123 La. 844, 49 South. 590, 131 Am. St. Rep. 375.

We are of the same opinion with regard to the claim predicated upon the conveyance to plaintiff by John E. Nunn. It is true that no title from him to Thomas Nunn has been produced; but, as no title to him was ever recorded, and as the recorded title stood in the name of Thomas Nunn, who acquired it from a third person some four years after the tax sale, plaintiff can hardly pretend that it purchased from John Nunn on the faith of a recorded title. The explanation that John Nunn makes of the receipt given by him does not, in view of all the circumstances which have been narrated, explain to our satisfaction, and is very far from rebutting the positive testimony of Gray, to the effect that he (John), as well as Samuel and Mrs. Butterfield, told him (Gray) that he had sold his interest in the property to his brother Thomas. Plaintiff's counsel, in their brief, attack the credibility of Gray; but there was no attempt to impeach him in the lower court, and it appears to us that, being a disinterested and apparently straightforward witness, whose testimony is corroborated by almost every admitted or proved fact in the case, he is better entitled to belief than John Nunn, who does not enjoy those advantages.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be so amended as to reject the demands of the plaintiff in toto, at its cost in both courts.

BUSBEE et al. v. THOMAS et al.

(Supreme Court of Alabama. Jan. 18, 1912.)

1. DEEDS (§ 38*)—PROPERTY CONVEYED—ADMISSIBILITY AS EVIDENCE—CERTAINTY OF DESCRIPTION.

Where a deed locates land by monuments, courses, and distances with a beginning point that is fixed and certain, and, though it does not specify the distances, does fix the termini of the several boundaries, which are the corners of the tract, by stakes and intersection with a known section line, it is *prima facie* certain, and is admissible as evidence of title.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 38.*]

2. EJECTMENT (§ 86*)—EVIDENCE—DEEDS—IDENTIFICATION OF PROPERTY.

Plaintiffs in ejectment must identify the tract sued for with that described in a deed introduced as evidence of title; and where the description therein was by monuments and boundaries it was necessary to locate such monuments and boundaries by competent evidence.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 86.*]

3. EJECTMENT (§ 94*)—EVIDENCE—DEEDS—IDENTIFICATION OF PROPERTY.

Possession under an ancient deed for more than 50 years is strong evidence that original boundaries mentioned in the deed are those of the land possessed.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 94.*]

4. BOUNDARIES (§ 40*)—EVIDENCE—DEEDS—IDENTIFICATION OF PROPERTY.

Where plaintiffs in ejectment introduced an ancient deed as evidence of title, which the defendants attacked for uncertainty of description, and a witness testified that he had lived in the neighborhood of the land practically all his life, that the original trustees under which the plaintiffs claimed were in possession of the tract before the War, and that he had seen a stake at the northwest corner frequently prior to 1860, under the latitude allowed in the proof of ancient boundaries, it was for the jury to say whether or not this stake was a stake referred to in the deed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 196-204; Dec. Dig. § 40.*]

5. EJECTMENT (§ 94*)—EVIDENCE—DEEDS—IDENTIFICATION OF PROPERTY.

Evidence in ejectment *held* sufficient to support a finding that the boundaries and monuments mentioned in an ancient deed, introduced as evidence of title, were the same as those of the tract sued for.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 94.*]

6. BOUNDARIES (§ 3*)—CONFLICTING ELEMENTS—QUANTITY—MONUMENTS AND BOUNDARIES.

Neither weight nor effect will be given a description in a deed in terms of quantity, except for the purpose of relieving some otherwise irremediable ambiguity in the more particular description, and, though a description by monuments, corners, and boundaries contains more than the amount specified by acres, the specific description will control.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 8-41; Dec. Dig. § 3.*]

7. CHARITIES (§ 50*)—CAPACITY OF TRUSTEES TO SUE.

Where trustees of a school, bringing ejectment, were shown by the minutes of the school board to have been elected as such according

to the terms of the deed under which they held, were serving in that capacity, and had been appointed as such by a regular and valid order of a register in chancery, in proceedings under Code 1907, §§ 6098, 6099, they were sufficiently qualified to bring ejectment for land conveyed as a charitable donation to the trustees of the school.

[Ed. Note.—For other cases, see Charities, Dec. Dig. § 50.*]

8. CHARITIES (§ 33*)—ELECTION OF TRUSTEE—COLLATERAL ATTACK.

Where, though an election of trustees of a school, bringing ejectment for property conveyed in trust for the benefit of the school, may have been voidable at the instance of the cestuis que trustent, it was not void; it could not be assailed collaterally by attacking the capacity of the trustees in the ejectment suit.

[Ed. Note.—For other cases, see Charities, Dec. Dig. § 33.*]

9. CHARITIES (§ 33*)—ELECTION OF TRUSTEE—COLLATERAL ATTACK.

An election of trustees under a deed of land for the maintenance of a school, though not strictly regular, cannot be declared void, so as to incapacitate such trustees to bring ejectment to recover the trust property, where there was no fraud, and the election has remained unquestioned for many years.

[Ed. Note.—For other cases, see Charities, Dec. Dig. § 33.*]

10. CHARITIES (§ 47*)—APPOINTMENT OF TRUSTEES—NECESSITY OF APPOINTMENT BY REGISTER.

Where the appointment of trustees under a deed of land for the maintenance of a school is neither void nor voidable, their later appointment by a register in chancery, under Code 1907, §§ 6098, 6099, was void for want of jurisdiction, as, where the creator of a trust has provided a method for filling vacancies, and it is possible to so fill them, no other method is applicable, general provisions of law notwithstanding.

[Ed. Note.—For other cases, see Charities, Dec. Dig. § 47.*]

11. APPEAL AND ERROR (§ 1051*)—ADMISSION OF EVIDENCE—PREJUDICIAL ERROR.

The admission of proceedings and a void order of a register in chancery, appointing trustees, in an action in ejectment by such trustees, is not prejudicial error, where the capacity of the plaintiffs was otherwise shown by uncontroverted evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1051.*]

12. EVIDENCE (§ 473*)—CONCLUSIONS—POSSESSION OF LAND.

A witness with personal knowledge of the subject-matter may testify in ejectment as to whether the plaintiffs have exercised acts of ownership over the land in suit in the last 25 years; his testimony not being objectionable as an opinion, since acts of ownership are collective.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 473.*]

13. EJECTMENT (§ 84*)—ISSUES—PROOF—IRRELEVANT MATTERS.

A question put to a witness in ejectment as to whether the plaintiffs had exercised any acts of ownership over any of the land in suit, "or anything else," in the last 25 years is objectionable, as calling for matters outside the issues.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 84.*]

14. WITNESSES (§ 245*)—EXAMINATION—REPLETION.

Where, in ejectment, a witness called for defendant testified as to all he knew about the plaintiffs and their acts of ownership and control over the land, and specifically answered in the negative an inquiry as to whether or not they had exercised acts of ownership over such land within the last 25 years, the refusal to allow a repetition of his testimony as to that fact was not error.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 827, 828; Dec. Dig. § 245.*]

15. EVIDENCE (§ 324*)—HEARSAY—COMMON REPUTATION.

Common reputation is inadmissible in ejectment to prove the number of acres in the tract in suit, because of its hearsay character.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1218-1229; Dec. Dig. § 324.*]

16. APPEAL AND ERROR (§ 1066*)—REVIEW—HARMLESS ERROR—ABSTRACT INSTRUCTIONS.

Though, in ejectment, the court in alluding to distances in its charge was abstract, so far as the deed to the land in suit was concerned, there was no reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

17. DEEDS (§ 88*)—CONSTRUCTION—DESCRIPTION—GRANT OF POWER TO LAY OFF.

Though a deed under which plaintiffs in ejectment claimed title states that the grantees are to have 10 acres "as they want it," it is not invalid as a grant of a power to lay off land, which has never been exercised, where the land to be taken was definitely described by monuments, boundaries, and corners.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 38.*]

18. APPEAL AND ERROR (§ 1078*)—ARGUMENT OF POINTS.

A court on appeal will not consider refused charges which are not argued.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from Circuit Court, Coosa County; H. P. Merritt, Special Judge.

Ejectment by E. W. Thomas and others, as trustees, against Lafayette L. Busbee and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

The oral charge of the court, excepted to, is as follows: "I charged you as a matter of law this morning that the boundaries govern, and that is still my charge to you. I simply reiterate that, where a deed sets out the boundaries and courses and distances, you must follow the boundaries, and even though it may name a certain number of acres, and according to the boundaries there will be a larger number of acres than named, the boundaries control."

The following charges were refused to defendant: (2) "I charge you that, unless you are reasonably satisfied from all the evidence in this case that the original trustees under the deed from Bradford and wife to said trustees laid off the land conveyed or attempted to be conveyed therein, and established the stakes therein specified, then the instrument is void, and cannot serve as a

muniment of title." (3) "I charge you that, under the deed to Bradford and wife to the school trustees, it was necessary for the said trustees to lay off same within a reasonable time, and if they fail to do so, and have never done so, then the deed is void for uncertainty." (6) "I charge you that plaintiff cannot recover more than 10 acres of land under this deed of Bradford and wife to the trustees." (7) "I charge you that unless you are reasonably satisfied, from all the evidence in this case, that the original trustee under the deed from Bradford and wife, or their successors in office, laid off the land as directed by said deed, then you must find for the defendant." (8) "I charge you no survey by subsequent township trustees or district trustees could put into operation the deed of Bradford and wife to the school trustees; but, for the deed to have been made operative, it was necessary for the trustees of the property under the deed to lay it off, and, if they have not done so, you should find the issue in favor of the defendant." (9) "I charge you that the plaintiff cannot recover, unless you are reasonably satisfied from all the evidence that the original trustees under the deed from Bradford and wife laid off the land described in said deed, and that the tract as laid off contained not exceeding ten acres." (10) "I charge you that the courses and distances are not sufficiently described in said deed, so as to make the deed sufficiently certain." (11) "I charge you that the plaintiff cannot recover in this action, unless you are reasonably satisfied from all the evidence that the original trustees under the deed from Bradford and wife to James A. Kelly and others laid off the lands described in said deed." (12) "I charge you that if you are reasonably satisfied, from all the evidence in this case, that it was the intention of Bradford and wife to convey only 10 acres to the school trustees, then plaintiff cannot recover the full amount of acres sued for."

Riddle, Ellis, Riddle & Pruett, for appellants. Whitson & Harrison, for appellees.

SOMERVILLE, J. The appellees sued the appellants in ejectment, and had verdict and judgment for the land sued for.

The issue in the trial court and on this appeal hinges upon the proper interpretation of the deed offered by plaintiffs in support of their title. This deed was executed in 1853 by the owner, one Bradford, to one Kelly and others, as trustees, principally for the maintenance of a school, and in part for other charitable uses. The plaintiffs constitute the present board of trustees, claiming in succession to those originally named in the grant.

The deed conveys "the following describ-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed lot of land lying and being in the county of Coosa and state of Alabama, and being a part of section eight in township twenty-three and range twenty east, in the Tallapoosa land district, containing and bounded as follows; to wit: *Beginning at the line of section eight where said line strikes Socapatoy creek; thence down the north bank of said creek to a stake; thence due north to a stake; thence east to a stake in said section line; thence south with said line to the beginning. Said lines to be run so as to contain ten acres, and the academy, and said trustees are to have said ten acres run so it contains the academy and the Baptist Church and ten acres of land as they want it.*"

The evidence shows with reasonable certainty that at the time of the grant in question an academy building stood near the southwest corner of the tract sued for, and a Baptist Church near the northeast corner; that for about 50 years past the tract has been commonly known as the "Bradford Academy Lot," and its boundaries and corners have been identified and well known to a number of people living in the neighborhood; that the entire tract contains about 17 acres; and that rectangular lines running from the eastern and southern boundaries (as fixed by the deed), so as to barely include the academy and church buildings as they originally stood, would inclose about 13 acres.

Defendants objected to the introduction of the Bradford deed, on the grounds (1) that it was void for uncertainty of description; (2) because it vested in the trustees merely a power to lay off 10 acres, as they pleased, so as to include the academy and church, and this power has never been executed; and (3) because it was not shown that plaintiffs are the persons who can recover under the deed.

[1] The rules of interpretation which declare the primacy and effect of variant modes of description in deeds have been too often stated to permit of repetition here. It is obvious that the deed before us fully describes the tract of land intended to be conveyed by monuments, courses, and boundaries, located with reference to a beginning point that is fixed and certain, by means of which the entire tract can, or could originally, be definitely pointed out. It is true that distances are not specified; but the termini of the several boundaries, which are, of course, the corners of the tract, are fixed as to the western corners by stakes on the specified courses, and as to the eastern corners by the intersection of the courses with a known section line. The deed was therefore prima facie certain as to the land conveyed, and clearly admissible in evidence.

[2] It, of course, devolved on the plaintiffs to show the identity of the tract thus described with the tract sued for; and in doing this it was necessary by competent evidence

to locate the monuments and boundaries set forth in the deed. As to this, the only points of real controversy were with respect to the two stakes which indicated the southwestern and northwestern corners, and with respect to the actual location of the western and northern boundaries.

H. R. Robbins, 64 years old, testified that he had lived in the neighborhood of the land practically all his life; that he attended school there as a boy; that he knew the original trustees; and that they were in possession of the tract of land sued for when he first knew it before the War, when it was used for school, church, and cemetery purposes.

[3] In the absence of any surviving monuments at all, an ancient possession under an ancient deed might be sufficient evidence of the original boundaries mentioned in the deed; and when such possession continues uninterruptedly for nearly half a century the fact becomes very cogent indeed. *Owen v. Bartholomew*, 9 Pick. (Mass.) 520; *Aldrich v. Griffith*, 66 Vt. 390, 29 Atl. 376.

[4] But Robbins goes further and testifies to the presence of a stake at the northwest corner, which he had frequently seen when a schoolboy, prior, we may fairly assume, to the year 1860. Much latitude must be allowed in the proof of ancient boundaries, and it was clearly for the jury to say, from all the circumstances before them, whether this stake was the stake referred to in the deed.

It will be noted that, since the southeast corner and the lines of the southern and eastern boundaries were certainly known, and since the western and northern boundaries ran with the points of the compass and at right angles to each other, the location of the northwest corner would suffice to complete and close the entire boundary on all the four sides.

W. T. Smith, son of one of the original trustees, testified that he saw an iron post placed at the northwest corner more than 40 years ago; that about 30 years ago his father and one McKinney, who was also one of the original trustees, pointed out to him on the land the corners and marked boundaries of the academy lot, which were the same as those now claimed by the plaintiffs. These boundaries were also shown to have been commonly known in the community for, perhaps, a generation or more.

[5] This, and much other testimony of a similar nature, however strongly disputed, necessarily carried to the jury the issue of the identification of the land, and was sufficient in this aspect to support a verdict for the plaintiffs. *C. & G. Ry. Co. v. Pilcher*, 163 Ala. 401, 51 South. 11.

[6] Whatever notion the grantor, Bradford, or the trustees, or any one else, may have had as to the number of acres contained in the tract he granted by specific boundaries is wholly immaterial. Even had he expressly declared an intention to convey only

10 acres, it would be unavailing to limit or qualify his definite description of the grant by monuments, corners and boundaries. This is a fixed rule of construction, and a rule of property as old as the common law; and neither weight nor effect is ever given to a description in terms of quantity, except for the purpose of relieving some otherwise irremediable ambiguity in the more particular description. *Page v. Whatley*, 162 Ala. 473, 50 South. 116; *S. C. Cement Co. v. U. L. Cement Co.*, 138 Ind. 297, 37 N. E. 721. But we discover in the grantor's allusions to quantity no more than a mere estimate of the probable acreage of the tract; and, having regard to his plain purpose, we think he intended to limit the area downward, rather than upward. In any case, however, this specification must yield to the boundaries actually named.

[7] The right of the plaintiffs to sue in the capacity of trustees was duly and seasonably shown. They were elected as such, as shown by the minutes of the board, and were serving in that capacity. If this were not enough, they were also appointed as such by a regular and valid order of the register in chancery, upon proceedings which were instituted and conducted in accordance with the statutes therefor provided. Sections 6098, 6099, Code 1907.

[8-11] We are of the opinion, however, that the election of these trustees by even a minority of the full membership of the board, a majority of the membership being vacant, was not void, though the exercise of the power conferred by the deed to fill ensuing vacancies may have been conferred on a majority of the board. And we further hold that, even if such election were voidable at the instance of the cestuis que trustent, it could not be thus assailed by strangers thereto in a collateral proceeding. See *Gaines v. Harvin*, 19 Ala. 491, 498. Nor should such election, though not strictly regular, be declared void where there has been no fraud, and where it has remained unquestioned for many years. 28 Am. & Eng. Ency. Law (2d Ed.) 966. The result of this view would render the register's appointments unnecessary, and therefore void for the want of jurisdiction; the rule being that, where the creator of the trust has provided a method for the filling of vacancies, this method will be carried out whenever possible, and vacancies can be filled in no other way, general provisions of law notwithstanding. 28 Am. & Eng. Ency. Law (2d Ed.) 965. Nevertheless, the admission of the proceedings and order in evidence was without prejudice to the defendants, since the capacity of the plaintiffs was otherwise sufficiently shown, and there was no conflict in the evidence with respect thereto.

[12-14] Defendants asked their witness Selman, "Have the school trustees exercised any acts of ownership over any of that land or the academy, or anything else, in the last 25

years?" Objection to the question was sustained by the trial court. Acts of ownership are collective facts, and the form of this question was not objectionable, as calling for the witness' opinion or conclusion. *Woodstock Iron Co. v. Roberts*, 87 Ala. 436, 6 South. 349. Nor, in view of some of the testimony introduced for plaintiffs, was the witness' negation of such acts other than rightful and proper. There are three reasons, however, any one of which might justify the rejection of the question: (1) It does not appear that the witness was qualified by any sufficient personal knowledge of the subject-matter of the inquiry to answer so sweeping a question; (2) the inquiry as to acts of ownership over "anything else" than the premises in dispute was outside the issue, and therefore irrelevant; and, (3) it conclusively appears from the bill of exceptions that this witness, in his testimony actually given, told all he knew about the trustees and their acts of ownership and control over the land, and, indeed, specifically answered in the negative this very inquiry, a duplication of which was not a matter of right in the defendants.

For the reason last stated, the questions to the same witness, as to acts of ownership on the part of the trustees over that part of the land lying between the graveyard and Garrett's creek, were rejected without prejudice to defendants. The testimony of the witness to which we above refer will be found in the reporter's statement of the case.

[15] Common reputation as to the number of acres in the academy tract was not admissible to prove that fact, even if the fact were relevant. It was but hearsay, and does not fall within any exception to the rule of exclusion.

[16] That part of the court's oral charge to which exception was taken correctly stated the law, though its allusion to *distances* was abstract, so far as the present deed is concerned. This, however, as often declared, is not reversible error.

[17] Charges 2, 3, 6, 7, 8, 9, and 11, refused to defendants, are framed on the mistaken theory that the Bradford deed vested in the trustees only a power to lay off 10 acres of land, in default of which they had taken nothing under the deed.

[18] Charges 4, 5, and 6, not being argued, do not merit discussion.

Charge 10, that the corners and distances are not sufficiently described in the deed, is opposed to the views which we have declared on that subject.

Charge 12, also, is opposed to our ruling that Bradford's intention to convey only 10 acres was immaterial in the face of the specific description of the land conveyed.

We find no error in the record prejudicial to appellants, and the judgment is affirmed. Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

ADAMS v. STATE.

(Supreme Court of Alabama. Jan. 11, 1912.)

1. CRIMINAL LAW (§ 785*)—INSTRUCTIONS—WEIGHT OF TESTIMONY.

Where, on a trial for murder, the relationship and association of decedent with many of the state's witnesses justified an inference that the witnesses were hostile to accused, and the chief witness was engaged in the combat, and was shot by accused at the time of the killing of decedent, the refusal to charge that, if the state's witnesses exhibited prejudice against accused, and they did not testify truly and were not worthy of belief, the jury could disregard their testimony *was* reversible error. (Affirmed by divided court.)

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776-1781; Dec. Dig. § 785.*]

2. CRIMINAL LAW (§ 789*)—TRIAL—INSTRUCTIONS—REASONABLE DOUBT.

It is reversible error to refuse to charge that, where there is a probability of accused's innocence, the jury must acquit him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1920; Dec. Dig. § 789.*]

3. ARREST (§ 65*)—CRIMINAL OFFENSE—AUTHORITY UNDER WARRANT.

Where two officers are acting together in attempting to arrest one under a warrant in the possession of one of them, the warrant is a justification for both, and the act of one of the officers, who does not have the warrant, in going into the house of accused to arrest him while the other officer, having the warrant, stands near by, is justified by the warrant; but such officer must, as required by Code 1907, § 6268, inform accused of his authority and produce the warrant before making an arrest, where the warrant is demanded.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 161-164; Dec. Dig. § 65.*]

4. HOMICIDE (§ 111*)—SELF-DEFENSE—RESISTANCE OF ARREST.

A citizen may resist an unlawful arrest; but he may not use such force as will endanger the life of the officer.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 143, 144; Dec. Dig. § 111.*]

5. CRIMINAL LAW (§ 782*)—INSTRUCTIONS—REASONABLE DOUBT.

An instruction that, where the evidence is evenly balanced, the jury must acquit accused is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 782.*]

6. CRIMINAL LAW (§ 1170½*) — EVIDENCE—HARMLESS ERROR.

Where a question asked a witness was not answered, accused may not complain of the question objected to by him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.*]

7. CRIMINAL LAW (§ 693*)—EVIDENCE—MODE OF OBJECTION.

Where, on a trial for murder of an officer while attempting to make an arrest under a warrant, the warrant was introduced in evidence without objection, the warrant, if shown not to be genuine or correct, must be excluded by motion, and not by an objection to its introduction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1630; Dec. Dig. § 693.*]

McClellan and Somerville, JJ., dissenting.

Appeal from City Court of Montgomery; Armstead Brown, Judge.

John Adams was convicted of murder in the second degree, and he appeals. Reversed and remanded.

It appears from the facts in the case that Ellington and Berry, two policemen, went to the home of John Adams to arrest him on a misdemeanor charge, Ellington being armed with a warrant for his arrest; and that in attempting to make the arrest Berry was killed and Ellington wounded by Adams. The witnesses were the wife of the dead man, Ellington, who was wounded, Julius Smith, W. E. Holland, and Bellinger Cheney, most of whom were connected with the police department. The evidence was in conflict as to how the killing occurred; that for the state tending to show an outrageous killing, and that for the defendant tending to show self-defense.

The following charges were refused to the defendant: (20) "The court charges that if the state's witnesses have exhibited prejudice or anger against the defendant, and satisfied you that they have not testified truly and are not worthy of belief, and you think their testimony should be disregarded, you may disregard it altogether." (12) "The court charges that, if there is a probability of defendant's innocence, you should acquit him." (5) "The court charges that, if the officers went into Adams' house to arrest him for a misdemeanor not committed in the officers' presence, the officer not having the warrant, the officer was engaged in an unlawful act." (8) "The court charges that the citizen may oppose a forcible aggression upon him in the execution of an unlawful arrest, even to slaying the officer when the arrest cannot otherwise be prevented." (22) "The court charges that if the evidence is evenly balanced the jury should lean to the side of mercy and acquit the defendant."

John S. Tilley, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

ANDERSON, J. [1] Charge 20, refused the defendant, is predicated upon an elementary rule of law, and the refusal of such a charge has been frequently held to be reversible error. *Burkett v. State*, 154 Ala. 19, 45 South. 682; *Hammond v. State*, 147 Ala. 79, 41 South. 761. It is true the refusal of a similar charge in the case of *Wright v. State*, 156 Ala. 108, 47 South. 201, was justified, because abstract. We cannot say, however, that the charge is abstract in the case at bar, as the relationship and association of the deceased with many of the state's witnesses could afford an inference for the jury that the said witnesses were hostile to the defendant. Moreover, the principal witness, Ellington, was engaged in the combat, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was shot by the defendant at the same time that Berry was killed.

[2] Charge 12, refused the defendant, has repeatedly received the approval of this court, and its refusal has often been pronounced reversible error. *Fleming v. State*, 150 Ala. 19, 43 South. 219; *Bones v. State*, 117 Ala. 138, 23 South. 138; *Whitaker v. State*, 106 Ala. 30, 17 South. 456; *Croft v. State*, 95 Ala. 3, 10 South. 517; *Bain v. State*, 74 Ala. 38; *Shaw v. State*, 125 Ala. 80, 23 South. 390; *Henderson v. State*, 120 Ala. 360, 25 South. 236; *Prince v. State*, 100 Ala. 144, 14 South. 409, 46 Am. St. Rep. 28; *Nordan v. State*, 143 Ala. 18, 39 South. 406.

[3] It may be conceded that the arrest in question, the defendant having been charged only with a misdemeanor not committed within the presence of the officer, could only have been lawfully made under a warrant (section 6269 of the Code of 1907); yet the state's proof shows that Ellington did have a warrant, and the deceased, Berry, was sent to help arrest the defendant, and was acting in concert with Ellington when he went to the house to arrest the defendant. Where two officers are acting together, the possession of the warrant by one is sufficient justification for both. *People v. Durfee*, 62 Mich. 487, 29 N. W. 109. Berry was not, therefore, engaged in an unlawful act in going into the house of Adams to arrest him, although he did not have the warrant on his person; it being held by Ellington, who was near by. It was his duty, however, under section 6268 of the Code, to inform the defendant of his authority; and if the warrant was demanded or required he should not have made the arrest until the warrant was produced. Charge 5, requested by the defendant, was properly refused. If not otherwise bad, it was calculated to mislead the jury to the belief that Berry had no right to act under a warrant held by Ellington.

[4] There was no error in refusing charge 8, requested by the defendant. If not otherwise bad, it was calculated to mislead the jury into the belief that the defendant would have the right to kill the officer while making a forcible arrest under an unlawful warrant, regardless of the amount of force used to accomplish said arrest. The citizen may resist an attempt to arrest him which is simply illegal, to a limited extent, not involving any serious injury to the officer. He is not authorized to slay the officer, except in self-defense; that is, when the force used against him is felonious, as distinguished from forcible. It is better to submit to an unlawful arrest, though made with force, but not with such force as to endanger the life or limb, than to slay the officer.

[5] There was no error in refusing charge 22, requested by the defendant. *Hill v. State*, 156 Ala. 3, 46 South. 864; *Kirby v. State*, 151 Ala. 66, 44 South. 38.

[6] The appellant can take nothing by the objection to the question asked Ellington as to the position of the deceased when shot, as the record shows that said question was not answered.

There was no error in permitting the state to show that Berry went with Ellington to help make the arrest, and that Ellington had a warrant; for, as heretofore stated, if they were acting in concert, the warrant was a protection to both of them.

[7] The warrant had been introduced in evidence without objection from defendant, and an objection to the introduction of same after it had already been introduced was not proper or appropriate. If the cross-examination disclosed that it was not correct or genuine, it should have been eradicated by motion to exclude, and not by objecting to same after it had previously been introduced. We do not wish to be understood, however, as holding that the cross-examination of Williamson discredited the warrant, so as to authorize the exclusion of same.

While we have discussed only the questions argued, the other rulings have been considered, and we find no reversible errors, other than the ones previously suggested.

The judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded.

SIMPSON and MAYFIELD, JJ., concur in the opinion. SAYRE, J., concurs in the opinion and in the reversal of the case, but thinks that charge 20, while correct, was abstract in the present case, and that the refusal of same was not reversible error. McCLELLAN and SOMERVILLE, JJ., think that the case should be affirmed, and therefore dissent.

Justices McCLELLAN and SOMERVILLE are of the opinion that the trial court did not commit reversible error in refusing special charges 12 and 20. That numbered 20 obviously referred, by the employment, in its hypothesis, of the term "exhibited," to manifestations of "prejudice or anger against the defendant" by witnesses while before the jury on the trial. There is not a line in the bill of exceptions to justify that feature of the hypothesis of charge 20. It was therefore abstract, and properly refused, as was expressly ruled in *Wright's Case*, 156 Ala. 108, 47 South. 201.

In several clearly expressed special charges, given at the instance of the defendant, the jury were advised that they could not convict the defendant, unless they were convinced of his guilt beyond a reasonable doubt and to a moral certainty. It has been often ruled here "that a probability of innocence is the equivalent of a reasonable doubt of guilt." *Sanders v. Davis*, 153 Ala. 375, 383, 44 South. 979; *Bones v. State*, 117 Ala. 134, 139, 23 South. 138; *Whitaker v. State*, 106 Ala. 30, 85, 17 South. 456, and other au-

thorities therein cited. *Reasonable doubt and probability of innocence* (the latter occurring in charge 12), both having reference to the state and degree of assurance requisite to justify a conviction of an accused, being, in law, equivalent, the court was not obliged to reiterate, in merely different language, the same idea it had expressed, at defendant's instance, to the jury; and hence the court committed no prejudicial error in refusing charge 12. This court has heretofore approved charge 12; but it has not heretofore taken account of the fact, present on this appeal, that the court, in other special charges given for the defendant, instructed the jury with respect to the approved equivalent of the very essence of charge 12. As they view the matter, any other conclusion would jeopardize solemn judgments by a mere play upon words.

Aside from this, however—Independent of it—they are convinced from the record that the verdict of the jury would not have been different, had special charge 12 been given to the jury, instead of refused. Being so convinced, they conceive it to be their duty to apply in this case, as the court did in *Pope v. State*, 57 South. 245, the just rule expressed in this provision of the statute (Code, § 6264), "But the judgment of conviction must not be reversed because of error in the record, when the court is satisfied that no injury resulted therefrom to the defendant," and as interpreted in *Dennis' Case*, 118 Ala. 72, 79, 23 South. 1002, 1004, as follows: "We are of the opinion the proper construction of this section of the Code is that the court must be satisfied that the verdict of the jury would not have been different if the charge had been given." They therefore think the judgment and sentence of the law pronounced in the city court should be affirmed.

JOHNSON v. STATE.

(Court of Appeals of Alabama. Jan. 16, 1912.)

1. JURY (§ 70*)—CAPITAL CASES—STATUTES—NUMBER TO BE SUMMONED.

Acts 1909, p. 317, § 32, requiring the court, in capital cases, to order the sheriff to summon not less than 50 nor more than 100 jurors, including those summoned on the regular juries for the week set for the trial, etc., is mandatory, so that, where accused, indicted for murder in the first degree, seasonably objects to the venire because of the failure of the court to make the statutory order, the venire must be quashed.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 323; Dec. Dig. § 70.*]

2. CRIMINAL LAW (§ 782*)—EVIDENCE—SELF-DEFENSE.

An instruction that, to justify the killing of a person under self-defense, the law says that certain things must be proven by all the

evidence in the case to the satisfaction of the jury is erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1880-1882; Dec. Dig. § 782.*]

3. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

The refusal to charge that, if there is a probability of accused's innocence he must be acquitted, is reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1920; Dec. Dig. § 789.*]

Appeal from Circuit Court, Winston County; Travis Williams, Special Judge.

Luther Johnson was convicted of murder in the second degree, and he appeals. Reversed and remanded.

The part of the oral charge referred to in the opinion is as follows: "In order to justify the killing of a human being under self-defense, the law says that certain things must be proven to you by all the evidence in the case to your satisfaction." The following is charge 22: "I charge you that, if there is a probability of the defendant's innocence, you must acquit him."

James J. Ray, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. The defendant was indicted and tried for murder in the first degree and convicted of murder in the second degree.

The fatal difficulty occurred at an entertainment or "party" of a public nature, given at the home of one Rowe, which was attended by the two daughters of the deceased. The defendant started to accompany the daughters of deceased from the place of entertainment to their home, when a difficulty arose between the father and the defendant, resulting in the fatal shooting of the former by the latter. While there is no positive evidence showing that the defendant was responsible for the daughters of the deceased going to the entertainment or dance in opposition to his wishes, it is manifest that the father held such a belief, and the difficulty started by the father's offering objection to the defendant accompanying his daughters, or one of them, home from the dance. The evidence is in conflict as to practically all of the principal particulars relating to the difficulty resulting in the killing. The evidence of the state tends in general to show that, upon the father peaceably and quietly protesting against the defendant's escorting his daughter home, the defendant persisted, and almost immediately, and without provocation, assaulted the father by shooting him with a pistol three times, inflicting a fatal wound from which death ensued in a few minutes. The evidence for the defense was to the effect that the deceased accused the defendant of surreptitiously taking his daughters, or being the cause of their going, to the dance, applied a vile epithet to defend-

ant, and attacked him with a knife, backing him up against a fence, whereupon the defendant, in self-defense, shot the deceased.

[1] The defendant being tried on an indictment charging murder in the first degree, it was necessary that the provisions of the jury law (Acts 1909, pp. 305, 317-319, § 32), applicable to a person on trial for a capital felony, be complied with. No order is shown by the record to have been made, as required by the provisions of section 32. The record recital is that: "Thereupon the presiding judge, in open court, * * * drew from said box the names of 65 persons to constitute a special venire for the trial of this cause." But the order provided for by section 32 that the court must make, fixing the number of jurors, is not shown to have been made; and the provisions of this statute having been held by the Supreme Court to be mandatory (Harris' Case [Sup.] 55 South. 609; Jackson's Case [Sup.] 55 South. 118, 120; Bailey's Case [Sup.] 55 South. 601), and the objection of the defendant having been seasonably interposed, the court's action in overruling the objection made to the venire by the defendant is, under the rulings of the Supreme Court in the cases above cited, error for which the case must be reversed.

Whether or not the court sufficiently inquired into the qualifications of the veniremen who appeared to satisfy the requirements of the statute, as against the specific objections made by the defendant, is questionable; but it is unnecessary to discuss the question, or the various rulings on the evidence and other objections arising on the trial, as the case must be reversed for the court's error in failing to make the mandatory order required by statute, definitely fixing the number of jurors; and, the case having been tried by a special judge, the same questions are not likely to occur on another trial.

[2] That part of the oral charge excepted to, in which the court charged the jury that, "under self-defense, the law says certain things must be proven to you by all the evidence in the case to your satisfaction," is clearly erroneous.

[3] Written charge No. 22, requested by the defendant and refused by the court, is the same charge that, to refuse, has been repeatedly held to be reversible error. These cases are collected and cited approvingly in the recent case of *Adams v. State*, 57 South. 591, Ala. Sup. Ct., present term.

Some of the other refused charges are mere copies of charges that have been considered and passed upon by the Supreme Court and approved; but we do not deem that a further discussion of the case would serve any beneficial purpose, and it is unnecessary, as the errors pointed out necessarily require an order of reversal.

Reversed and remanded.

JACKSON v. STATE.

(Court of Appeals of Alabama. Jan. 11, 1912.)
On Application for Rehearing,
Jan. 30, 1912.)

1. LARCENY (§ 15*)—POSSESSION OF PROPERTY.

Where a daughter had possession of her father's money as his agent, and kept the same in her trunk, her taking the money animus furandi constituted larceny.

[Ed. Note.—For other cases, see Larceny. Cent. Dig. §§ 39-42; Dec. Dig. § 15.*]

2. CRIMINAL LAW (§ 792*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

The evidence in a larceny prosecution tended to show that accused and a female were criminally intimate, and that the latter informed accused that she had in her trunk money belonging to her father, and that he told her to get it, and she could go with him to another state, whereupon she took the money from the trunk. Held, that a charge that unless the jury found from the evidence beyond all reasonable doubt and to a logical certainty that accused conspired with the female, or aided, abetted, or incited her to steal the money, they could not convict accused, was sufficiently favorable to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1818-1820; Dec. Dig. § 792.*]

3. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in a prosecution for larceny committed by accused with the owner's daughter, the undisputed evidence showed that accused and the daughter left the county together and went to another town, defendant was not prejudiced by permitting a question to the owner as to whether he found out that accused had left the town, and permitting witness to answer in the affirmative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

4. CRIMINAL LAW (§ 1170*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

There was no error of which accused could complain in refusing to permit an answer to a question, where the witness had theretofore answered the same question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

5. CRIMINAL LAW (§ 785*)—INSTRUCTIONS—CONSIDERING EVIDENCE—MALICE OF WITNESS.

A requested charge that, if the jury found that a witness had exhibited malice or ill will toward accused, they might reject his entire testimony if they believed that witness on that account was not worthy of belief, was properly refused, where such witness testified as to facts necessarily within his knowledge and was corroborated by accused himself, as the jury could not disregard the testimony of a biased witness if they believed he testified truthfully.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1776-1781, 1889-1894; Dec. Dig. § 785.*]

6. WITNESSES (§ 89*)—PERSONS JOINTLY CHARGED.

After severance as to persons jointly indicted, one of them could testify as a state's witness in a prosecution of the other.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 245, 246; Dec. Dig. § 89.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. WITNESSES (§ 37*)—CHARACTER WITNESS—OPPORTUNITY FOR KNOWLEDGE.

There was no reversible error in excluding a question whether witness had ever heard anything against accused's character where the only showing of the witness' opportunity to know of accused's character was his testimony that he lived at the same place, and had known accused five or six years.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 80-87; Dec. Dig. § 37.*]

8. CRIMINAL LAW (§ 1141*)—APPEAL—PRESUMPTIONS.

Error must be affirmatively shown by the record on appeal, and will not be presumed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3014, 3015; Dec. Dig. § 1141.*]

On Application for Rehearing.

9. CRIMINAL LAW (§ 811*)—INSTRUCTIONS—CHARGES ON FACTS.

Where evidence is admitted for a specific purpose, a charge confining its consideration to that purpose is not bad as giving undue prominence to particular evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1869-1872; Dec. Dig. § 811.*]

10. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—ABSTRACT INSTRUCTIONS.

A charge which does not state a correct legal principle applicable to the evidence in a particular case should be refused, though it may be correct upon other facts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1879; Dec. Dig. § 814.*]

11. CRIMINAL LAW (§ 742*)—TRIAL—PROVINCE OF JURY.

While the jury are the sole judges of the credibility and weight of the evidence, they cannot arbitrarily reject testimony.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1719-1721; Dec. Dig. § 742.*]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Daniel Jackson, alias, etc., was convicted of larceny, and he appeals. Affirmed.

Hill, Hill & Whiting and Phil H. Stern, for appellant. R. C. Brickell, Atty. Gen., for the State.

DE GRAFFENRIED, J. The defendant and Lena Taylor were jointly indicted for the larceny of a \$50 bill, the property of William Taylor. The defendant, upon his motion, was granted a severance, was tried and convicted by a jury of the offense, was sentenced to the penitentiary, and appeals.

It appears that Lena Taylor is the daughter of said William Taylor, and that she lived with her father and mother as a member of their family. It further appears that the father had more than \$100 in cash, and that Lena Taylor had access to it. The testimony of Lena Taylor tends to show that the money was kept in her trunk, that she kept the key, was the custodian of the money, and, to use her language, "that she used some of it; that her father never objected to it."

[1] If Lena was in fact the custodian of the money, she was simply, under the evidence in this case, in possession of it as a member of her father's family—in law his servant—and her possession of the key and her ownership of the trunk in which the money was kept in his house in no way affected her father's possession of the money. It is also evident that, if she at any time used any of the money, the use was for some legitimate purpose of herself or the family for which, as his child, she knew she possessed his consent. "It has often been decided, and is now settled law, that goods in the bare charge or custody of a servant are legally in the possession of the master, and the servant may be guilty of trespass and larceny by the fraudulent conversion of such goods to his own use." *Crocheron v. State*, 86 Ala. 64, 5 South. 649, 11 Am. St. Rep. 18. The testimony, in the aspect most favorable to the defendant, shows, as above stated, that the woman Lena Taylor had the bare charge or custody of the money, and, if she took the money described in the indictment *animo furandi* out of her trunk, she was guilty of larceny. *Oxford v. State*, 33 Ala. 416; *Holbrook v. State*, 107 Ala. 154, 18 South. 109, 54 Am. St. Rep. 65.

[2] It appears from the evidence offered on behalf of the state that the defendant and said Lena Taylor were criminally intimate with each other; that the defendant was informed by her of the existence and whereabouts of the money; that he decided to go to Savannah, Ga.; that he told Lena to get the money, asked her if she did not want to go to Savannah with him, and told her that, if she would get the money, she could go with him. Thereupon, the evidence tends to show, Lena Taylor took from the trunk something over \$100, including the \$50 bill described in the indictment, and she and the defendant left Montgomery county together, and together spent the money. The court, at the request of the defendant, charged the jury that, "unless you find from the evidence beyond all reasonable doubt and to a moral certainty that Dan Jackson conspired with Lena Taylor or aided or abetted or incited Lena Taylor to steal the money of William Taylor, then you cannot convict the defendant." In the above charge, the court, it seems to us, placed the defendant's case before the jury as favorably for the defendant as it could, under the facts, have been placed. 1 Mayfield's Dig. p. 216, § 47. As the undisputed facts show that Lena Taylor was the bare custodian of the money, the court was justified in making the oral explanation of charge four given at the request of the defendant, to which an exception was reserved by the defendant, and it was free from error in refusing the various written charges requested by the defendant covering the subject of embezzlement.

[3] 2. The evidence, without dispute, showed that defendant and Lena Taylor left Montgomery county together; that they went to Savannah together; and that they were together in Savannah at least a part of each night. There was therefore no error prejudicial to the defendant committed by the court in permitting the solicitor to ask the witness William Taylor the following question: "Did you find out that Daniel [meaning defendant] had gone away from there [meaning Ramer, Montgomery county]?" and in permitting the witness to answer the question in the affirmative.

[4] 3. On his cross-examination, the witness William Taylor testified, among other things, as follows: "That the defendant persuaded her to steal it; that she took it; that she had the power to go in there whenever she got ready; that he was low down enough to do it; that he had both his daughter and the defendant arrested; that he did not tell Mr. Walters on yesterday at the courthouse that the only reason he had the defendant arrested was because the defendant took his daughter, but that he did tell Mr. Walters that it would have been all right if the defendant had not been married; that he said that and that was what he hated about it; that he did tell Mr. Walters that he would never have had the defendant arrested if the defendant had not been a married man." It is therefore evident that when the defendant asked said witness the following question: "You got him arrested because he is married and went off with your daughter?" the question had already been answered when it was asked, and, if the question was otherwise unobjectionable, the court committed no error of which the defendant can complain in refusing to allow the witness to answer it.

[5] 4. Charge "B," requested by the defendant, was properly refused. The charge was in the following language: "If you find that the witness William Taylor has exhibited malice or ill will toward the defendant, Dan Jackson, you may reject his entire testimony, if you believe that said witness, on that account, is not worthy of belief." Malice and ill will entertained by a witness against a party to a cause may always be proven for the purpose of showing the bias of the witness so that the jury may say, under all the circumstances of the particular case, what, if any, weight shall be given to the testimony of such witness. Undoubtedly a jury has no right, however, to discard the entire testimony of a witness who, on account of bias or for any other reason, "is not worthy of belief" if they believe the witness swore truthfully when testifying as a witness in the case. In the present case the testimony of William Taylor was corroborated in some of its material parts, as to matters necessarily within his knowledge, by the testimony of the defendant himself,

and in other material parts by the testimony of other witnesses, and, although the jury may have, because of his bias, believed that "he was not worthy of belief," yet, if the jury believed any material portion of the evidence of Dan Jackson, they had no right to reject it in its entirety. The above charge is materially different from the charge which the Supreme Court held to be proper in *Hammond v. State*, 147 Ala. 79, 41 South. 761. In the *Hammond* Case the charge requested was as follows: "If any of the state's witnesses have exhibited malice against the defendant or anger, or have testified to contradictory statements and thereby satisfied the jury *that they have not testified truly*, and are not worthy of belief, and the jury think their testimony on these accounts should be discarded, they may discard it altogether." The italicized portion of the above charge emphasizes what we have above said, and indicates wherein charge "B" requested in this case was vicious. A charge similar to the charge above quoted from the *Hammond* Case was approved in *Burkett v. State*, 154 Ala. 19, 45 South. 682, but as the charge discussed in the *Burkett* Case was, as above pointed out, materially different from the charge now under discussion, that case is without value as an authority on the question here presented.

[6] 5. It appears from this record that, after the finding of the indictment and before pleading to it, the defendant demanded a severance, and the court made the order of severance prayed for by the defendant. After this order of severance was made, the defendant pleaded "not guilty" to the indictment, and the trial of the case was then had. Lena Taylor, who was jointly indicted with the defendant, was, after such severance as above stated, against the objection of the defendant, examined as a witness against him. Pretermittting any consideration of the question as to what, if any, effect the legislative enactments on the subject of the competency of witnesses which have been adopted since the Legislature passed the acts now known as sections 7898 and 7899 of the Code have had upon said sections, it is evident that the court was, without regard to such subsequent legislative enactments, without error in permitting Lena Taylor to testify as a witness for the state. "The proper practice seems to be that where two or more defendants are jointly indicted neither is a witness for or against the other, unless some order is made in the case which amounts to an acquittal or a severance. The trial of the one proposed to be offered as a witness must be severed from that of the codefendant against whom he is offered; or else a nolle prosequi must be taken or a verdict of acquittal entered in favor of the proposed witness as authorized by the statute." *Henderson v. State*, 70 Ala. 29; *South v. State*,

86 Ala. 617, 6 South. 52; Woodley v. State, 103 Ala. 23, 15 South. 820.

[7] 6. The bill of exceptions contains the following: "The defendant then introduced in evidence one J. E. Walters, who testified that he lived at Snowdown; that he had known the defendant five or six years. The defendant then asked him the question, 'Have you ever heard anything against the character of this defendant?' The solicitor objected to this question, and the court sustained the objection, and the defendant then and there legally excepted."

[8] Nothing is more plainly established than the proposition that on appeal all the presumptions are that the trial court committed no error. Error must be affirmatively shown by the record. It will never be presumed. There is nothing in the above testimony of the witness Walters tending to show that he was competent to testify either affirmatively or negatively to the defendant's character. For aught that the above questions and answers show, Walters may have not been born in the neighborhood in which the defendant lived; he may have known no person who was acquainted with the defendant or who lived where the defendant was known. In other words, "he failed to show that he was in such a position with reference to the defendant's residence, or circle of acquaintances, as that the fact of his not having heard anything against him would have had any tendency to show that nothing had been said, and that therefore his character was good." *Holmes v. State*, 88 Ala. 26, 7 South. 193, 16 Am. St. Rep. 17. The court therefore properly refused to allow the witness to answer the above question.

After a careful examination of the record in this case, we are of the opinion that the record fails to disclose that the trial court committed any error on the defendant's trial. The judgment of the court below is therefore affirmed.

Affirmed.

On Application for Rehearing.

1. The frequency with which charges are asked that the jury in deliberating upon their verdict may consider certain specific testimony, or may reject certain specific testimony, or parts of testimony, leads us to announce the following in reply to the application for a rehearing in this case.

[9] It frequently occurs that charges are asked which the trial court, because they tend to give undue prominence to that part of the testimony about which they are asked, should refuse. "There is, however," says Stone, Chief Justice, in *Smith v. State*, 88 Ala. 73, 7 South. 52, "a limited, exceptional class of cases, which does not fall within the rule stated, and therefore does not fall within the rule. Testimony is sometimes admissible only for a specific

purpose, such as the peaceable character of the defendant, who is accused of a crime of violence; or testimony impeaching or sustaining a witness, or testimony of previous threats, communicated or uncommunicated, made by the person on whom the injury was inflicted, or testimony proving or disproving the character of the person alleged to have been injured, for turbulence, violence, or blood-thirstiness. In such cases it is but right that the jury should be told to what extent this exceptional testimony should be weighed by them." See, further, *Hale's Case*, 122 Ala. 85, 26 South. 236; *Roberts' Case*, 122 Ala. 47, 25 South. 238; *Perry's Case*, 78 Ala. 22.

[10] 2. It does not follow that, because a certain charge is held to be the law as applied to the facts of one case, it must be given in all other cases of the same general character. A charge which does not state a correct legal proposition as applied to the evidence in the case in which it is asked should not be given, although, under the facts of some other case, it may have been held to be a correct charge. *Outier v. State*, 147 Ala. 39, 41 South. 460; *Keller v. Holland*, 56 Ala. 603; *Ross, Adm'r, v. Pearson*, 21 Ala. 473; *Robinson v. Bullock*, 66 Ala. 548; *Street v. State*, 67 Ala. 87.

In the case of *Prater v. State*, 107 Ala. 26, 18 South. 238, cited by counsel for appellant in his brief on this application for a rehearing, the Supreme Court properly held that a charge asserting that "if the evidence convinces you that Ephraim Prewitt is a man of bad character, and unworthy of belief, then you may disregard his evidence altogether" should have been given. In that case the witness Prewitt was contradicted as to every material fact to which he testified. In the present case the witness William Taylor was corroborated in material parts of his testimony, not only by every other witness who testified in the case, but by the defendant himself, when he testified as a witness. The facts to which William Taylor testified and which the defendant, when he testified as a witness, admitted to be true, were facts necessarily within the knowledge of said William Taylor. These facts were material, and, as the defendant himself corroborated the witness as to this part of his testimony, an instruction authorizing the jury to reject his testimony as a whole was not justified under the evidence.

[11] While jurors are the sole judges of the credibility of witnesses and alone have the right to say what weight shall be given to their testimony, they have no right, under the law, to capriciously reject the testimony of any witness. If the trial judge had given charge B in this case, he would, in effect, have charged the jury that they had the right to capriciously reject certain material parts of William Taylor's testimony, the

truth of which was admitted by the defendant, and the court properly refused to give the charge to the jury.

The application for a rehearing is overruled.

Overruled.

BARNEY v. STATE.

(Court of Appeals of Alabama. Jan. 18, 1912.)

1. CRIMINAL LAW (§ 218*)—PRELIMINARY WARRANT—RETURN TO COUNTY COURT.

In view of Code 1907, § 7348, providing that prosecutions before a justice of the peace must be commenced within 60 days after the commission of the offense, unless otherwise provided, where a larceny prosecution, laid in Clay county, was commenced more than 60 days after the commission of the offense, the justice properly made the warrant returnable to the county court of Clay county; Acts 1898-99, p. 186, providing that all cases of misdemeanor returned by justices of the peace or appeals from the justices or other courts of Clay county to the county court shall be tried upon the complaint of the solicitor filed in the cause.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 444-451, 457; Dec. Dig. § 218.*]

2. LARCENY (§ 15*)—LARCENY BY CUSTODIAN.

One merely having the custody of goods may commit larceny thereof; the legal possession being in the true owner.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 39-42; Dec. Dig. § 15.*]

3. CRIMINAL LAW (§ 726*)—TRIAL—IMPROPER ARGUMENT.

Accused's counsel stated in argument, in a prosecution for larceny of a coat, that defendant could not be guilty as charged, as it would only be a civil action, and the owner could sue defendant and get the value of the coat. The solicitor in his closing argument referred to such contention, and stated that he did not agree with accused's counsel, and did not believe that a member of the jury believed that the owner could ever get a penny by a civil suit, even if he sued until he was gray. Held, that the solicitor's remarks were strictly in reply to the argument of accused's counsel, so that the court could not be put in error for permitting them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1681; Dec. Dig. § 726.*]

4. CRIMINAL LAW (§ 304*)—EVIDENCE—JUDICIAL NOTICE.

The Supreme Court will take judicial notice of the fact that certain towns are located in a certain county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 705; Dec. Dig. § 304.*]

5. CRIMINAL LAW (§ 1159*)—APPEAL—VERDICT—CONCLUSIVENESS.

If there is some evidence that the offense was committed in the county of the venue, in absence of its sufficiency being raised by a requested instruction, or otherwise, a verdict of conviction is conclusive of the question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

6. CRIMINAL LAW (§ 807*)—TRIAL—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.

The court cannot be put in error for refusing requested charges which were argu-

mentative, or in reply to a statement by counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. § 807.*]

Appeal from Clay County Court; E. J. Garlison, Judge.

Len Barney was convicted of larceny, and he appeals. Affirmed.

It appears from the facts that on a Sunday morning in October, 1910, the defendant was working as a driver in the livery stable of J. B. Miller, and drove Mr. Kitchens from Ashland to Lineville; that Mr. Kitchens handed the overcoat to the negro upon his arrival at Lineville, with the request that he carry it to Kitchens' home in Ashland; that he agreed to do so, took the coat but did not deliver it; and that Kitchens had not seen the coat since that time. The evidence for defendant tended to show the same state of facts, and, further, that the defendant took the coat back to Miller's livery stable, and hung it up in the office with directions to the office man to deliver it to Mr. Kitchens, and that he had not seen it since. In his remarks to the jury, the defendant's attorney said: "Gentlemen of the jury, the defendant in this case could not be guilty as charged. It would only be a civil action, and Mr. Kitchens could sue the defendant and thus get the value of the coat." In his closing argument to the jury, the solicitor said: "Now, as to the contention that this ought to be a civil suit, as defendant's attorney argued, I do not agree with him, and I don't believe one member of this jury believes Mr. Kitchens could ever get a penny by a civil suit, even if he sued till he is gray."

O. B. Cornelius, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. [1] The prosecution in this case was commenced more than 60 days after the commission of the alleged offense. The affidavit was made before a justice of the peace, and as section 7348 of the Code provides that prosecutions before a justice of the peace for offenses within his jurisdiction, unless otherwise provided, must be commenced within 60 days after the commission of the offense, the justice made the warrant returnable to the county court of Clay county. In making the warrant returnable to the county court of Clay county, the justice of the peace complied with the law. Acts 1898-99, p. 186; Smith v. State, 165 Ala. 122, 51 South. 602.

[2] 1. The facts in the present case are, in so far as they relate to the question as to whether the defendant could legally be convicted of larceny, practically similar to the facts in the case of Holbrook v. State, 107 Ala. 154, 18 South. 109, 54 Am. St. Rep. 63.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in which the Supreme Court held that the question of the defendant's guilt of larceny *vel non* was properly submitted to the jury. "It is a clear rule of law that, where a party has only the bare charge and custody of the goods of another, the legal possession remains in the owner; and the party in custody may be guilty of trespass and larceny in fraudulently converting the same to his own use." *Oxford v. State*, 38 Ala. 416; *Roscoe, Crim. Ev. 646*; *Daniel Jackson v. State*, (Ala. App.) 57 South. 110, present term.

[3] 2. The remarks of the solicitor, to which exceptions were taken, were strictly in reply to remarks which were made by counsel for the accused in his argument to the jury. The court cannot, therefore, be put in error for permitting him to make the remarks which were objected to by the defendant. *Childress v. State*, 86 Ala. 77, 5 South. 775.

[4, 5] 3. The court takes judicial knowledge of the fact that Lineville and Ashland are both in Clay county. The coat was delivered to the defendant in Lineville, to be carried to Ashland, and there was evidence tending to show that the defendant had the coat in his possession in Ashland. There was, therefore, some evidence in the case tending to show that the offense was committed in Clay county. "There was some evidence showing that the offense was committed in Jefferson county. No instruction was given or requested in respect to its sufficiency. Without a decision by the circuit court, made the subject of an exception, and involving an inquiry into the sufficiency of the evidence, this court cannot interfere." *Clarke v. State*, 78 Ala. 474, 56 Am. Rep. 45; *Ragsdale v. State*, 134 Ala. 24, 32 South. 674.

[6] 4. A court cannot be put in error for refusing to give a charge requested simply as an argument or reply to some statement made by counsel in a case. Charge numbered 6 was requested as a reply to an argument of the solicitor in the case, and is, in fact, simply an argument, and the court cannot be put in error for refusing it.

There is no error in the record. The judgment of the court below is affirmed.

Affirmed.

RANKIN et al. v. McCLEERY.

(Court of Appeals of Alabama. Jan. 9, 1912.)

1. CONTRACTS (§ 184*)—CLAIM BY INDORSERS OF BANKRUPT—AGREEMENT BETWEEN INDORSERS—EFFECT.

A bankrupt was indebted to plaintiff and defendant and codefendant, who as indorsers of the bankrupt had paid his note. Defendant and codefendant filed a claim against the bankrupt, and plaintiff desisted from doing so on the promise of defendant and codefendant that each should have a third of any dividend paid on the claim filed. The negotiations resulting in the agreement were conducted by plaintiff and defendant alone, but the agreement was signed by defendant and codefendant. *Held*,

that the obligation created was a joint and several obligation of defendant and codefendant, and plaintiff was entitled to judgment against codefendant, though he had only received a third of the claim allowed, and though defendant had collected the two-thirds.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 789; Dec. Dig. § 184.*]

2. CONTRACTS (§ 71*)—CONSIDERATION.

The forbearance of plaintiff to file a claim against a bankrupt's estate for his share of a joint claim, and allowing the entire amount to be collected under the claim as filed by defendant and codefendant, his co-obligees, was a sufficient consideration to support an agreement by defendant and codefendant to pay plaintiff one-third of the dividends obtained.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 295, 296, 298, 316-324; Dec. Dig. § 71.*]

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by George McCleery against J. W. Rankin and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Cabaniss & Bowles, for appellants. Nathan L. Miller, for appellee.

PELHAM, J. The appellee, George McCleery, as plaintiff in the court below, instituted a suit in assumpsit against J. W. Rankin and L. C. Morris, defendants, and the case was tried before the court without a jury, and judgment was rendered for the appellee, plaintiff, against both defendants, and an appeal was taken by the defendant L. C. Morris alone; the record being amended by agreement so as to show the appeal to have been taken by both defendants, a severance granted, separate assignments of errors by the appellant L. C. Morris, and a waiver of the right to assign errors entered of record by J. W. Rankin, the codefendant with Morris in the court below.

The suit was brought by plaintiff to recover of the defendants the sum of \$490, claimed by plaintiff to be due from the defendants as the pro rata share (one-third) of the sum collected on a claim filed in the name of Rankin and Morris in a bankruptcy proceeding in the matter of the Rankin-Tuck Paint Company, which company was subsequently declared a bankrupt, and a compromise agreement effected, and a 30 per cent. dividend paid to creditors. Prior to being adjudged a bankrupt, the Rankin-Tuck Paint Company was indebted to J. W. Rankin, L. C. Morris, and the appellee, George McCleery, in the sum of \$4,900; the said indebtedness having accrued on account of these parties' joint indorsement of the note of the Rankin-Tuck Paint Company in the sum of \$5,000, of which amount \$100 was paid by the maker, leaving a balance of \$4,900, which was paid by the indorsers, Rankin, Morris, and McCleery; each party paying an equal proportion.

A claim was filed for this indebtedness

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

due to Rankin, Morris, and McCleery by the Rankin-Tuck Paint Company in the bankruptcy proceeding by J. W. Rankin, in the name of J. W. Rankin and L. C. Morris, and upon this claim a dividend of 30 per cent. was declared and \$1,470 paid. It is to recover one-third of this sum (\$490) that appellee brought his action in the lower court, and recovered judgment against J. W. Rankin and L. C. Morris, from which judgment this appeal is prosecuted by the defendant L. C. Morris.

[1] The evidence set out in the bill of exceptions shows that after proceedings in bankruptcy were instituted negotiations were had between the coindorsers, who had paid the note of the company, looking to filing a claim in the bankruptcy court where the proceedings were pending, and that Rankin, in behalf of himself and Morris, did file such a claim for the entire amount due all three of the indorsers, but did not include McCleery as a party in the transaction. The evidence is in conflict as to why Rankin filed the claim for the entire interest of himself and the other two parties, and failed to include McCleery as a party in interest; but after McCleery found out he had not been included in the claim filed, he went to Rankin and protested, claiming that he had authorized Rankin to include his interest in the claim filed, and informed him (Rankin) that he (McCleery) would file a claim against the bankrupt estate in the bankruptcy court where the proceedings were pending for his pro rata share, or one-third interest. The evidence is in conflict as to what was said between Rankin and McCleery; but, after McCleery had discussed this matter with Rankin, he (McCleery) desisted from filing a claim against the bankrupt, the Rankin-Tuck Paint Company, in the bankruptcy court for the pro rata share he had paid as an indorser on the note of the bankrupt, and took from Rankin and Morris the following agreement in writing: "Birmingham, Ala., May 2, 1906. Mr. Geo. McCleery: In case a compromise is made in the Rankin-Tuck Paint Company matter, and we receive any dividend on our claim of \$4,900, we will prorate the same with you; each of us taking a third, and you taking a third. J. W. Rankin, L. C. Morris."

The negotiations between McCleery and Rankin, which resulted in McCleery's taking the above agreement and not filing his claim in the bankruptcy court, were conducted by the parties (McCleery and Rankin) alone, Morris not being present, but the contract or agreement entered into with McCleery as a result of the negotiations was signed by both Rankin and Morris, Morris being as much a party to the written instrument that was the termination of the negotiations which resulted in McCleery's not filing his claim as Rankin; and as we construe the contract it

creates a joint and several liability on Rankin and Morris to pay McCleery a pro rata, or one-third interest of any dividend received on the claim filed in the name of Rankin and Morris in case of a compromise being effected in the bankruptcy proceedings and a dividend paid on their joint claim. This claim, filed by Rankin and Morris, or by Rankin for himself and Morris, in the name of both parties, and clearly by the authority of Morris, included the interest, or pro rata share, of McCleery in the \$4,900, for which McCleery did not file a claim or set up his rights in the proceedings in bankruptcy, but forbore to do so, relying on the joint agreement of Rankin and Morris to prorate with him, and specifically providing that McCleery should receive one-third of any dividend that might be paid on the claim. The contingency happened, a compromise settlement of the bankrupt company's affairs was effected, and a dividend of 30 per cent. was paid on the claim filed by Rankin and Morris, amounting to \$1,470. It makes no difference, under the issues involved in this suit, that the check given in payment of the dividend on the joint claim of Rankin and Morris, which was made payable to the order of Rankin and Morris, was turned over to Rankin and collected by him, and that he paid Morris only his pro rata share, or one-third, of the amount, and retains the other two-thirds, for Rankin and Morris were jointly and severally bound under the terms of their contract with McCleery to prorate the amount paid in compromise of the claim and pay McCleery his pro rata share of one-third of the amount. The obligation being joint and several, the lower court properly rendered judgment against both defendants, as they were alike liable to plaintiff as joint obligors. Code 1907, § 5384; 9 Cyc. p. 956 et seq.; *Clark v. Dane*, 128 Ala. 122, 28 South. 960.

[2] The evidence before the court was sufficient to authorize the conclusion that Rankin was acting for Morris and by his authority in filing the claim in the bankruptcy proceedings and in collecting the dividend paid on the claim, and Morris subsequently adopted it by receiving benefits under it. The forbearance of McCleery to file a claim for his share and allow the entire amount, including his interest, to be collected under the claim filed by Rankin and Morris, or by Rankin for himself and Morris, with consent of Morris, is a sufficient consideration to support the contract. *Pollak v. Billing*, 131 Ala. 519, 32 South. 639; *Ashburn v. Watson*, 8 Ga. App. 566, 70 S. E. 19; *Sanford v. Huxford*, 32 Mich. 313, 20 Am. Rep. 647.

There was no error committed by the court in entering judgment against the appellant Morris on the evidence adduced on the trial in the court below, and the case is affirmed. Affirmed.

BARLEW v. STATE.

(Court of Appeals of Alabama. Jan. 9, 1912.
Rehearing Denied Jan. 30, 1912.)

1. WITNESSES (§ 269*)—CROSS-EXAMINATION—CHARACTER OF DECEASED.

In a prosecution for murder in the second degree, where no evidence had been offered to show self-defense, the refusal to permit defendant to show by cross-examination of the state's witness the character of the deceased as quarrelsome and violent was proper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

2. CRIMINAL LAW (§ 478*)—OPINION EVIDENCE—COMPETENCY OF EXPERT.

To permit a witness to testify that there were powder marks on the face of deceased, after witness had shown a knowledge of and experience in the use of powder, was within the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1065, 1066; Dec. Dig. § 478.*]

3. CRIMINAL LAW (§ 448*)—OPINION EVIDENCE—CONCLUSIONS.

Questions to a witness in a prosecution for murder in the second degree as to what he endeavored to do, or what the defendant was trying to do, or what it appeared to him the defendant was trying to do, at a different place and prior to the homicide, were properly refused, as calling for the mere conclusions of the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043; Dec. Dig. § 448.*]

4. HOMICIDE (§ 169*)—EVIDENCE—MATERIALITY.

In a prosecution for murder, questions as to the possession of a pistol, before the difficulty, by one who had no part in the fatal difficulty, and as to what such person said at that time, were immaterial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 341-350; Dec. Dig. § 169.*]

5. CRIMINAL LAW (§ 390*)—EVIDENCE—COMPETENCY IN GENERAL—INTENT.

In a prosecution for murder, questions to a witness for defendant intended to show the witness' uncommunicated purpose in going to the house of the defendant a short time before the difficulty, and as to what was said or done there, were objectionable as tending to elicit incompetent evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 858; Dec. Dig. § 390.*]

6. HOMICIDE (§ 190*)—EVIDENCE—UNCOMMUNICATED THREATS.

In a prosecution for murder in the second degree, evidence that a witness for defendant had told defendant's wife about threats made against defendant was incompetent, in the absence of any evidence tending to show that the threats were communicated.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 399-413; Dec. Dig. § 190.*]

7. HOMICIDE (§ 339*)—APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In a prosecution for murder, a refusal to allow defendant to show that he was or was not at a place when the witness went there was not prejudicial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714; Dec. Dig. § 339.*]

8. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTIONS.

A question to a witness for defendant in a prosecution for murder as to whether she was

expecting to hear shots was properly excluded as leading.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 837-845; Dec. Dig. § 240.*]

9. CRIMINAL LAW (§ 390*)—EVIDENCE—STATE OF MIND.

The question was improper as calling for the witness' undisclosed condition of mind.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 858; Dec. Dig. § 390.*]

10. CRIMINAL LAW (§ 687*)—RECEPTION OF EVIDENCE—REOPENING CASE—DISCRETION OF THE COURT.

The further examination of a witness on matters not in rebuttal, on being recalled by defendant after the evidence was closed, was in the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1621; Dec. Dig. § 687.*]

11. CRIMINAL LAW (§ 1056*)—EXCEPTIONS—EFFECT OF FAILURE TO EXCEPT.

Where the court's oral charge is not shown to have been excepted to, it is not before the appellate court for consideration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056.*]

12. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE—FREEDOM FROM FAULT.

In a prosecution for murder, a requested charge that, if the jury believed that the defendant had a reasonable apprehension to believe that his life or limb was in danger at the time he fired the fatal shot, then they must acquit him, was properly refused as ignoring the question of freedom from fault and duty to retreat.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

13. HOMICIDE (§ 300*)—INSTRUCTIONS—DUTY TO RETREAT.

A requested instruction in a prosecution for murder that, before the jury could convict defendant, they must be reasonably satisfied that he brought on the difficulty in which deceased was killed, is faulty in not including the elements of imminent danger and duty to retreat.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

14. HOMICIDE (§ 300*)—INSTRUCTIONS—EFFECT OF THREATS.

A charge requested by defendant in a prosecution for murder that if deceased had made threats to kill the defendant, and defendant knew of them, or had a right to believe that his life or limb was in danger, was erroneous, in stating that threats alone could put defendant in imminent danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

15. HOMICIDE (§ 300*)—INSTRUCTIONS—BEGINNING OF DIFFICULTY—FREEDOM FROM FAULT.

A requested instruction by defendant in a prosecution for murder that if he was free from fault in bringing on the difficulty, and his life and limb were in danger, he should be acquitted, is erroneous, as predicated only danger, and not imminent or impending danger, and failing to include the duty to retreat.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

16. CRIMINAL LAW (§ 890*)—TRIAL—CORRECTING DEFECTIVE VERDICT.

Where the jury in a trial for murder in the second degree returned a verdict of guilty as charged, and "sentence him to ten years and one day imprisonment," the court may properly

correct the verdict so as to read that defendant is guilty as charged, and shall suffer imprisonment in a penitentiary for ten years and one day.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2109-2111; Dec. Dig. § 890.*]

17. CRIMINAL LAW (§ 1125*)—APPEAL—RECORD—MOTION IN ARREST.

Where a motion in arrest of judgment is not set out in the record proper, but appears only in the bill of exceptions, the rulings thereon are not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2949; Dec. Dig. § 1125.*]

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

Charley Barlew, alias, etc., was convicted of murder in the second degree, and he appeals. Affirmed.

The exceptions to evidence sufficiently appear from the opinion. The following charges were refused to the defendant: "(1) If the jury believe that the defendant had reasonable apprehension to believe that his life or limb was in danger at the time he fired the fatal shot, then you must acquit the defendant. (2) Before the jury can convict the defendant, they must be reasonably satisfied that the defendant brought on the difficulty in which Martin was killed. (3) If the jury believe from the evidence that deceased had made threats to kill the defendant, and the defendant knew of the same, he had a right to believe this his life or limb was in danger. (4) If the jury believe that the defendant was free from fault in bringing on the difficulty, and his life or limb was in danger, you must acquit the defendant."

The jury returned the following verdict: "We, the jury, find the defendant guilty of murder in the second degree as charged in the indictment, and sentence him to ten years and one day imprisonment." The defendant objected to this verdict, whereupon the court took the papers from the foreman and changed the verdict so as to read as follows: "We, the jury, find the defendant guilty of murder in the second degree, as charged in the indictment, and say that he shall suffer imprisonment in the penitentiary for ten years and one day." The bill of exceptions then recites that the jury retired a moment or two, and brought in the last set out verdict, whereupon the defendant moved in arrest of judgment because the jury had not been qualified as to relation, kinship, or interest, that the verdict was void, and that the jury had been coerced into returning the verdict.

Bush & Bush, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. The appellant's motion to establish a bill of exceptions in this case is

not contested, and the motion is granted, and the bill of exceptions made a part of the record. The defendant was tried on an indictment charging murder in the second degree, and convicted of that grade of murder.

[1] No evidence up to that time having been offered to show an element of self-defense attending the killing, the court properly refused to let the defendant show, by cross-examination of the state's witness Martin, the character of the deceased for being a quarrelsome, violent, and turbulent man. *Gilmore v. State*, 141 Ala. 51, 37 South. 359; *Morrell v. State*, 136 Ala. 44, 34 South. 208; *Gafford v. State*, 122 Ala. 54, 25 South. 10; *Rutledge v. State*, 88 Ala. 85, 7 South. 335; *Roberts v. State*, 68 Ala. 156; *Payne v. State*, 60 Ala. 80; *Eiland v. State*, 52 Ala. 322; *Franklin v. State*, 29 Ala. 14; *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 250; *Quesenberry v. State*, 3 Stew. & P. 308.

[2] There was no error committed by the court in allowing the witness Martin to testify that there were powder burns on the face of the deceased. The witness showed that he had knowledge of and experience in the use of powder, and whether a witness possesses the necessary qualifications to testify as an expert is a preliminary question largely within the discretion of the court. *Tesney v. State*, 77 Ala. 33; *L. & N. R. R. Co. v. Sandlin*, 125 Ala. 585, 28 South. 40.

[3] The evidence sought to be elicited from the witness Underwood with reference to what took place between the witness and deceased at a different place and prior to the difficulty that resulted in the homicide called for the conclusions of the witness. If the evidence was relevant, as being matters connected with the transaction, the witness should not have been asked what he endeavored to do, or what the defendant was trying to do, or what it appeared to him (witness) the defendant was trying to do, but should have been asked what was done, so that the jury could draw the conclusions from the facts as to whether from what was done the witness endeavored to prevent the deceased from going back to town, or that the defendant was trying to pull away from deceased, or that it appeared that defendant was not trying to get away from deceased. The questions asked called for the mere conclusions or opinions of the witness, and were properly refused. *Knight's Case*, 160 Ala. 58, 49 South. 764; *Bettis' Case*, 160 Ala. 3, 49 South. 781; *Henningburg's Case*, 153 Ala. 13, 45 South. 246; *Weaver v. State*, 1 Ala. App. 48, 55 South. 956.

[4] The objections to the questions asked the witness Mrs. Orange about her son John Orange having a pistol before the difficulty, and what he said at that time, were properly sustained. John Orange was not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

shown to have taken any part in the fatal difficulty, and it was entirely immaterial what he said and whether he had a pistol prior to the difficulty. The defendant subsequently examined John Orange as a witness in his behalf, and received the full benefit of all that this party did preceding the difficulty. The trial court allowed a wide range to the defendant in examining this witness, permitting him to show what the witness believed in reference to the defendant's having some of his money, and the purpose that he and the deceased had in looking for the defendant prior to the encounter.

[5] The court correctly refused to allow the defendant to show by his witness Mrs. Orange her uncommunicated purpose in going to the house of the defendant a short time before the difficulty, and the questions, "What did you do there?" "What did you say there?" were capable and calculated to elicit incompetent and inadmissible evidence as responsive to the questions, and a general objection to the questions was properly sustained. *Ross' Case*, 139 Ala. 144, 36 South. 718; *Braham's Case*, 143 Ala. 28, 40, 38 South. 919.

[6] Even if uncommunicated threats would be competent evidence, as tending to show the animus of the attack, and even though the caution sought to be proven by this witness as having been given to defendant's wife be construed as a threat, or growing out of threats, still it would not be competent to prove what the witness told the defendant's wife about the threats, in the absence of any evidence going to show that the threats were communicated. No communicated threats were proven that the evidence could be corroborative of, and the court was not in error in sustaining objections to the questions. *Webb v. State*, 135 Ala. 36, 33 South. 487.

[7] There was nothing prejudicial to defendant in not being allowed to show the mere fact that defendant was or was not at the house when the witness went there.

[8.9] The question asked this witness, "Mrs. Orange, you were expecting to hear those shots, were you not?" was leading and suggestive, and called for the witness' undisclosed condition of mind.

[10] The further examination of the witness Wingo on matters not in rebuttal upon being recalled by defendant after the evidence was closed was in the discretion of the trial court, and no abuse of the discretion is shown. *Dyer v. State*, 88 Ala. 225, 7 South. 267; *Granison v. State*, 117 Ala. 22, 23 South. 146; *W. U. Tel. Co. v. Bowman*, 141 Ala. 175, 37 South. 493; *Braham v. State*, 143 Ala. 28, 44, 38 South. 919; *Cross v. State*, 147 Ala. 125, 41 South. 875; *McBride v. Sullivan*, 155 Ala. 166, 45 South. 902.

[11] That part of the oral charge set out in the bill of exceptions urged by appellant in brief as constituting error is not shown to have been objected to or any exception reserved thereto, and is not therefore before us for consideration.

[12] Charge No. 1, requested by the defendant and refused, ignores the question of freedom from fault and duty to retreat.

[13] Charge No. 2 is faulty in not including the elements of imminent danger and duty to retreat.

[14] Charge No. 3 is erroneous in stating that threats alone could put defendant in imminent danger.

[15] Charge No. 4 predicates only danger, and not imminent or impending danger, and fails to include the duty to retreat.

[16] The action of the court in having a verdict defective in form corrected was free from error. *Higginbotham & Co. v. Clayton & Webb*, 80 Ala. 194; *Hughes v. State*, 12 Ala. 458.

[17] The motion in arrest of judgment is not set out in the record proper, but only appears in the bill of exceptions, and the rulings thereon are not reviewable. *Taylor v. State*, 112 Ala. 69, 20 South. 848; *Hampton v. State*, 133 Ala. 180, 32 South. 230.

No reversible error available to appellant being shown by the record, the case will be affirmed.

Affirmed.

FLORIDA EAST COAST R. CO. v. SCHUMACHER et al.

(Supreme Court of Florida. Jan. 16, 1912.
Rehearing Denied Feb. 20, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1140*)—DISPOSITION OF CAUSE—REMITTITUR.

The statute authorizes the recovery of compensation "for any damage done to persons, stock or other property, by the running of" a train of a railroad company; and where punitive damages are erroneously allowed in a verdict and judgment, a remittitur may in a proper case be ordered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4478; Dec. Dig. § 1140.*]

Error to Circuit Court, Duval County; R. M. Call, Judge.

Action by Effie W. Schumacher and another against the Florida East Coast Railroad Company. Judgment for plaintiffs, and defendant brings error. Modified.

Alex. St. Clair Abrams, A. V. S. Smith, and R. E. Stillman, for plaintiff in error. C. H. North and Bryan & Bryan, for defendants in error.

PER CURIAM. In an action for personal injuries to the wife, caused by the running of a railroad train, the verdict and judgment

awarded \$800 to the husband for expenses incurred on account of the injury to the wife, and also \$8,200 to the wife. It is conceded that the latter amount included punitive damages, and this is assigned and urged as error.

The statute authorizes the recovery of compensation "for any damage done to persons, stock or other property, by the running of" a railroad company's train. Allegations in the declaration that the railroad company, through its servants and agents, was "wantonly" negligent, are not sustained by the evidence. Consequently punitive damages were erroneously allowed.

There was no evidence upon which to base a charge for exemplary damages. There was nothing to show a malicious or intentional injury inflicted upon plaintiff, neither was there any evidence tending to show that the defendant was guilty "of negligence of so gross and flagrant a character as to evince reckless disregard of human life, or of the safety of those exposed to its dangerous effects, or that entire want of care which would raise the presumption of a conscious indifference to consequences, or to show wantonness and recklessness, or reckless indifference to the rights of others, equivalent to an intentional violation of them, which is necessary to justify a jury in inflicting punitive damages." Florida Cent. & P. R. Co. v. Mooney, 40 Fla. 17, text 34, 24 South. 148; Florida South. Ry. Co. v. Hirst, 30 Fla. 1, 11 South. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17; Florida Ry. & Nav. Co. v. Webster, 25 Fla. 394, 5 South. 714; Dowling Lumber Co. v. King, 57 South. 337, decided at June term, 1911.

The liability of the railroad company for compensatory damages is admitted, and both parties to the action request this court to order a remittitur if the award of punitive damages is error. It appears that the wife was rendered unconscious for a few minutes; that the injury consisted in a bruise of the chest and some slight laceration of the skin, and a fracture of the fourth and fifth ribs, with some depression; that this caused traumatic pneumonia, which continued for a week or ten days; that she was confined to the bed for some weeks; that there was acute dilation of the heart, which lasted for a few days; that there was some spitting of blood, a great deal of high fever, rapid, weak pulse, and a great deal of shock, pain, and nervousness, which lasted in some degree for several months; that pleurisy set in and lasted some weeks; and that for several months there was dizziness and fainting spells, nervousness, sleeplessness, nausea, impaired circulation, rapid heart action, pain in the right arm and shoulder, and other species of personal discomfort.

The court charged the jury that no damages should be allowed for permanent injury, as none was shown.

Under the circumstances of this case, there being no basis for punitive damages, it is upon consideration ordered that, upon the entry in the trial court of a remittitur of \$4,200 of the amount awarded to the wife, the judgment will then stand affirmed as to the remainder of \$4,000 of the amount allowed the wife, and as to the award of \$800 to the husband. If such remittitur is not entered within 80 days after the filing of the mandate of this court in the trial court, the judgment shall stand reversed.

It is so ordered.

WHITFIELD, C. J., and SHACKLEFORD, TAYLOR, COCKRELL, and HOCKER, JJ., concur.

MITCHELL et al. v. MASON.

(Supreme Court of Florida. Jan. 13, 1912. Rehearing Denied Feb. 5, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 460*)—SUPERSEDEAS.

Where an appeal is taken from a decree which is in whole or in part other than a money decree, and the amount and condition of a supersedeas bond is not fixed by a circuit judge, and the bond is not duly executed, approved, and filed within 30 days after the decree is rendered and recorded, there is no supersedeas, in the absence of an order to that effect by the Supreme Court or a justice thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2217-2226, 2228, 2245-2246; Dec. Dig. § 460.*]

Bill by Harry Mason against David F. Mitchell and others. Decree for complainant, and defendants appeal. On application for an order to annul the proceedings and foreclose. Application denied.

D. C. Campbell, for appellants. Alex. St. Clair Abrams, for appellee.

PER CURIAM. This is an application for an order to annul the proceedings taken under a foreclosure decree alleged to have been had in violation of an alleged supersedeas order, and for a rule against those alleged to have violated the alleged supersedeas order.

It appears that a final decree in the foreclosure of a mortgage was rendered and recorded in the circuit court for Duval county on December 1, 1911; that the property was, beginning with December 4, 1911, advertised for sale; that from December 23, 1911, to 5 p. m. on January 1, 1912, the judge was not at his office or his home, and his whereabouts could not be ascertained, as he was on a hunting trip, though he was within his circuit; that on December 28, 1911, an appeal from the foreclosure decree was taken by the defendant, and an application was filed for an order to fix the amount and condition of the supersedeas bond under the statute; that, in the absence of the judge, an order was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

made on January 1, 1912, by the judge of another circuit, fixing the amount and condition of the supersedeas bond, and approving the bond; that after notice of this order was communicated to the master he made the sale on the same day, and the sale was on January 2, 1912, confirmed by the judge who rendered the foreclosure decree; and that a conveyance of the property was then made by the master appointed for that purpose.

In obtaining supersedeas orders in this class of cases, the function of the circuit judge is to fix the amount and condition of the supersedeas bond. If this is done within 30 days after the decree is rendered and recorded, the bond executed, approved, and filed within that time operates as a supersedeas under the statute. If the order fixing the amount and condition of the bond is not made, and the bond is not approved and filed, within 30 days after the rendition and record of the decree, there can be no supersedeas, unless an order therefor is made by the Supreme Court, or a justice of the Supreme Court, and such order is made effective in the manner provided by law. See sections 1701, 1909, Gen. Stats. 1906; International Kaolin Co. v. Vause, 60 Fla. 324, 53 South. 644.

In this case no supersedeas order was made by a justice of this court, and the circuit judge had no authority to fix the amount and condition of a supersedeas bond on January 1, 1912, which was not within 30 days after December 1, 1911, on which date the decree appealed from was rendered and recorded.

A bond, not approved and filed within 30 days after the date of the record of the decree, did not operate as a supersedeas, in the absence of an order by this court or a justice thereof. As the appeal had been entered, the cause was pending in this court, and the circuit judge apparently did not make an order staying the execution of the decree appealed from, as contradistinguished from a supersedeas.

As there was no valid supersedeas order to be violated, the application is denied.

WHITFIELD, C. J., and COCKRELL, TAYLOR, SHACKLEFORD, and HOCKER, JJ., concur.

SAVAGE v. STATE.

(Supreme Court of Florida. Jan. 18, 1912.)

(Syllabus by the Court.)

ANIMALS (§ 18*)—ALTERING BRANDS—CRIMINAL PROSECUTION—EVIDENCE.

In a prosecution for fraudulently changing the marks of cattle with intent to claim the cattle, it is error to exclude proper testimony offered by the defendant that he had not claimed the cattle after their marks were changed; and where the exclusion of such tes-

timony is manifestly harmful to the defendant, a judgment of conviction will be reversed. [Ed. Note.—For other cases, see Animals, Dec. Dig. § 13.*]

Error to Circuit Court, Osceola County; Minor S. Jones, Judge.

W. Henry Savage was convicted of fraudulently changing the marks on cattle with intent to claim the cattle, and brings error. Reversed.

W. L. Palmer and W. J. Sears, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

PER CURIAM. W. Henry Savage was convicted of the statutory offense of altering or changing the marks of three head of cattle not his own, with intent to claim the same and to prevent identification by the true owner, and took writ of error.

At the trial the state showed that the three cattle whose marks are alleged to have been fraudulently changed with intent to claim the cattle, together with three oxen claimed by the defendant, had been taken from an open range and placed in the custody of the sheriff, in the absence of the defendant; and there was testimony offered by the state tending to show that the defendant, in recovering his oxen, also claimed the cattle. When the defendant took the stand, he was not permitted to answer a question as to whether he had put in a claim for the three head of cattle, upon the theory that it was "a self-serving statement." This was error and prejudicial to the defendant, who should have been permitted to rebut testimony offered by the state tending to show he claimed the cattle when they were in the hands of the sheriff. An answer to the question as to whether he had claimed the cattle was responsive to the state's testimony, and was not merely a self-serving statement. The testimony showing guilt is not conclusive, and because of this error, harmful to the defendant, the judgment is reversed.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, COCKRELL, and HOCKER, JJ., concur.

PRESLEY v. STATE.

(Supreme Court of Florida. Jan. 17, 1912.)

(Syllabus by the Court.)

1. WITNESSES (§ 255*)—EXAMINATION—REFRESHING MEMORY—MEMORANDA.

A written memorandum may be used to refresh the memory of a witness, but not as independent evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 874-890; Dec. Dig. § 255.*]

2. CRIMINAL LAW (§ 455*)—EVIDENCE—OPINION EVIDENCE.

A witness may be asked how a defendant looked when the goods he is charged with hav-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

ing stolen were taken from a place where they had been concealed, and were shown to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1044; Dec. Dig. § 455.*]

3. CRIMINAL LAW (§ 371*)—EVIDENCE—SIMILAR ACTS.

Evidence of previous similar crimes by a defendant which tend to show the criminal conduct and intent of the defendant bearing on the issue being tried may be admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

4. CRIMINAL LAW (§ 1173*)—TRIAL—INSTRUCTIONS—TESTIMONY OF ACCOMPLICES.

A refusal of the court to instruct the jury that the testimony of an accomplice "should be received with great caution" is not necessarily harmful error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.*]

5. LARCENY (§ 75*)—PROSECUTION—TRIAL—INSTRUCTIONS.

Any felonious taking or asportation of personal property may be larceny; therefore the omission of the word "away" from a charge as to "the felonious taking and carrying of the personal property of another" is not per se error.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 190, 198; Dec. Dig. § 75.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3991-4003.]

6. LARCENY (§ 77*)—PROSECUTIONS—TRIAL—INSTRUCTIONS.

A charge containing the words "when a person is found in the exclusive possession of goods recently stolen, or has the goods concealed on his premises," includes the idea that the person knowingly had possession of or concealed the goods.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 190, 202-204; Dec. Dig. § 77.*]

(Additional Syllabus by Editorial Staff.)

7. CRIMINAL LAW (§ 761*)—TRIAL—INSTRUCTIONS—ASSUMING FACTS.

A charge that, to find the defendant guilty, the jury must find from the evidence, beyond a reasonable doubt, that the offense was committed in Walton county, Fla., within two years prior to the filing of the information is not erroneous, as assuming the commission of the offense by accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754-1764, 1771; Dec. Dig. § 761.*]

8. CRIMINAL LAW (§ 1122*)—APPEAL—RECORD—QUESTIONS PRESENTED FOR REVIEW.

A charge that the unlawful removing or pushing aside of anything used to inclose or secure the contents of a building is a breaking is not shown to be erroneous, when all the testimony adduced at the trial is not brought up to the Supreme Court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2940-2945; Dec. Dig. § 1122.*]

Error to Criminal Court of Record, Walton County; C. O. Andrews, Judge.

G. D. Presley was convicted of breaking and entering a warehouse with intent to commit grand larceny, and of grand larceny, and brings error. Affirmed.

See, also, 61 Fla. 46, 54 South. 367.

S. K. Gillis, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

WHITFIELD, C. J. The plaintiff in error, having been convicted in the criminal court of record of Walton county on an information in one count charging breaking and entering a warehouse with intent to commit the felony of grand larceny and in another count grand larceny, took writ of error.

[1] The bill of exceptions does not contain all the testimony; but enough appears to show that a written list of the goods missing from the warehouse the morning after the alleged crime was committed was used by a witness to refresh his memory, and that the writing was not introduced as independent evidence, in violation of the rule announced in *Jenkins v. State*, 35 Fla. 737, 18 South. 182, 48 Am. St. Rep. 267; *Jenkins v. State*, 31 Fla. 196, text 201, 12 South. 677.

[2] A witness was asked how the defendant looked when he saw some of the stolen property recovered. This was not error. *Higginbotham v. State*, 42 Fla. 573, 29 South. 410, 89 Am. St. Rep. 237. No motion was made to strike the answer that defendant "looked like another party looks who has done wrong," even if the answer was subject to the motion under the rule stated in the case last cited.

[3] A witness who had been jointly informed against with the defendant testified to a previous similar crime by the two, and the court denied a motion to strike this testimony. This evidence tended to show the criminal conduct and intent of the defendant bearing on the issue being tried, and there was no abuse of discretion in refusing to strike it. See *Wallace v. State*, 41 Fla. 547, 26 South. 713.

A witness was asked why he searched the defendant's house. This question was objected to as irrelevant and immaterial. It does not on the record appear to be subject to the objections made to it, and no motion was made to strike the answer that the witness believed the goods were in the house, if the answer was subject to a motion to strike.

[4] A refusal of the court to instruct the jury that the testimony of an accomplice "should be received with great caution" is not shown to be harmful error, as all the evidence is not here. See *Myers v. State*, 43 Fla. 500, 31 South. 275.

[7] A charge that, to find the defendant guilty, the jury "must find from the evidence, beyond a reasonable doubt, that the offense was committed in Walton county, Fla., within two years prior to the filing of the information," is not erroneous, since it does not assume the commission of the offense by the accused.

[8] A charge that "the unlawful removing or pushing aside of anything used to inclose

or secure the contents of a building is a breaking" does not appear to be erroneous, when all the testimony adduced at the trial is not brought here.

[5] Any felonious taking or asportation of personal property may be larceny; therefore the omission of the word "away" from a charge as to "the felonious taking and carrying of the personal property of another" is not per se error. See *Williams v. State*, 46 Fla. 80, 85 South. 335.

[6] A charge containing the words "when a person is found in the exclusive possession of goods recently stolen or has the goods concealed on his premises," includes the idea that the person knowingly had possession of or concealed the goods. See *McDonald v. State*, 56 Fla. 74, 47 South. 485.

No other points need be considered.

The judgment is affirmed.

TAYLOR, SHACKLEFORD, COCKRELL, and HOCKER, JJ., concur.

MESSER v. DEKLE et al.

(Supreme Court of Florida. Jan. 13, 1912.)

(Syllabus by the Court.)

CONTRACTS (§ 339*)—ACTION—PLEADING—DENIAL.

It is error to strike a plea of "did not promise as alleged" in an action on a simple contract other than a bill or note.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1706-1712; Dec. Dig. § 339.*]

Error to Circuit Court, Jackson County; William H. Price, Judge.

Action by M. L. Dekle and others against C. M. Messer. Judgment for plaintiffs, and defendant brings error. Reversed.

Thomas E. Walker, for plaintiff in error. C. L. Wilson, for defendants in error.

PER CURIAM. A judgment herein was rendered on a former writ of error. 61 Fla. 333, 54 South. 366. To an amended declaration in assumpsit, alleging the nonpayment of a subscription to be paid "in the event a railroad is built to Marianna, Fla., with a possible Northern connection," the performance of the condition precedent being alleged, the defendant filed, among other pleas, a plea "that he never did promise as in said declaration alleged." This plea was stricken. Other pleas were stricken or held bad on demurrer, and, the defendant not pleading further, a judgment by default for want of a plea was entered by the court, and a final judgment for the plaintiffs was entered by the clerk. The defendant, Messer, took writ of error, and assigns as error the order striking the above-quoted plea. The statute (Gen. Stats. 1906, § 1467) expressly provides that the plea "did not promise as alleged" shall

be applicable to declarations on contracts other than bills and notes.

For the error in striking the quoted plea, the judgment is reversed.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, COCKRELL, and HOCKER, JJ., concur.

HULLEY v. HUNT.

(Supreme Court of Florida. Jan. 16, 1912. Rehearing Denied Feb. 20, 1912.)

(Syllabus by the Court.)

1. LIBEL AND SLANDER (§ 7*)—EVIDENCE.

For the president of a coeducational college to say of a girl student, who has been suspended, but not expelled, that "she got to running out at night with the boys, she was out one night in particular until half past 7 or 8 o'clock and did not come to her supper at all, and on various occasions she was doing the same thing and came in late to her supper," is not a charge of fornication.

[Ed. Note.—For other cases, see *Libel and Slander*, Dec. Dig. § 7.*]

2. LIBEL AND SLANDER (§ 7*)—EVIDENCE.

It is not slanderous, as charging fornication, for a president of a college to say of a suspended student that "she would be ruined for life" if he told all he knew of her.

[Ed. Note.—For other cases, see *Libel and Slander*, Dec. Dig. § 7.*]

3. LIBEL AND SLANDER (§ 123*)—INNUENDO—QUESTION FOR JURY.

When the spoken words could not properly leave on the hearer's mind the impression charged in the innuendo, there is no issue for the jury.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 356-364; Dec. Dig. § 123.*]

Error to Circuit Court, Volusia County; Minor S. Jones, Judge.

Action by Helen Hunt against Lincoln Hulley. Judgment for plaintiff, and defendant brings error. Reversed.

Geo. M. Robbins, Stewart & Bly, and Blount & Blount & Carter, for plaintiff in error. Alex St. Clair-Abrams and Landis & Fish, for defendant in error.

COCKRELL, J. Helen Hunt recovered judgment against Lincoln Hulley in an action for slander in the sum of \$15,000. At the trial the declaration consisted of four counts, being of statements alleged to have been made to A. G. Hamlin, Silas B. Wright, Carney L. Wilder, and H. L. Clayberg. The counts as to Wright and Wilder went out upon the denial by them of the alleged statements, and we have left only the counts as to Hamlin and Clayberg.

Clayberg's evidence was discredited, not only by inherent improbability, but impeached in every possible way, and we are forced to the conclusion that the verdict was found

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

solely upon the alleged statements to Mr. Hamlin, and we shall confine ourselves to that count.

In that count, as originally filed, it is alleged that Miss Hunt, a student of the John B. Stetson University, of which Dr. Hulley was president, was without cause by him expelled therefrom, and following such expulsion Dr. Hulley said to Mr. Hamlin, "There were serious reasons for my actions; * * * I do not wish to discuss this question, the reasons are serious," and further, when told that Miss Hunt might bring legal proceedings in the matter, "she had better not, or I will have to show up her character"; the innuendoes being that "she was and had been guilty of immoral and improper conduct." In the amended count the language is changed, and reads: "I have done all I can for Helen (meaning this plaintiff), and I am thinking that at some future time she may be permitted to return here, if this thing is allowed to die out. I have written to them to that effect; but, if they sue, it will be the mistake of their lives. I have kept still about Helen in her and their interests. I will not show her up unless they make me. If they want this matter kept quiet, so it will die out, they must help me do it. It will be a sorry day for Helen Hunt, * * * the worst thing they can do for her, * * * if they should ever attempt to force me to give my reasons for sending her away as I did. You can depend upon it they had better let this matter drop.' And saying further: 'I have sent her away for sufficient reasons; * * * something serious you may be sure. If you knew them, you, or any other fair-minded man, or set of men, would agree with me,' meaning thereby that the plaintiff, Helen Hunt, was and had been guilty of improper and immoral conduct. And saying further: 'They (meaning plaintiff's parents) know she is not all right, because she had trouble in a St. Augustine school, right under their eyes.'" The count was further amended by adding an innuendo that the statements involved the young lady's chastity.

After various pleadings, the sole issue raised by the plea of not guilty was before the jury.

At the trial, upon the testimony of Mr. Hamlin, the count was again amended by enlargement, so as to include these statements: "I have said this before, and I will say it now, that Helen Hunt got to running out at night with the boys. She was out one night in particular until half past 7 or 8 o'clock, and did not come home to her supper at all, and on various other occasions she was doing the same thing and came in late to her supper. * * * There are other things in connection, just of that sort, which, if I should tell you, you would not believe. I do not think you would believe them, unless I would corroborate them.

You would be just perfectly appalled if you knew of the facts. I owe something to other students and their parents, as well as Helen Hunt. She was not a proper person to be connected with this school, and she had to go. Her example was a very bad one, and her influence was bad. * * * You tell the Hunts that I have done all I can for Helen now. I have it in my mind that, if this thing is allowed to die out, that she may be permitted to return here some time in the future. I have so written them; but it is all with them. They will make the mistake of their lives if they ever bring a suit. I am taking this step, Mr. Hamlin, in their interest, and I am trying to conceal the facts. I do not wish them to be made public, and it will be a sorry day for Helen Hunt if she ever forces me to tell what I know. She can depend upon it that, unless she wants to be ruined for life, they had all better keep this matter quiet." To all of these statements were added the innuendo that they charged fornication.

[1-3] A most careful and thoughtful reading of these alleged statements convinces us that, whether taken singly or all together, they are not susceptible to the innuendo of fornication imputed to them by the pleader. There is nothing in them, either with or without the colloquium, that bears upon the sex relation, except the being out late at night with the boys; and this is so immediately qualified by the showing of the early hour at which she returned, and by the further showing that the speaker, as president of the institution, expected to reinstate her in the school, that the remark clearly applies to an infraction of the rules or the proprieties of this coeducational boarding school, and may not be contorted into an imputation of unchastity. The remark was made, if made, to one who looked upon the institution as his child, who drew its original charter and was for many years officially connected with it, and who also in a way was interested in the welfare of the young lady—a peacemaker as it were.

We cannot see how the language could properly have left on his mind the impression that the young lady was charged with fornication, and Dr. Hulley repudiates, not only the use of the quoted language, but affirms that there never entered his mind a thought of sexual impurity, and that to his knowledge there was no possible basis for the thought, much less the statement.

As Miss Hunt has not been charged with so flagrant a dereliction, except in the Clayberg count, which we ignore, and upon this record stands spotless, not only as to the fact, but also as to the imputation, the judgment must be reversed.

WHITFIELD, C. J., and SHACKLEFORD, TAYLOR, and HOCKER, JJ., concur.

POWELL v. STATE.

(Supreme Court of Florida. Jan. 18, 1912.
Headnotes Filed March 2, 1912.)

(*Syllabus by the Court.*)

LARCENY (§ 55*)—EVIDENCE—SUFFICIENCY.

The only question presented is the sufficiency of the evidence to sustain the verdict, and this in the opinion of this court was sufficient.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 55.*]

Error to Criminal Court of Record, Duval County; John S. Maxwell, Judge.

Tom Powell was convicted of larceny, and brings error. Affirmed.

Scarborough & Scarborough, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

HOCKER, J. An information was filed in the criminal court of record of Duval county in April, 1911, against Tom Powell, charging him with the larceny of a hand bag, of the value of \$1.50, one pocketbook, of the value of 75 cents, and one lot of paper bills and silver coins, a more particular description of which is to the informant unknown, of the value of \$47.75, of the money, goods, and chattels of one Lula Parker. The larceny is alleged to have taken place on the 27th of March, 1911. The defendant was tried in May, 1911, convicted, and sentenced to the state prison for two years. The judgment is here for review on writ of error.

The only question properly before this court for consideration is the sufficiency of the evidence to sustain the verdict. The evidence tends to show that Lula Parker met the defendant on a street in Jacksonville on the morning when the offense is alleged to have been committed. Tom Powell, who lived next door to Lula Parker, came out of his house on the veranda, and was quarreling with an old colored man. He then came out upon the street, and was talking with a white man. Lula spoke to Tom about his quarreling with the old negro, and he asked what she had to do with it. She replied, and backed off into the street. Tom's hack (for he was a hack driver) was in front of his house, or near the street corner. As Lula backed into the street Tom followed her. She had her purse on her arm, containing over \$40. In the mêlée that ensued Tom jerked Lula's umbrella from her hand and hit her with it. She hit him back. Several blows passed. The purse fell to the ground, and Tom picked it up and walked towards his hack; Lula following him and demanding her purse. She requested some colored men not to let Tom take her purse. Some one knocked the pocketbook or purse out of his hand, and a colored boy picked it up and handed it to Lula. Before Tom got to his

hack a one-legged man joined in the mêlée and seems to have given Tom several punches with his wooden leg. Tom did not open the purse. He did not conceal it, but had it in his hands. The mêlée occurred in the street, and a crowd was standing around. Tom was drinking, and it seems he had been in the habit of drinking and fighting. Lula and he had always been friends. It seems that Tom got into the hack with the pocketbook, and Lula got in also in her tussle with Tom. The policeman who arrested Tom says Tom said: "Cap, I had a line on old Lula for a hundred and fifty; but you beat me to it."

The rule in this state is that the appellate court should not grant a new trial upon the insufficiency of the evidence to sustain a verdict of guilty, if there is some evidence of all the facts legally essential to support the verdict, and the whole evidence is such that the verdict may have fairly been found on it. *McDonald v. State*, 56 Fla. 74, 47 South. 485. Tom picked up the pocketbook. Why did he do it? It was not a weapon. He then undertook to get into his hack with it. Why did he do that? It was knocked out of his hand. He then stated to the policeman, in substance, that he was prevented by the latter from appropriating it. The jury saw and heard the witnesses, and found from these facts the essentials of larceny, viz., a taking and carrying away, with the felonious intent to deprive the owner of her property. The jury also passed on the question of intent as affected by his alleged drunkenness, and found against the defendant. Under the decision referred to above, we are not authorized to reverse the judgment; and it is affirmed.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, and COCKRELL, JJ., concur.

RAY v. RAY.

(Supreme Court of Florida. Jan. 20, 1912.
Headnotes Filed March 2, 1912.)

(*Syllabus by the Court.*)

DIVORCE (§ 93*)—PLEADING—BILL.

Where a bill for divorce, filed by a wife against her husband, alleges acts of violence against the wife and a long-continued course of abuse, accompanied by foul epithets addressed by the husband to her, by means of which her health is affected, her life made a burden, and the performance of marital duties by her made impossible, and states all the jurisdictional facts, a demurrer thereto is properly overruled.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 292-307; Dec. Dig. § 93.*]

Appeal from Circuit Court, Hillsborough County; F. M. Robles, Judge.

Bill in equity by Luella E. Ray against Roland L. Ray. From an order overruling

a demurrer to the bill, defendant appeals. Affirmed.

H. P. Bailey, for appellant. S. T. Fletcher, for appellee.

HOCKER, J. Luella E. Ray, appellee, filed a bill in the circuit court of Hillsborough county against appellant, her husband, Roland L. Ray, praying for a divorce, alimony, etc. After stating the jurisdictional facts of residence, she alleges in substance that she was legally married to appellant on the 11th of September, 1900, and lived with him until 9th of September, 1911, during which time she was an exemplary wife, notwithstanding the appellant shortly after the marriage commenced to indulge in a violent and ungovernable temper, amounting to quarrelling, bickering, and fault-finding generally; that he became intemperate and unreasonable, occasionally becoming violent, calling appellee all sorts of names, such as bitch, Indian squaw, seizing her and shoving her against the wall with such force as to give her great pain, making her arms black and blue from bruises which he inflicted; that he refused to allow her to visit her mother, and refused her mother and other relatives permission to visit appellee, and when her mother occasionally visited appellee, appellant cursed and abused her, and referred to her as "your damned old mammy"; that neither appellee's mother nor other relatives at any time undertook in the slightest degree to interfere with the domestic relations of appellee and appellant; that his abuse was without reason or cause; that appellee, though once strong and unusually healthy, by reason of appellant's constant bickering and quarrelling became unhealthy, and life with him became unbearable; that on one occasion a short while ago appellant locked appellee out of the house and refused her admittance without just cause, and appellee was forced to appeal to the police authorities of Tampa for assistance to get into her house; that on another occasion she was forced to appeal to Mr. Gullett, the constable in district No. 20 of Hillsborough county, for protection.

The bill alleges that when appellee married appellant he had nothing; that he was working for Dr. Corrigan by the month; that appellee assisted her husband in menial work; that by reason of his irritable disposition he lost his place with Dr. Corrigan, and appellee and appellant then moved to Tampa, where both of them worked—oratrix serving as pantry woman at the Arno Hotel, giving to appellant every penny of her earnings; that subsequently oratrix secured a position as stewardess on several steamship lines plying between Tampa and Havana, thereby earning \$800, which she turned over to appellant; that through their joint efforts they procured a lot in the Garrison, and built a home thereon through the

Building and Loan Association, where for three years oratrix kept from five to seven boarders, doing all the work herself, and turning over to appellant all the receipts; that the arduous work for three years, coupled with the constant bickering, quarrelling, and fault-finding of appellant, resulted in a complete physical breakdown of appellee. Whereupon appellant and appellee bought a small place at Palmetto Beach, where they have since lived, renting the home on the Garrison lot; that appellee hoped appellant would mend his ways, but instead he has unceasingly quarreled and found fault with appellee, on occasions shoved her against the wall, thrown her out of the door, refused to let her have any company, even objected to her attending church, until her life is unbearable.

Appellee alleges that one child, named Mamie Lou, aged 8 years, is the result of her marriage to appellant; that appellant curses and use all kinds of vile language to appellee before this child; that his manner terrifies the child, who clings to appellee for protection.

The bill alleges that appellant is just 38 years old, healthful and vigorous, earns \$80 per month, has in addition \$3,500 worth of personal and real property, besides a considerable sum in cash, the amount unknown to appellee. Appellee alleges that, apart from the place in the Garrison, which is in her name, and when rented yields about \$16 per month, she has no means whatever; that her health is such she is unable to work, a condition caused by the treatment of appellant. The bill prays for alimony, counsel fees, the exclusive custody of her minor child, Mamie Lou, and a divorce a vinculo matrimonii.

A demurrer was interposed to the bill on the grounds, first, that sufficient facts are not stated to warrant the relief claimed; second, that the bill fails to allege any definite dates, places, or circumstances where or when the alleged mistreatment occurred; third, that the bill fails to allege oratrix's prior training, temperament, or education before marriage; fourth, that the allegations of the bill are indefinite, uncertain, and insufficient.

This demurrer was overruled, and this ruling is here on appeal for review.

This court in a series of decisions has held that it is not enough in a bill for divorce to allege the statutory grounds of extreme cruelty and the habitual indulgence of a violent and ungovernable temper, in the language of the statute. Facts must be stated from which the court may see that the conduct of the defendant is such as to render it impracticable for the complainant to further perform the marital duties. In *Hancock v. Hancock*, 55 Fla. 680, 45 South. 1020, 15 L. R. A. (N. S.) 670, this court reviewed its previous decisions and held that "divorce

on the ground of extreme cruelty will be denied, where there is no actual violence, unless the treatment or abuse or neglect or bad conduct complained of be such as damages health, or renders cohabitation intolerable and unsafe, or unless there are threats of mistreatment of such flagrant kind as to cause reasonable and abiding apprehension of bodily violence, so as to render it impracticable to discharge marital duties." In *Palmer v. Palmer*, 26 Fla. 215, 7 South. 864, it is said: "Nor will divorce on the ground of habitual indulgence of a violent and ungovernable temper be granted, unless that temper has been displayed towards complainant habitually and with the effect of rendering life an oppressive and intolerable burden, and making it impracticable to discharge marital duties under such burden. Occasional outbursts of passion, petulance, readiness to anger, frequent and unreasonable complaints, if these are only calculated to render the relations between the parties unpleasant and disagreeable, or simply unhappy, do not furnish sufficient cause for divorce." See *Hickson v. Hickson*, 54 Fla. 556, 45 South. 474.

It follows, of course, that where a bill alleges acts of violence against the wife, and a long-continued course of abuse, accompanied by foul epithets addressed to her by the man who is under the highest obligations to treat her with kindness and affection, by means of which her health is affected and her life made a burden, and the performance of the marital duties made impossible, such a bill states a good cause of action. In the instant case we think the demurrer was properly overruled, and the order is affirmed.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, and COCKRELL, JJ., concur.

TOWNSEND v. STATE.

(Supreme Court of Florida. Jan. 16, 1912.
Headnotes Filed March 2, 1912.)

(*Syllabus by the Court.*)

EMBEZZLEMENT (§ 26*)—INFORMATION—MOTION TO QUASH.

Where the count in an information charging embezzlement, upon which a party is tried and convicted, is based partly on section 3308 of the General Statutes of 1906, and partly on section 3309, which two sections embrace different bailees, a motion to quash the information should have been granted.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 37, 38; Dec. Dig. § 26.*]

Error to Criminal Court of Record, Walton County; C. O. Andrews, Judge.

Josephine Townsend was convicted of embezzlement, and brings error. Reversed.

S. K. Gillis, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

HOCKER, J. Josephine Townsend was tried, convicted, and sentenced in the criminal court of record of Walton county on the third count of an information, which is as follows:

"And the said A. G. Campbell, county solicitor for the county of Walton, prosecuting for the state of Florida in said county, under oath further information makes that one Josephine Townsend, alias Josephine Townsell, late of the county of Walton, in the state aforesaid, on the 25th day of December in the year of our Lord one thousand nine hundred and ten, at and in the county of Walton aforesaid, did then and there, having been intrusted with one gold certificate, lawful currency of the United States of America, of the denomination of fifty dollars, and of the value of fifty dollars, by one Martin Mayo, the owner of said gold certificate, she the said Josephine Townsend, alias Josephine Townsell, then and there being intrusted with the gold certificate for the purpose of examination, being so intrusted by said Martin Mayo, the owner thereof, did then and there unlawfully secrete the same, with intent then and there to unlawfully embezzle the same and fraudulently convert the same to her own use, the said property having been then and there intrusted and delivered to her as aforesaid, and being the subject of larceny, against the form of the statute in such case made and provided, and against the peace and dignity of the state of Florida."

A motion was made to quash each count of the information, for that neither stated any offense against the laws of Florida, and the second and third counts were so drawn as to embarrass the defendant in her defense. This motion was denied, and the ruling assigned as error.

This third count seems to be based partly on section 3308 of the General Statutes, in that it charges the gold certificate to have been *intrusted* to the defendant by Martin Mayo, and partly on section 3309, Id., in that it charges that she *secreted* the property intrusted to her. These two sections, it seems to us, are intended to embrace different kinds of bailees. The first embraces factors, commission merchants, warehouse keepers, wharfingers, wagoners, stage drivers, or other common carriers on land or water, or *any other person with whom any property which may be the subject of larceny is intrusted or deposited by another*. The doctrine of "*nosctur a sociis or ejusdem generis*" applies to the last clause, and must be understood as referring to bailees for hire, not embraced in the enumeration of such bailees first set forth. *McGriff, Adm'r, v. Porter*, 5 Fla. 373, text 378; *Broom's Legal Maxims* (8th Ed.) 452. The other section (3309) evidently refers to a different class of bailees not for hire.

We think the motion to quash this count of the information should have been granted, and we are the more inclined to sustain this assignment because the evidence does not show any *intrusting* of the money to the defendant within the meaning of section 3308, which deals with embezzlement by bailees for hire, nor does it clearly show a *secreting* within the meaning of section 3309.

The judgment below is reversed.

WHITFIELD, C. J., and SHACKLEFORD, TAYLOR, and COCKRELL, JJ., concur.

SEABOARD AIR LINE RY. v. RENTZ
et al.

(Supreme Court of Florida. Feb. 6, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1066*)—HARMLESS
ERROR — INSTRUCTIONS — SHIPMENTS —
INJURIES.

Where a bill of lading stipulates that the value of property lost or damaged in shipment shall be computed as of the place and time of shipment, it is not reversible error to charge the jury that the value should be computed at the time and place of delivery, when the evidence is that the value was the same at both places.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1066.*]

2. APPEAL AND ERROR (§ 237*)—OBJECTIONS
TO EVIDENCE—WAIVER.

Where evidence is, when offered, not subject to the general objection that it is "immaterial and irrelevant," but it becomes irrelevant by the subsequent introduction of evidence, if there is then no motion to strike it, the party objecting to it cannot complain of it in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1386-1388; Dec. Dig. § 237; Trial, Cent. Dig. §§ 228-252.]

3. COSTS (§ 256*)—COSTS ON APPEAL.

Where matters are improperly incorporated in a transcript on writ of error, the cost thereof will be taxed against the party requiring it to be included in the transcript.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 968-971; Dec. Dig. § 256.*]

Error to Circuit Court, Marion County; W. S. Bullock, Judge.

Action by E. P. Rentz and others against the Seaboard Air Line Railway. Judgment for plaintiffs and defendant brings error. Affirmed.

L. N. Green, for plaintiff in error. H. M. Hampton, for defendants in error.

WHITFIELD, C. J. A former judgment, awarding damages for the death of some and injury to other mules by the failure to feed and water them while being transported by the railroad company from a point in Georgia to Silver Springs, Fla., was reversed in *Seaboard Air Line Ry. v. Rentz*, 60 Fla. 449, 54 South. 20.

The bill of exceptions shows that at a sub-

sequent trial the following proceedings were had:

"The plaintiffs introduced as a witness one C. B. Stillwell, who having testified that the first shipment of mules mentioned in the declaration and in count 1 thereof was received at Silver Springs, Fla., the same having been shipped from a point in the state of Georgia, during the month of December, 1906, plaintiffs' attorney propounded to said witness Stillwell the following question: 'What was the value of a mule of the kind and character that these mules were, had they been sold at Silver Springs, Fla., at that time?'

"Whereupon counsel for defendant objected to said question, on the grounds that the value of said animals at Silver Springs was immaterial and irrelevant. Which objection being overruled by the court, the defendant, by its attorney, then and there excepted.

"Whereupon said witness testified as follows: 'A. I should say at least \$250 a head; some of them were worth more than that.'

"And thereafter the said plaintiffs offered and introduced in evidence in said cause, and the same was duly marked as introduced in evidence by the court stenographer, who had been duly sworn and appointed by the court at the request of the respective parties, a paper writing purporting to be the bill of lading accepted by the plaintiffs, at the initial point of shipment, from the common carrier accepting for shipment and shipping over its line the animals of plaintiffs mentioned in the first count of plaintiffs' declaration, when the bill of lading was headed 'Adrian, Ga., December 9, 1906,' and contained, among others, the following conditions and provisions:

"In consideration of the rate charged under the conditions of the bill of lading, it is mutually agreed as to each carrier, severally but not jointly, of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions whether printed or written, on the face or back hereof, all of which are agreed to by the shipper as owner or agent for the owner, and accepted for himself or his assigns as just and reasonable.'

"Which bill of lading showed the consignment in question to consist of seventeen (17) head of mules, and the consignee to be E. P. Rentz Lumber Company, at Silver Springs, Fla.

"On the back thereof, the said bill of lading contained the following conditions:

"3. No carrier shall be liable for loss or damage not occurring on its portion of the route, nor after said property is ready for

delivery to the consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation."

The following charge, given at the request of the plaintiffs, was excepted to, and is assigned as error:

"In assessing such damages, you will consider (a) the value of the animals that you find died from the effect of the neglect of defendant to feed and water the same, as aforesaid, at the time and place of such death, if same had been transported and delivered to plaintiffs in the condition they were in when received by defendants."

A motion for new trial contains the following grounds that are referred to in the assignment of errors:

(1) "The court erred in permitting the witness Stillwell to testify as to the value of plaintiffs' animals at Silver Springs which died, and in overruling defendant's objections to such testimony."

(2) "In permitting the witness Stillwell to testify as to the value at Silver Springs, or at the time and place of the death, of those animals which died, in view of the terms and conditions of the bill of lading issued for such shipment."

(3) "That the court erred in giving that portion of the sixth charge requested by the plaintiffs, wherein it is stated as follows: '(a) The value of the animals that you find died from the effects of the neglect of defendant to feed and water the same, as aforesaid, at the time and place of such death, if the same had been transported and delivered to the plaintiffs in the condition they were in when received by defendant.'"

(4) "The court erred in giving that portion of the sixth charge requested by the plaintiffs, as follows, viz.: 'In assessing such damages, you will consider (a) the value of the animals that you find died from the effects of the neglect of the defendant to feed and water the same, as aforesaid, at the time and place of such death, if the same had been transported and delivered to plaintiffs in the condition they were in when received by defendant.' Said portion of said sixth charge being erroneous in view of the terms and conditions of the bill of lading issued to cover said shipment, and wherein it is specifically stated: 'The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading.'"

In denying the motion for new trial, the court stated:

"The fourth ground of the motion is a

good one, but under the circumstances I cannot see that any harm was done. Mr. Rentz did testify as to the value of the animals at the place of shipment, as I remember the same. The charge would not have been given, had this court known of any such provision in the bill of lading. The bill of lading was offered and filed in evidence, but never read, and did not know of such provision, and the mere failure to instruct as requested when there was evidence, as I remember the same, as to value at the place of shipment, when that value was the same as at the place of destination, cannot constitute ground for new trial."

The following are the assignments of errors:

"The trial court erred: (1) In overruling defendant's first ground for new trial. (2) In overruling the second ground of defendant's motion for new trial. (3) In overruling third ground of defendant's motion for new trial. (4) In overruling fourth ground of defendant's motion for new trial. (5) In permitting the plaintiffs' witness Stillwell to testify as to the value of the animals which died at Silver Springs; this over the objections and exceptions of the defendant. (6) In giving that portion of the sixth charge requested by the plaintiffs, as follows, viz., 'In assessing such damages, you will consider (a) the value of the animals that you find died from the effect of the neglect of the defendant to feed and water same, as aforesaid, at the time and place of such death, if the same had been transported and delivered to plaintiffs in the condition they were in when received by defendant.' Said portion of said sixth charge being erroneous in view of the terms and conditions of the bill of lading issued to cover said shipment, and wherein it is specifically stated as follows, viz.: 'The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading.'"

In denying the motion for new trial, the judge stated that the evidence did not impress him that "a failure to feed and water the stock was the proximate cause of the death of the animals, or that it did or could produce such death; but as there was evidence, and the jury heard it, and the rule of law, as it seems, is that if there was any evidence to support the verdict, the court has no authority to set aside the verdict. There was some evidence to support the verdict, and the jury has adopted that view." This statement was not excepted to, and is not covered by any assignment of error; therefore the effect of the statement, under the rule announced in *Tampa Water Works Co. v. Mugge*, 60 Fla. 263, 53 South. 943, is not considered.

The only questions presented for adjudication are whether the quoted testimony

was erroneously admitted in evidence, and whether there was reversible error in giving the charge above quoted.

[1] The entire evidence is not before us, and the trial court states in the order overruling the motion for new trial that "Mr. Rentz did testify as to the value of the animals at the place of shipment, as I remember the same," and that "there was evidence, as I remember the same, as to the place of shipment, when that value was the same as at the place of destination"; therefore it must be assumed that the evidence showed the value of the mules to be the same, both at the place and time of shipment and at destination, and that consequently the technical error in the charge is harmless to the plaintiff in error.

[2] As the bill of lading had not then been introduced in evidence, the testimony of the witness as to the value of the mules at destination was not then subject to the only objection made to it—that it was "immaterial and irrelevant."

It does not appear that a motion was made to strike the testimony after the bill of lading was introduced, or that the attention of the court was called to the provisions of the bill of lading that the bill of exceptions clearly shows was introduced after the testimony objected to was admitted, and the bill of lading was not read in evidence.

[3] As the matters incorporated in the transcript by direction of the defendants in error were not properly a part of the record on the assignment of errors, the costs thereof will be taxed against the defendants in error under the rule.

No reversible error appearing in the matters properly presented for consideration, the judgment is affirmed.

TAYLOR, SHACKLEFORD, COCKRELL, and HOCKER, JJ., concur.

ALLES v. DIAZ.

(Supreme Court of Florida, Division A. Dec. 19, 1911. On Rehearing Feb. 5, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS OF CHANCELLOR.

Where the testimony is conflicting in an equity cause, but there is ample evidence to sustain the finding of the chancellor on the merits, and no errors of law appear, the decree will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Circuit Court, Hillsborough County; J. B. Wall, Judge.

Bill by Antolín Alles against Fernando Diaz. Decree for defendant, and complainant appeals. Affirmed.

Wall & McKay, for appellant. F. M. Simonton, for appellee.

PER CURIAM. The appellant filed a bill to dissolve an alleged copartnership with appellee and for a receiver and an accounting. The answer admitted a former partnership, but denied the then existence of a partnership, and asserted an exclusive right to the property by virtue of conveyances for value made by the complainant to the defendant more than four years before this suit was brought. Replication was filed, and voluminous testimony was taken. The chancellor dismissed the bill, and denied an application for a rehearing, and the complainant appealed.

Conveyances of property used by the former partnership and the possession of the defendant thereunder were shown in evidence. The complainant undertook to show that the asserted conveyances were not made for the purpose of depriving him of his right therein, but for other purposes personal to the complainant.

The testimony is conflicting, but there is ample evidence to sustain the finding in favor of the defendant. No rights of third parties are involved. The rights of the parties between themselves should be left as they themselves fixed them, no unilateral fraud or overreaching being made to clearly appear, as against the finding of the chancellor. See *Baxter v. Liddon* 62 Fla. —, 56 South. 410.

The decree is affirmed.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

On Rehearing.

PER CURIAM. This cause came on again to be heard upon a rehearing heretofore granted, and being duly considered, and the court being of the opinion that its former decision was in all respects correct, it is ordered, adjudged, and decreed that the decree be and the same is hereby reaffirmed, and the opinion of the court heretofore filed shall stand as the opinion of the court.

TRUSTEES OF SPECIAL TAX SCHOOL DIST. NO. 1, LEON COUNTY, et al. v. LEWIS.

(Supreme Court of Florida. Jan. 20, 1912.)

(Syllabus by the Court.)

SCHOOLS AND SCHOOL DISTRICTS (§ 79*)—LEASE OF PROPERTY—POWER OF TRUSTEES.

The statutory authority of trustees of a special tax school district with reference to schools in the district is of supervision only,

and does not include a right to lease the school property.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 188-191; Dec. Dig. § 79.*]

Appeal from Circuit Court, Leon County; J. W. Malone, Judge.

Bill by J. Stewart Lewis against the Trustees of Special Tax School District No. 1, Leon County, and others. Decree for complainant, and defendants appeal. Affirmed.

W. H. Ellis, for appellants. Frederick T. Myers, for appellee.

PER CURIAM. This appeal is from an order granting a temporary restraining order enjoining the use of the auditorium in a public school building in the special tax school district by private parties for entertainments, such as exhibitions of moving pictures, etc., under a contract made with the trustees of the special tax school district.

The title to the land and the building is vested in the board of public instruction of the county, and the statutory authority of the trustees of the special tax school district with reference to schools in the district is not of control, but of supervision only, and does not include a right in the trustees to make the lease of the school property of the county involved in this controversy. No authority in the trustees to make the lease is made to appear. See *Special Tax School District v. Dade County Board*, 61 Fla. 798, 54 South. 265.

The order appealed from is affirmed.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, COCKRELL, and HOCKER, JJ., concur.

GILLETT et al. v. BEACHAM.

(Supreme Court of Florida. Jan. 16, 1912.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 1009*)—REVIEW—QUESTION OF FACT.

A decree will not be reversed, as being against the evidence and because no replication was filed, when ample evidence to support the decree was filed by consent.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Circuit Court, Hillsborough County; F. M. Robles, Judge.

Bill in equity by Harrison T. Beacham against M. E. Gillett and another, partners as Gillett & Son. From a decree for complainant, defendants appeal. Affirmed.

E. R. Gunby, for appellants. F. M. Simon-ton, for appellee.

WHITFIELD, C. J. Beacham agreed to sell Gillett & Son two-eighths interest in the

schooner *Brazos* at any time within a year from April, 1906, for \$3,250, without interest. On December 4, 1906, Gillett & Son wired Beacham to know if he would accept \$3,250 and interest for his two-eighths interest in the schooner. Beacham replied that he would accept \$3,250 for his one-fourth interest in the schooner, but was entitled to his dividends on the earnings of the schooner. Gillett & Son remitted \$3,401.60 to Beacham, and Beacham sent them a bill of sale for his interest in the vessel, and at the same time protested that he was entitled to more as dividends. Finally suit was brought by Beacham against Gillett & Son for an accounting as to profits due him for the period from April, 1906, to December, 1906, when Beacham conveyed his interest in the vessel to Gillett & Son. The defense set up is that the acceptance of the \$3,401.60 remitted to Beacham and the conveyance of his interest in the vessel to Gillett & Son constituted a new contract, resulting in a conveyance of Beacham's interest in the schooner, including dividends due to him to the date of the conveyance. This is not borne out by the evidence. The correspondence shows that Beacham did not expressly or impliedly relinquish his claim to dividends.

The decree in favor of Beacham is founded on statements filed by consent. It is contended that an error was made in allowing Beacham credit for insurance premiums paid on the vessel; but this is not sustained, since Gillett & Son remitted \$3,401.60 to Beacham, being \$151.60 over the \$3,250 due as the agreed purchase price, and this \$151.60 is \$28.48 in excess of the \$123.12 paid by Beacham for insurance premiums, and the \$28.48 was deducted from the \$746.26 found to be due to Beacham by the statements filed by consent, leaving \$717.78, the amount for which the decree was rendered. It was not suggested in the circuit court that the insurance premium was not a proper charge against the vessel.

The defendants, appellants here, cannot complain that no replication was filed, when the evidence in support of the bill of complaint was filed by consent and sustains the decree.

The decree is affirmed.

TAYLOR, SHACKLEFORD, COCKRELL, and HOCKER, JJ., concur.

DIXON LUMBER CO. v. JENNINGS.

(Supreme Court of Florida. Jan. 13, 1912.)

(*Syllabus by the Court.*)

1. **CHATEL MORTGAGES (§ 139*)—LIEN AND PRIORITY—MORTGAGEE AS BONA FIDE PURCHASER.**

Where the vendor of personal property retains possession of it after sale, it devolves

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

upon the vendee to maintain a showing that the possession of the vendor is either consistent with the sale, is unavoidable, or temporary, for the reasonable convenience of the vendee; and where a mortgage is placed on the property by the vendor, when the latter had remained in possession of it more than two years after its alleged sale, with nothing to indicate that the ownership had been transferred, the mortgagee, without notice of anything putting him upon inquiry as to the true ownership, will have priority over the vendee.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 238; Dec. Dig. § 139.*]

2. APPEAL AND ERROR (§ 1009*)—REVIEW—QUESTIONS OF FACT—FINDINGS OF CHANCELLOR.

While the findings and conclusions of a chancellor, where the evidence is not taken before him, but before a master or examiner, by reason whereof he is not afforded an opportunity of seeing and hearing the witnesses, are not entitled to the same weight as the verdict of a jury, yet even in that case they should not be disturbed by an appellate court, unless they are clearly shown to be erroneous.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

3. APPEAL AND ERROR (§ 934*)—REVIEW—PRESUMPTIONS.

In equity, as well as at law, every presumption is in favor of the correctness of the rulings of the trial judge, and a final decree rendered by him, based largely or solely upon questions of fact, will not be reversed, unless the evidence clearly shows it to be erroneous.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3777-3781; Dec. Dig. § 934.*]

Appeal from Circuit Court, Hamilton County; Ira J. Carter, Judge.

Suit in equity between the Dixon Lumber Company and J. R. Jennings. From the decree, the Lumber Company appeals. Affirmed.

C. A. Stephens, for appellant. L. E. Roberson and B. B. Johnson, for appellee.

PER CURIAM. On February 26, 1910, W. L. Perkins executed to J. R. Jennings a mortgage on a certain locomotive engine apparently used in hauling timber to a lumber mill. Dixon Lumber Company claimed to own the engine by virtue of a bill of sale dated January 5, 1908. The engine remained in the custody of Perkins for more than two years after its alleged sale to Dixon Lumber Company, with apparently no visible indicia of ownership or right in another. An alleged lease of the engine by the Dixon Lumber Company to Perkins was not proved for record, and its record did not give Dixon Lumber Company any advantage, under section 2516, General Statutes of 1906. *Onyz Soda Fountain v. L'Engle*, 53 Fla. 314, 43 South. 771.

[1] Where the vendor of personal property retains possession of it after sale, it devolves upon the vendee to maintain a showing that the possession of the vendor is either consistent with the sale, is unavoidable,

or temporary, for the reasonable convenience of the vendee; and where a mortgage is placed on the property when the vendor had remained in possession of it more than two years after its alleged sale, with nothing to indicate that the ownership had been transferred, the mortgagee, without notice of anything putting him upon inquiry as to the true ownership, will have priority over the vendee. See *Volusia County Bank v. Bertola*, 44 Fla. 734, 33 South. 448; *Gibson v. Love*, 4 Fla. 217.

[2] While the findings and conclusions of a chancellor, where the evidence is not taken before him, but before a master or examiner, by reason whereof he is not afforded an opportunity of seeing and hearing the witnesses, are not entitled to the same weight as the verdict of a jury, yet even in that case they should not be disturbed by an appellate court, unless they are clearly shown to be erroneous.

[3] In equity, as well as at law, every presumption is in favor of the correctness of the rulings of the trial judge, and a final decree rendered by him, based largely or solely upon questions of fact, will not be reversed, unless the evidence clearly show it to be erroneous. *Brannon v. Blume*, 61 Fla. 505, 55 South. 549.

The only real question presented is whether Jennings had any actual notice that the title to the engine was, at the time he took the mortgage, in the Dixon Lumber Company. The testimony is quite voluminous, and in some respects conflicting; but there is evidence to sustain the finding of the chancellor in favor of Jennings, and the finding does not clearly appear on the whole evidence to be erroneous. Therefore the decree will not be reversed, but is hereby affirmed.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, COCKRELL, and HOCKER, JJ., concur.

HULL et al. v. BURR.

(Supreme Court of Florida. Feb. 27, 1912.)

(Syllabus by the Court.)

COSTS (§ 247*)—COSTS ON APPEAL—PREMIUM FOR BOND.

Under section 2789 of the General Statutes of 1906, the reasonable premium paid for a supersedeas bond may be taxed as costs only when such bond is given by a fiduciary.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 951; Dec. Dig. § 247.*]

On petition for rehearing of motion to tax costs. Denied.

For former opinion in this case on the merits, see 56 South. 673.

Bisbee & Bedell and Wilson & Swearingen, for the motion. Jas. F. Glen, opposed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

PER CURIAM. A motion to have taxed as costs in this case the amount paid a surety company for a supersedeas bond, on the ground that it is authorized by section 2789 of the General Statutes of 1906, was denied, and counsel for the motion request the court to give its reasons for the denial of the motion, so that it may be a guide in future litigation.

The statute under which the motion was made is chapter 4716, Acts of 1890, entitled:

"An act providing for the payment of premium on bonds by trustees and others out of trust fund, and allowing the same as costs.

"Be it enacted by the Legislature of the state of Florida:

"Section 1. Any receiver, assignee, trustee, committee, guardian, executor, or administrator, or other fiduciary required by law to give bond as such, may include as part of his lawful expenses such reasonable sum paid such a company for such suretyship not exceeding one per centum per annum on the amount of said bond, as the head of department, board, court, judge or officer by whom, or the court or body by which he was appointed allows; and in all actions or proceedings the party entitled to recover costs may include therein such reasonable sum as may have been paid such company executing or guaranteeing any bond or undertaking therein."

This section is now section 2789 of the General Statutes of 1906, without change. The title to the original act limits it to bonds given by fiduciaries, and there is nothing in its reproduction in the General Statutes to indicate that a broader effect was intended to be given to the statute. On the contrary, the context of the section manifests an intention to make the entire section relate only to cases where fiduciaries are required by law to give a bond.

Rehearing denied. All concur.

COLLIER et al., Sumter County Com'rs, v. CASSADY et al.

(Supreme Court of Florida. Jan. 20, 1912.
Rehearing Denied Feb. 5, 1912.)

(Syllabus by the Court.)

1. STATUTES (§ 68*)—GENERAL LAWS—COUNTIES.

A law is a general law which is potentially applicable to every county in the state, though at the time of its passage it applies to but some of the counties.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 70; Dec. Dig. § 68.*]

2. STATUTES (§ 94*)—GENERAL LAWS—COUNTIES.

The Legislature may provide that there be no county seat elections in counties having

built a courthouse until that courthouse be 20 years old.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 103, 104; Dec. Dig. § 94.*]

3. COUNTIES (§ 26*)—COUNTY SEAT—LOCATION—STATUTORY PROVISION.

A proviso to an act for the removal of county seats, that it "shall not apply to any county having constructed a courthouse within the past twenty years," is prospective, and the period runs back, not from the passage of the act, but from the date of the filing of the petition thereunder for a removal.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 26.*]

4. APPEAL AND ERROR (§ 883*)—RIGHT TO ALLEGE ERROR—ABANDONMENT OF OBJECTION.

Objections specifically abandoned in the circuit court may not in general be renewed in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8611; Dec. Dig. § 883.*]

Appeal from Circuit Court, Sumter County; W. S. Bullock, Judge.

Bill in equity by W. F. Cassady and others against H. O. Collier and others, County Commissioners of Sumter County. From an order enjoining the removal of the county seat and overruling a demurrer to the bill, defendants appeal. Reversed.

Hocker & Duval and J. B. Gaines, for appellants. W. F. Himes, for appellees.

COCKRELL, J. This is an appeal from an order enjoining among other things, the removal of the county seat of Sumter county from the town of Sumterville, and overruling the demurrer to a bill filed to that end by certain resident taxpayers in or near that town. The whole case depends upon the constitutionality of chapter 6239 of the Laws of 1911, entitled "An act to provide for the change and establishment of county sites, calling elections for, and prescribing the regulations under which such elections shall be held, and providing a penalty for the use of money, goods or chattels, to secure votes or influence for any place as county site in such elections, and specifying who shall be qualified to vote in the said elections."

No objection is urged to the title to the act; but it was successfully insisted before the circuit judge that the tenth section of the act destroyed its dignity as a general law, within the inhibition of article 8, § 4, forbidding the Legislature to remove the county seat of any county, and commanding that it "shall provide by general law for such removal."

After general provision for change of the county seat in any county by a majority vote, upon application to the county commissioners by a petition signed by one-third of the qualified electors, a radical departure was made from the old law, in that provision is made where there is a failure of any place voted for receiving a majority over

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

all other places; the provision being that a second election be promptly held, in which only the two places receiving the highest number of votes are placed upon the ballot.

Under the act, an election was held in Sumter county on September 1, 1911, at which election the vote was declared to be for Sumterville, 68 votes, for Bushnell, 282 votes, for Coleman, 269 votes, for Webster, 271 votes, for Wildwood, 305 votes, and a second election was called for the 29th of that month, at which the voters might choose between Wildwood and Bushnell.

The objectionable language in the tenth section of chapter 6239 reads: "The provisions of this act shall not apply to any county having constructed a new courthouse within the past twenty years."

It is true that this court, in *County Commissioners of Lake County v. State*, 24 Fla. 263, 4 South. 795, said, "The purpose of section 4 of article 8 of the Constitution, considered independently of the proviso, was to prohibit the Legislature from removing the county seat of any county otherwise than by a general law, applicable to all cases of removal;" but, as clearly appears in that opinion, the case depended solely on the proviso, and the words "applicable to all cases of removal" are additions to the language of the Constitution, not thoroughly considered by the court as being outside the case before it, which was the validity of a purely local or special law creating the county of Lake.

[1] It will be noted that the requirement of a general law for the removal of county seats is not included within the twentieth section of the legislative article, prohibiting local or special laws on certain subjects, and as to which special subjects the succeeding section requires "all laws shall be general and of uniform operation throughout the state," but the inhibition is under the article entitled "counties and cities"; and, after providing that the law for the removal of county seats be a general law, the Constitution does not further emphasize the generality by saying it shall be of uniform operation throughout the state. The evil aimed at was the harm that might result, and had theretofore resulted in this state, by sudden changes wrought through local acts, passing the Legislature hastily, without full, if any, consideration, upon the request of the local members, and we can refuse to apply legislation for the removal of county seats only when we can clearly say that the legislation of necessity is local, and may not be, potentially at least, of general operation. It need not be immediately in fact applicable everywhere.

[2] To bring the discussion to the concrete case, the Legislature may provide that there be no county seat removal until the courthouse already built at the county seat shall be 20 years old. Every county in the state

is brought potentially within the act, though it may be sometime before a particular county may indulge in the excitement of a county seat fight, while others may do so immediately; but the Legislature may surely safeguard the property rights of the taxpayers as against the wishes of those who enjoy the agitation of the political arena.

[3] We think the language of the proviso means nothing more nor less than to postpone all removal contests until the courthouse shall be 20 years old, and that the 20-year period is counted, not from the passage of the act, but from the filing of the petition for the election.

[4] The circuit judge states in his findings that the complainants abandoned the contention that 30 days notice of the second election was not given, and they will not be permitted to renew it here.

The act is not beyond the legislative authority; the bill of complaint is without equity, and should be dismissed.

Order reversed.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, and HOCKER, JJ., concur.

WARFIELD et al. v. HEPBURN et al.
(Supreme Court of Florida. Jan. 6, 1912. On Rehearing, Feb. 21, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 48*)—ALLEGATIONS IN GENERAL—ULTIMATE FACT.

A declaration should contain sufficient allegations of all the facts that are necessary to state a cause of action. As a general rule, only ultimate facts need be alleged.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 105, 106; Dec. Dig. § 48.*]

2. PLEADING (§ 48*)—DECLARATION—STATEMENT OF CAUSE OF ACTION.

Where the facts are, or reasonably should be, within the knowledge of the plaintiff, the declaration should contain sufficient statements of facts to apprise the defendant of the particular acts or circumstances upon which the action is based, in order that there may be no embarrassment in preparing a defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 105, 106; Dec. Dig. § 48.*]

3. NEGLIGENCE (§ 108*)—ACTIONS—PLEADING.

In actions for negligent injuries, it may be necessary to allege only the relation between the parties out of which the duty to avoid negligence arises, and the act or omission that proximately caused the injury, coupled with a statement that such act or omission was negligently done or omitted.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 174-180; Dec. Dig. § 108.*]

4. CARRIERS (§ 314*)—INJURIES TO PASSENGERS—PLEADING.

In an action by a passenger for injuries received by the operation of a railroad train, it is in general sufficient to allege ultimate facts showing that the relation of passenger and carrier existed, and that the defendant negli-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

gently did or omitted the act or acts that proximately caused or contributed to causing the injury as stated, the specific fact that actually caused the injury being duly alleged, so that a definite issue may be presented for trial.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1260-1280; Dec. Dig. § 314.*]

5. CARRIERS (§ 314*)—INJURIES TO PASSENGERS—PLEADING.

Allegations that the carrier "so negligently and carelessly operated said train, and so negligently and carelessly failed to take the necessary precaution looking to the safety of said train and its occupants, that the said car in which said plaintiff was riding by and through the negligence of the defendant was derailed, causing the same to be suddenly and violently stopped, from the effects of which the said Amelia Hepburn was" injured, as stated, are sufficient statements of ultimate facts to show negligence of the defendants in the operation of its train and injury to the plaintiff proximately resulting from a particular fact stated, viz., the derailling and sudden, violent stopping of the car caused by the negligence alleged.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1260-1280; Dec. Dig. § 314.*]

6. PLEADING (§ 245*)—ALLEGATIONS IN GENERAL—ULTIMATE FACTS.

Allegations that the plaintiff was a passenger, and was riding on defendant's train "as a passenger * * * and seated in the car assigned to her as a passenger," are of ultimate facts that on demurrer are sufficient to show the relation of passenger and carrier.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1076; Dec. Dig. § 245.*]

7. CARRIERS (§ 316*)—INJURIES TO PASSENGERS—PRESUMPTIONS.

When the plaintiff sufficiently alleges, and proves substantially as alleged, the fact of a personal injury or a property loss caused by the running of a train of the defendant railroad company and also the ultimate fact that actually caused the injury or loss, the statute raises a presumption of negligence against the company, and its liability in damages will then be shown, "unless the company shall make it appear that its employes exercised all ordinary and reasonable care and diligence; the presumption in all cases being against the company."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261-1294; Dec. Dig. § 316.*]

8. CARRIERS (§ 323*)—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—ISSUES AND PROOF.

Whether contributory negligence is a bar to an action for a merely negligent injury as at common law, or operates under the statute to diminish the amount of damages recoverable in actions against railroad companies "for any damage done to persons or * * * property by the running of" the company's trains, such contributory negligence is an affirmative defense, and, to be available either as a bar to the action or to diminish the recovery, it shall be pleaded and proved by the defendant, unless the plaintiff permits it to be shown without objection under other pleas, or unless contributory negligence appears in the case made by the plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1346; Dec. Dig. § 323.*]

9. DAMAGES (§ 18*)—COMPENSATORY DAMAGES—PROXIMATE CONSEQUENCES.

Where liability appears, compensatory damages may be recovered upon proper allegations and proofs for property losses and person-

al injuries that result proximately from the negligence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 37; Dec. Dig. § 18.*]

10. DAMAGES (§ 142*)—ASSESSMENT—PLEADING AND PROOF.

Damages for such losses and injuries as naturally and ordinarily result proximately from the injury received or loss sustained as alleged may generally be shown in evidence under a general claim for damages, because the defendant is held to notice of the natural and ordinary results of its negligent acts.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 413; Dec. Dig. § 142.*]

11. DAMAGES (§ 163*)—AMOUNT—BURDEN OF PROOF.

When liability in damages for negligence is shown, the burden of distinctly proving by a preponderance of the evidence the character or nature of the personal injuries sustained or of the property rights injured or destroyed, within the sufficient allegations of the declaration, is upon the plaintiff as at common law.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 454-459; Dec. Dig. § 163.*]

12. DAMAGES (§ 18*)—COMPENSATORY DAMAGES—PROXIMATE CONSEQUENCES.

The compensatory damages that are recoverable for personal injuries are such only as proximately result from the negligence alleged.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 37; Dec. Dig. § 18.*]

13. DAMAGES (§ 1*)—ASSESSMENT—REASONABLENESS.

Every award of damages should be reasonable and just to both the plaintiff and the defendant under the facts properly alleged and shown in evidence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 1; Dec. Dig. § 1.*]

14. APPEAL AND ERROR (§ 1021*)—REVIEW—QUESTIONS OF FACT—AMOUNT OF RECOVERY.

Where the amount of damages found by a referee is in accordance with the issues made, and is not manifestly unreasonable or unjust in view of the entire legal evidence, the judgment will not be disturbed by the appellate court for excessiveness in amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4013, 4014; Dec. Dig. § 1021.*]

Whitfield, C. J., and Taylor, J., dissenting.

In Banc. Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Action by Amelia Hepburn and another against S. D. Warfield and others, as receivers of the Seaboard Air Line Railway Company. Judgment for plaintiffs, and defendants bring error. Affirmed.

P. O. Knight, for plaintiffs in error. Hilton S. Hampton and D. A. DeVane, for defendants in error.

WHITFIELD, C. J. The part of the declaration that is material here is as follows: "The plaintiff, Amelia Hepburn, was a passenger on a train operated by said defendants, their servants, agents and employes bound from the city of Jacksonville to the city of Tampa, and on said date, while plaintiff was riding as a passenger aforesaid and

seated in the car assigned to her as a passenger, the defendants by their servants and employes, disregarding their duty to the said plaintiff as a passenger, so negligently and carelessly operated said train, and so negligently and carelessly failed to take the necessary precaution looking to the safety of said train and its occupants, that the said car in which said plaintiff was riding by and through the negligence of the defendants was derailed, causing the same to be suddenly and violently stopped, from the effects of which the said Amelia Hepburn was violently thrown from her seat, her body striking a portion of the car, from the effects of which plaintiff suffered grievous injury to her right hip, leg, and back, and from thence until the present time has suffered excruciating pain, being confined to her bed for a period of several weeks, and suffering great shock to her nervous system, the latter injury plaintiff avers being permanent, and has, in addition, been compelled to expend a large sum of money for physician's services, nursing, and medicines in an effort to rid herself of the said injury without avail, and is debarred and prevented by said injury from attending to her household or social duties."

A demurrer to the declaration upon grounds that only conclusions of law were alleged as to the plaintiff being a passenger and as to the negligence of the defendants being the proximate cause of the injury complained of was overruled. The defendant pleaded not guilty, and a judgment for \$4,000 in favor of the plaintiff Amelia Hepburn was rendered by a referee, to which judgment a writ of error was taken.

[1, 2] A declaration should contain sufficient allegations of all the facts that are necessary to state a cause of action. The facts that are essential in stating a cause of action depend upon the circumstances of each case. Allegations of conclusions of law unsupported by appropriate statements of facts will not suffice. As a general rule only ultimate facts need be alleged; but what are the ultimate facts depends upon varying conditions. Where the facts are, or reasonably should be, within the knowledge of the plaintiff, the declaration should contain sufficient statements of facts to apprise the defendant of the particular acts or circumstances upon which the action is based, in order that there may be no embarrassment in preparing a defense. If the particular facts or circumstances upon which the ultimate facts constituting the cause of action depend are peculiarly within the knowledge of the defendant, only the necessary ultimate facts need be alleged by the plaintiff.

[3] In actions for negligent injuries, it is in general not necessary to state in detail the facts, conditions, or circumstances that constitute the negligent act or omission complained of. If there are sufficient allegations of the relation between the parties out

of which the duty to avoid negligence arises, and of the act or omission that proximately caused the injury, coupled with a statement that such act or omission was negligently done or omitted, it may be sufficient.

[4] In an action by a passenger for injuries received by the operation of a railroad train, it is in general sufficient to allege ultimate facts showing that the relation of passenger and carrier existed, and that the defendant negligently did or omitted the act or acts that proximately caused or contributed to causing the injury as stated; the specific fact that actually caused the injury being duly alleged, so that a definite issue may be presented for trial.

Ordinarily the particular facts constituting a comprehensive negligent act of the carrier are not within the knowledge of the passenger, and they are or should be within the knowledge of the carrier.

A bare allegation that the plaintiff was injured because of the negligent operation of the train by the defendants or its employes may be insufficient because too general and indefinite, since the fact that actually caused the injury would not appear.

On the other hand, where the specific facts or circumstances that constitute the alleged negligence are stated with unnecessary particularity, the proofs must correspond without substantial variance.

Even in cases when the statute affords a presumption of negligence against a defendant railroad company, if it is shown that the injury was not caused by the material detailed facts or acts of negligence substantially as alleged, the action may fail, for there can be no recovery upon a cause of action, however meritorious or well proven, if it is substantially different from the cause of action alleged.

The allegations of a declaration in an action for a negligent injury may be sufficiently definite and particular if they show in a general way the negligence of the defendant that proximately resulted in a stated ultimate or particular fact which actually caused the injury.

This latter rule is particularly applicable where the specific facts or circumstances that constitute the negligence alleged are, or reasonably should be, better known to the defendant.

[5] The allegations that the carrier "so negligently and carelessly operated said train, and so negligently and carelessly failed to take the necessary precaution looking to the safety of said train and its occupants that the said car in which said plaintiff was riding, by and through the negligence of the defendant, was derailed, causing the same to be suddenly and violently stopped, from the effects of which the said Amelia Hepburn was" injured, as stated, are sufficient statements of ultimate facts to show negligence of the defendants in the operation of

its train and injury to the plaintiff proximately resulting from a particular fact stated, viz., the derailing and sudden, violent stopping of the car caused by the negligence alleged.

The particular facts and circumstances that caused or resulted in the alleged negligent operation of the train whereby the car was derailed, causing it to suddenly stop and injure the plaintiff as alleged, are or reasonably should be peculiarly within the knowledge of the defendant carrier, whose duty it is to so operate its trains as to safely transport its passengers. If a more exacting rule of pleading were enforced, it would result in hardship, if not in a denial of justice to those who are lawfully on a train, and have no part in its operation. No undue burden is thereby put upon the carrier, since in reason it should know why its trains are so operated as to cause injury to passengers it engages to exercise the highest degree of care in transporting.

[6] It is alleged that the plaintiff was a passenger, and was riding on defendant's train "as a passenger, and seated in the car assigned to her as a passenger." These allegations of ultimate facts admitted by the demurrer are sufficient to show the relation of passenger and carrier, the payment of fare being reasonably presumed, even if that be necessary to give the plaintiff a right of action, in view of the legal duty of the carrier towards those lawfully on its passenger car. The demurrer to the declaration was properly overruled.

[7] Section 3148 of the General Statutes of 1906, which is section 1 of chapter 4071, Acts of 1891, defines the liabilities of railroad companies "for damage done to persons," other than employes and to property by the running of trains, and provides a method of proving the liability. But the statute does not relate to the manner of alleging or proving the nature and extent of the personal injuries received, or the character and value of the property rights injured or destroyed for which compensatory damages are recoverable. When the plaintiff sufficiently alleges and proves substantially as alleged, the fact of a personal injury or a property loss caused by the running of a train of the defendant railroad company and also the ultimate fact that actually caused the injury or loss, the statute raises a presumption of negligence against the company, and its liability in damages will then be shown, "unless the company shall make it appear that its employes exercised all ordinary and reasonable care and diligence; the presumption in all cases being against the company."

[8-10] Whether contributory negligence is a bar to an action for a merely negligent injury as at common law, or operates under the statute to diminish the amount of damages recoverable in actions against railroad companies "for any damage done to persons

or property by the running of" the company's trains, such contributory negligence is an affirmative defense and, to be available either as a bar to the action or to diminish the recovery, it should be pleaded and proved by the defendant, unless the plaintiff permits it to be shown without objection under other pleas, or unless contributory negligence appears in the case made by the plaintiff. Where liability appears, compensatory damages may be recovered upon proper allegations and proofs for property losses and personal injuries that result proximately from the negligence. Damages for such losses and injuries as naturally and ordinarily result proximately from the injury received or loss sustained as alleged may generally be shown in evidence under a general claim for damages, because the defendant is held to notice of the natural and ordinary results of its negligent acts. But damages for such special losses or injuries as do not naturally and ordinarily result from the negligent injury alleged should be shown in evidence over objection only when the defendant is advised of them by specific allegations in the declaration.

[11, 12] When liability in damages for negligence is shown, the burden of distinctly proving by a preponderance of the evidence the character or nature of the personal injuries sustained or of the property rights injured or destroyed within the sufficient allegations of the declaration is upon the plaintiff as at common law. Compensatory damages may be recovered for property losses actually sustained as a proximate result of the defendants' negligence as alleged where such losses are properly pleaded and proven, and are capable of reasonably accurate and certain ascertainment in amount from reliable data. Remote, speculative, and conjectural damages are not allowed. The compensatory damages that are recoverable for personal injuries are such only as proximately result from the negligence alleged. They are to be ascertained by a fair consideration of all the pertinent facts and circumstances affecting both parties and properly in evidence under the pleadings. In such consideration, the processes and standards of reasoning and computation that are afforded by law, or, if the law provides none, then by common experience and the dictates of right and justice, should be applied.

[13, 14] Every award of damages should be reasonable and just to both the plaintiff and the defendant under the facts properly alleged and shown in evidence. Where the amount of damages found by a referee is in accordance with the issues made, and is not manifestly unreasonable or unjust in view of the entire legal evidence, the judgment will not be disturbed by the appellate court for excessiveness in amount.

The members of the court, except the writer, are of opinion that the finding of the referee in awarding \$4,000 damages is sustained

by the evidence. Therefore the judgment is affirmed.

TAYLOR, SHACKLEFORD, COCKRELL, and HOCKER, JJ., concur.

On Rehearing.

PER CURIAM. A determination of the liability of the defendant was necessarily involved in affirming the judgment awarding damages to the plaintiff, Amelia Hepburn. There is evidence that the plaintiff, Amelia Hepburn, was injured by the derailing of the car in which she was a passenger while it was being run at a rapid rate of speed through a dense fog and smoke over a track that a few hours before and unknown to the train crew had been partially destroyed by fire. The statute affords a presumption of negligence and consequent liability of the defendant upon proof of the injury to the plaintiff by the running of the railroad company's train, and the evidence does not entirely rebut the statutory presumption, since it does not clearly appear that "all ordinary and reasonable care and diligence" to prevent the injury was exercised by the defendants, whose duty it was to use the highest degree of care and diligence for the safety of passengers. The evidence as to the speed of the train in the presence of dense fog and smoke before and at the time the train reached the burned track indicates at least some lack of due care and diligence for the safety of passengers. This establishes the liability of the defendants, and the amount of damages that should be allowed on the evidence was adjudicated in affirming the judgment.

WHITFIELD, C. J., and TAYLOR, J., are of opinion that the evidence does not support the amount of the damages awarded in the finding and judgment.

A rehearing is denied.

McCOY v. STATE. (No. 15,482.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

1. GRAND JURY (§ 11*)—EXCUSING GRAND JURY—RIGHT OF COURT AND OF FOREMAN.

After the grand jury has been duly impaneled, the court, for sufficient reason, can discharge a member, making it a matter of record, and should substitute another in his place, if the discharged member reduces the panel below 15; but the foreman has no power to finally discharge any member after the grand jury has been duly organized.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 28, 29; Dec. Dig. § 11.*]

2. GRAND JURY (§ 11*)—DISCHARGE OF JURORS—EFFECT ON INDICTMENT.

The foreman of a grand jury, legally organized with 18 members, excused 4 disinter-

ested members pending the return of an indictment against defendant, and the indictment was found by a grand jury of 14 members, at least 12 of whom voted in the affirmative. The law provides that the grand jury shall be organized with not less than 15 members, and Code 1906, § 2704, provides that the impaneling of the grand jury shall be conclusive evidence of its competency and qualifications. *Held*, in view of section 2704 and of the common-law rule, that to render an indictment valid it is only necessary that 12 of the grand jurors consent, and that the grand jury was legally constituted when it returned the indictment.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 28, 29; Dec. Dig. § 11.*]

Appeal from Circuit Court, Pearl River County; A. E. Weathersby, Judge.

"To be officially reported."

J. W. McCoy was convicted of white-capping, and he appeals. Affirmed.

Appellant was indicted at the April term of the circuit court of Pearl River county for the crime commonly called "white-capping," as defined by section 1398, Code of 1906. He was convicted, and sentenced to the penitentiary for five years. From this sentence and judgment, he appeals to this court.

On the facts of this case, appellant certainly has no ground for complaint at the verdict rendered. The proof fully warranted the jury in returning the verdict they did—"guilty as charged." The only assignment of error we will consider in this case is that "the court erred in overruling the motion to quash the indictment." The motion is as follows:

"And now comes the defendant in the above-styled cause, by his attorneys, and moves the court to quash the indictment returned against him herein, and in support of said motion assigns the following reasons why the same should be sustained, to wit: (1) Because heretofore, on the 10th day of April, 1911, the grand jury which returned this indictment was duly impaneled, sworn, and charged according to law, and immediately began the investigation of violations of the law, and on the first day of the organization of said grand jury it heard and considered all of the testimony in the case, and continued its deliberations on said case throughout the whole of Tuesday, the 11th of April, same being the second day of grand jury's deliberations, and failed to return a bill of indictment against the defendant, and that accordingly on Wednesday, the third day of said jury's deliberations, the foreman of said grand jury, acting upon the instructions of the district attorney, unlawfully and without legitimate or just cause for so doing excused four members of said grand jury from the grand jury room while deliberating on the merit of this case, said excused members being in no wise related to the defendant, and having absolutely no interest in the matter under investigation, one of whom lived in the extreme southern por-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

tion of Pearl River county, the offense having been alleged to have occurred in the extreme northern part of said county, the names of which said excused grand jurors are as follows, viz.: Will Lee, Print Smith, Webb Ladner, and Adolph Ladner. That immediately after said members were excused from said grand jury, and retired from the grand jury room, the remainder of said grand jury, in the absence of said excused members, and denying them the right to participate in the same, proceeded again to deliberate over said alleged offense and discuss the same, and then proceeded to return the indictment which is herein filed against the defendant. (2) Because four disinterested members of the grand jury were denied the right to participate in the investigation and discussion of this alleged offense. (3) Because at the time this indictment was returned the grand jury consisted of only thirteen members, after having excused the four above referred to."

Upon this motion the court ruled as follows: "The defendant offers to introduce evidence to establish the allegation in said motion, the court being of the opinion that the facts stated and alleged in said motion are insufficient to warrant the quashing of said indictment, and after hearing and considering said motion, the same is hereby overruled," to which action of the court the defendant then and there excepted.

T. E. Salter and Toxey Hall, for appellant. Claude Clayton, Asst. Atty. Gen., for the State.

McLAIN, C. (after stating the facts as above). This motion to quash the indictment is based upon the idea that there was no legal grand jury that found and returned the indictment. From the record in this cause, it is evident that the grand jury was duly and legally organized with 18 men. After they retired to their room to consider of their business, and before the finding of this indictment, 4 of these were excused by the foreman, thereby reducing their number to 14 members present at the time this case was considered and indictment found and returned into open court.

[1] It is contended that "under authority of the court, as announced in the case of Posey v. State, 86 Miss. 141, 38 South. 324, the opinion being delivered by Judge Truly, it was held that less than 15 men did not constitute a legal grand jury; therefore it must follow, there being only 14 men on the grand jury when the indictment was returned, that the indictment was void," etc. We do not think that the facts in this case are applicable to the above announcement of the court. This quotation from the opinion of Judge Truly we fully indorse; but we are clearly of the opinion that the facts of this case are quite different from the facts involved in that case. After this grand jury

retired to consider of its business, the foreman had no power to discharge finally any member of the grand jury from the panel after it was duly organized by the court. That power alone is in the hands of the court. The court can, for good and sufficient reason, discharge a member from the grand jury after it has been duly impaneled and retired for business, making it a matter of record; and he may, if he sees proper, substitute, or rather appoint, another in his place. This the court should certainly do, if the discharged members reduce the panel below 15.

[2] This grand jury was legally organized with 18 members. Our law provides that the grand jury shall be organized with not less than 15 members, and this grand jury was legally organized with 18 members; and the fact that the foreman, for good and sufficient reasons, we take it, excused 4 members of the same, thereby reducing its number to 14, did not prevent the grand jury from proceeding with business. At the time this bill was found, there were 14 members present of the constituted grand jury of 18. This was sufficient for the grand jury to transact business. Indeed, 12 would have been a sufficient number. Whatever the number of the organized grand jury, 12 jurors, by the unwritten rule, and largely by statutes, are an adequate quorum for business. Bishop's New Criminal Procedure, § 854. But there are states in which statutes variously provide otherwise. But "in England and all of our states, to render a finding valid, 12 of the grand jurors must consent; nor need more than 12, even though this body should consist of the full number of 20." Bishop's New Cri. Proc. § 854.

The record in this case shows that at least 12 of the grand jury, when passing upon the question whether a bill should be returned against appellant, voted in the affirmative. At least 12 of the grand jury were present when the bill was returned. We think the indictment was found and returned by a legal grand jury. This grand jury was legally constituted, and was a legal grand jury when considering this case, and was a legal grand jury when it returned the bill, and we think the court properly overruled the motion to quash. "The judicial records of this country furnish mortifying testimony that many culprits have gone free, unwhipped of justice, because of technical exceptions taken to the grand jury who preferred the indictment." J. W. Head v. State, 44 Miss. 749. "For remedy for this sore grievance" the Legislature has embodied into our statute section 2704, Code 1906. We cite a few of the many authorities throwing light in a more or less degree upon this subject: Code 1906, § 2704; Posey v. State, 86 Miss. 142-145, 38 South. 324; Cain v. State, 86 Miss. 505, 38 South. 227; Logan v. State, 50 Miss. 277; Dixon v. State, 74 Miss. 282, 20 South. 839; Head v. State,

44 Miss. 749; Durrah v. State, 44 Miss. 789; Lee v. State, 45 Miss. 116; Nichols v. State, 46 Miss. 283; Chase v. State, 46 Miss. 697.

We think the case should be affirmed.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment is affirmed.

DOUGLAS et ux. v. PARSONS-MAY-OBERSCHMIDT CO. (No. 15,338.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

APPEAL AND ERROR (§ 1227*)—DISMISSAL—LIABILITY ON BOND.

Where a supersedeas bond has served the purpose for which it was given, it will not be discharged on motion in the Supreme Court, on the grounds that the sureties were misled into signing it and that one of them notified the clerk before the bond was filed not to approve it, since such matters cannot be adjudicated on such a motion.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1227.*]

Appeal from Chancery Court, Lincoln County; G. G. Lyell, Chancellor.

Action by George T. Douglas and wife against the Parsons-May-Oberschmidt Company. From the judgment, complainants appeal. On motions to dismiss and discharge the supersedeas. Cause dismissed, motion to discharge supersedeas denied, and judgment entered against the sureties.

George T. Douglas and wife, being indebted to the Parsons-May-Oberschmidt Company, executed a deed of trust to secure said indebtedness. Default having been made in the payment of said indebtedness, the trustee advertised the property for sale, whereupon Douglas and wife filed a bill in chancery enjoining the sale and praying an accounting. On the hearing (October 22, 1910) the appellee obtained a decree for an amount admitted to be due; said decree providing that a lien should attach to all the property described in the trust deed to secure the payment of the amount of the decree, and appointing a commissioner to sell said property and apply the proceeds to the payment of the amount decreed in case same was not paid, and report the sale back to the court. Douglas and wife failed to pay the amount adjudged against them in the decree, and the property was advertised by the commissioner for sale. Thereafter Douglas and wife filed a petition with the clerk, praying an appeal, and on January 4, 1911, executed bond, with sureties approved by the clerk; said bond operating as a supersedeas. No further steps were taken by the Douglases to perfect their appeal, and on May 30, 1911, the Parsons-May-Oberschmidt Company filed a motion in the Supreme Court to dismiss the bill for want of prosecution. No action

was taken at that time on the motion to dismiss.

The record was filed on November 4, 1911, and thereafter the sureties on the supersedeas bond appeared and moved the court to dismiss the appeal and discharge the supersedeas, alleging that they had served notice on the clerk before the approval of the bond that they desired to withdraw therefrom, and before the record was transcribed had given notice of their desire to be released, and because they were convinced that the bill was without merit, but merely for delay, and because they were advised by said Douglas that no appeal would be taken, but that the appeal bond was filed merely to obtain time in which to raise the money, and that they had been misled into signing the same, and, further, that the bond was not in proper form. The case was submitted on both motions.

Jones & Tyler, for sureties. T. Brady, Jr., for appellee.

SMITH, J. This cause is dismissed for want of prosecution, the motion to discharge the supersedeas and relieve the sureties on the bond is overruled, and judgment will be entered here against the sureties on the bond for the decree rendered, with the interest and damages thereon as provided by law. The decree appealed from was a final one, and the bond, whether technically accurate or not, served the purpose for which it was intended. It may be, as stated by the bondsmen, that they were misled by appellant into signing the bond, and that one of them notified the clerk, before the bond was filed, not to approve the same; but these matters cannot be adjudicated on this motion, or, for that matter, by this court on original proceeding here.

LAUREL OIL & FERTILIZER CO. et al. v. HORNE. (No. 15,210.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

BANKRUPTCY (§ 161*)—PREFERENCES—NECESSITY OF RECORDING.

A deed of trust, made more than four months before the grantor filed a petition in bankruptcy, but recorded within four months, is not void, under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445) as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1315), invalidating transfers made within four months, and providing that, if by law a transfer is required to be recorded, the period of four months shall not expire until four months after the recording, since a deed of trust is not required to be recorded in Mississippi, to be valid between the parties and against general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.*]

Appeal from Chancery Court, Newton County; Sam Whitman, Jr., Chancellor.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action in equity by F. O. Horne against the Laurel Oil & Fertilizer Company and others. From a judgment overruling a demurrer to the bill, defendants appeal. Reversed, and bill dismissed.

On December 4, 1907, appellee executed and delivered to the Laurel Oil & Fertilizer Company a deed of trust covering certain land in Newton county to secure an indebtedness then past due, for which he then executed a note due March 1, 1908. This deed of trust was not filed for record until April 8, 1908. On April 23, 1908, the land embraced in this trust deed was advertised for sale by the trustee (W. L. Wilson); default in the payment of the note having been made. On April 30, 1908, the appellee filed a voluntary petition in bankruptcy, and on May 8th following was adjudicated a bankrupt, and a trustee was duly appointed to take charge of the bankrupt estate. Said trustee immediately obtained a temporary restraining order to prevent the trustee in the deed of trust from making a sale of said land. The Laurel Oil & Fertilizer Company filed a demurrer to the petition of the trustee, upon which the restraining order had been obtained; but no further steps seem ever to have been taken. The claim of the Laurel Oil & Fertilizer Company was scheduled in the bankrupt proceedings as a secured claim. The regular notices were published in bankruptcy proceedings, and after the expiration of one year the Laurel Oil & Fertilizer Company had not proven its claim against the bankrupt estate. Afterwards a composition with creditors was effected, and on the 4th day of November, 1909, the appellee received his discharge in bankruptcy. Thereafter on March 25, 1910, the trustee in the deed of trust (W. L. Wilson) proceeded to sell the land under the deed of trust, and same was purchased by K. C. Hall.

Thereafter on June 18, 1910, Horne filed his bill in the chancery court against the Laurel Oil & Fertilizer Company, Hall, and Wilson, setting out the foregoing facts, and alleging that at the time the deed of trust was executed appellee was insolvent, and this fact was known to the Laurel Oil & Fertilizer Company, who had requested the execution of the note and deed of trust, which was procured in order to secure a preference over other creditors of appellee; that such deed of trust was invalid, since it was not filed for record four months before the adjudication of appellee as a bankrupt; and that the claim was barred, because it was not proven against the bankrupt estate within one year, and was no longer binding and legally enforceable; and praying for the cancellation of the trustee's deed to Hall as a cloud upon appellee's title. The appellants demurred to the bill, the demurrer was overruled, and an appeal granted to settle the principles of the case.

Section 60a of the bankrupt act (Act July

1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 8445]), as amended by Act Feb. 5, 1903, c. 487, § 18, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1315), reads as follows: "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

Section 2787 of the Mississippi Code of 1906, is as follows: "All bargains and sales, and all other conveyances whatsoever of lands, whether made for passing an estate of freehold or inheritance, or for a term of years; and all instruments of settlement upon marriage, wherein land, money or other personalty should be settled or covenanted to be left or paid at the death of the party, or otherwise; and all deeds of trust and mortgages whatsoever, shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they be acknowledged or proved and lodged with the clerk of the chancery court of the proper county, to be recorded in the same manner that other conveyances are required to be acknowledged or proved and recorded; but the same as between the parties and their heirs, and as to all subsequent purchasers with notice or without valuable consideration, shall nevertheless be valid and binding."

Pack & Montgomery and Baskin & Wilbourn, for appellants. Flowers, Alexander & Whitfield, for appellee.

SMITH, J. If the deed of trust in question was valid under the laws of this state and under the bankrupt law, its lien survived the discharge of the bankrupt, and the purchaser at the foreclosure sale acquired a valid title to the property therein described. Its validity under the state law is not, and could not be, seriously questioned. It was executed more than four months prior to the filing of the petition in bankruptcy; but, since it was recorded less than four months prior to the filing of this petition, it was invalid under the bankrupt law, if by the laws of this state it was required to be recorded. Under section 2787 of the Code of 1906, as construed in *Loughridge v. Bowland*, 52 Miss. 546, an unrecorded deed of trust is valid as between the parties thereto

and as against general creditors and consequently a deed of trust is not such an instrument, within the meaning of the bankrupt law, as is required by the laws of this state to be recorded. Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240.

The decree of the court below is reversed, and the bill dismissed.

SOWELL et al. v. SOWELL et al.
(No. 15,569.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

1. APPEAL AND ERROR (§ 115*)—DECISIONS REVIEWABLE—INTERLOCUTORY JUDGMENT.

In an action for partition, a decree ordering the land to be sold is interlocutory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 798; Dec. Dig. § 115.*]

2. APPEAL AND ERROR (§ 339*)—TIME FOR APPLICATION FOR APPEAL.

If an appeal is not applied for within 10 days after the date of an interlocutory decree, as required by Code 1906, § 35, an appeal subsequently taken will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1884; Dec. Dig. § 339.*]

McLean, J., dissenting.

On suggestion of error. Suggestion overruled.

For former opinion, see 56 South. 615.

The appellees filed a bill in chancery against appellants, alleging that they were tenants in common of certain lands described in the bill, and praying for a sale of said lands, for a division of the proceeds among the owners according to their respective interests. Appellants, who were defendants below, answered, denying that appellees, complainants below, owned any interest whatever in the land. Upon the hearing the chancellor entered a decree in favor of complainants, and ordered the lands to be sold for a division of the proceeds, and appointed the chancery clerk as special commissioner of the court to make the sale in accordance with the terms of the decree and report his actions to the next term of the court after such sale, or to the chancellor in vacation. No appeal was obtained at the time, and the decree grants no appeal. Neither was a decree asked within 10 days after the rendition of the decree, to wit, February 1, 1911. Afterwards, on March 25, 1911, the appellants filed a petition with the chancery clerk, praying an appeal with supersedeas.

When the case reached the Supreme Court, appellees filed the following motion: "Now come appellees, by their solicitors, and move the court to dismiss the appeal in this case, discharge the supersedeas herein granted, and for an order directing the special commissioner appointed by the court below to proceed to carry out the mandates of said

decree, and for grounds for said motion say: (1) This is an appeal from an interlocutory decree of the chancery court, and no appeal was granted by the chancellor in term time, nor in vacation within 10 days after the date of the decree complained of, in order to settle the principles of the case, or to avoid expense and delay. (2) No appeal has been granted by the chancellor, either in term time or in vacation, for any purpose whatsoever, and none applied for."

MAYES, C. J. [1] It is our judgment that the decree rendered in this case is an interlocutory and not a final decree. For this reason, this case was dismissed on motion of appellees. The case is again before the court on suggestion of error. That the decree in this case is an interlocutory and not a final decree is settled by the cases of Gilleylan v. Martin, 73 Miss. 695, 19 South. 482, Beeks v. Rye, 77 Miss. 358, 27 South. 635, and Sweatman v. Dean, 86 Miss. 641, 38 South. 231.

[2] Under section 35 of the Code of 1906, if an appeal is desired from an interlocutory decree, it is required that the appeal "be applied for within ten days after the date of the order or decree complained of." In this case, a compliance with this statute was not attempted on the part of appellants, and, of course, this appeal must be dismissed.

The suggestion of error is overruled.

MCLEAN, J., dissents.

ODOM v. GULF & S. I. R. CO. (No. 15,264.)

(Supreme Court of Mississippi. Feb. 26, 1912.)

1. RAILROADS (§ 274*)—INJURIES TO PERSON AT STATION—DUTY OF AGENT.

A railroad owes no duty to supply general peace officers, so that a person seeking to charge a company for a failure of a station agent to protect him from insult and abuse must show that he was at the station to transact business with the agent in connection with his duties as an agent of the railroad.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 274.*]

2. RAILROADS (§ 282*)—INJURIES TO PERSON AT STATION—DUTY OF AGENT.

A declaration in an action for a failure of a station agent of a railroad company to protect the plaintiff from insult and abuse, which merely alleged that the plaintiff "went to the depot for the purpose of transacting business with the agent of defendant," does not show that his attendance was for the purpose of transacting business with such agent as the agent of defendant, and is insufficient to charge the company with liability.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.*]

3. PLEADING (§ 34*)—CONSTRUCTION AGAINST PLEADER.

A pleading is to be construed most strongly against the pleader.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 66; Dec. Dig. § 34.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

4. JUDGMENT (§ 101*)—DEFAULT—PLEADINGS TO SUSTAIN.

Where a complaint wholly fails to state a cause of action, a default judgment may not be taken therein.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 168-170; Dec. Dig. § 101.*]

5. RAILROADS (§ 274*)—INJURIES TO PERSON AT STATION—DUTY OF AGENT.

Code 1906, § 4867, which provides that the agent in charge of a passenger station of a railroad shall preserve order, and, if necessary, eject any person whose conduct is boisterous or offensive, is merely designed to aid the agent in the discharge of his duty to those coming to the station to transact railroad business, and is not intended to make him a state peace officer, so as to charge the company for his failure to protect from insult and abuse a person in the station for no purpose of transacting railroad business.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 274.*]

McLean, J., dissenting in part.

Appeal from Circuit Court, Simpson County; W. H. Hughes, Judge.

Action by E. M. Odom against the Gulf & Ship Island Railroad Company. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. Affirmed.

The declaration, omitting formal parts, is as follows:

"On or about the 17th day of April, 1910, the defendant was a Mississippi corporation, doing business as a railroad company, and in the operation of its railroad it had depots up and down its line of railroad, and agents at said depots, or stations, with whom the general public would go and transact their business with the defendant. There was a depot in the town of Star, in Rankin county, Mississippi, where the plaintiff lived, and the said depot was in charge of an agent of the defendant, and under and by the laws the said agent at Star was a conservator of the peace, and it was his duty to preserve the peace, and to protect all persons coming to the depot to transact business with the defendant from insults and abuse and attacks, especially when such persons appeal to the agent for such protection. On or about this day the plaintiff went to the depot, at Star, of the defendant, for the purpose of transacting business with the agent of the defendant, and when the plaintiff arrived at the depot the section foreman in the employ of the defendant met plaintiff at the door, and cursed, abused, maltreated, and insulted the plaintiff in the presence of the depot agent, or depot master, who was also the agent of the defendant, and while said insults, abuse, cursing, and maltreatment was heaped upon the plaintiff by this section foreman, plaintiff appealed to the station master, or the agent, of the defendant, who was in charge of the depot for protection. The said agent in charge of the depot stated that he would have nothing to do with it, and refused to protect plaintiff

from such insults, abuse, cursing, and maltreatment, or to cause the other servant of the defendant, the section foreman, to desist from his cursing, abusing, and maltreating plaintiff. The plaintiff charges that the railroad company owed the duty to the public to employ competent servants in each and every capacity; that by having in its employment as the section foreman a species of moral degenerate and a drunken sot, a man who had no regard for the rights of the general public, who would approach the stations of his master, to transact business with his master, the defendant violated the duty that it owed to the public, in having this kind of servants in its employment. Plaintiff avers, further, that the defendant owed to the general public the duty to have in its employment as station masters, or depot agents, servants competent in every particular, whose moral courage would enable them to protect people coming to the depot on business from ruffians and drunken desperadoes, and who would protect the general public, transacting business with the defendant, from abuse, cursing, and insults; but the defendant violated this duty that it owed to the general public, in having in its employment an incompetent servant and station master, or depot agent. Plaintiff avers, further, that it was the duty of the depot agent of the defendant to protect him from this abuse, cursing, and maltreatment, made so by his employment of the defendant; but the defendant's agent or servant, and the defendant itself, has been grossly and willfully negligent in performing those duties that it owed this plaintiff and the general public; and by reason of said gross and willful negligence of the defendant, the plaintiff has been greatly damaged and humiliated and mistreated, to wit, in the sum of \$5,000. Wherefore he brings this suit and demands judgment."

Hilton & Hilton and Flowers, Alexander & Whitfield, for appellant. B. E. Eaton and May & Sanders, for appellee.

MAYES, C. J. On the 28th of January, 1911, E. M. Odom brought a suit against the Gulf & Ship Island Railroad Company, in which he sought to recover \$5,000 damages for the failure of the depot agent to protect him from alleged abuse and maltreatment by a section foreman of the above railroad. It would be hardly worth while to set out the declaration at length. We shall only set out the substance of the complaint as stated in the declaration. The declaration states that about the 17th of April, 1910, Odom went to the depot of the Gulf & Ship Island Railroad Company, located at Star, for the purpose of transacting "business with the agent of the railroad company," and, on arriving at the depot, a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

section foreman employed by the railroad company met him at the door, and cursed, abused, insulted, and maltreated him in the presence of the depot agent. It is alleged that Odom appealed to the station master for protection, but the station master refused to have anything to do with the affair, and refused to attempt to protect Odom from insults, abuses, etc., or to attempt to cause the section foreman to desist. The declaration then alleges that the railroad company owes the duty to the public to employ competent servants in every capacity, and that having in its employ a section foreman who was a moral degenerate and a drunken sot, having no regard for the rights of the general public resorting to the station of his master to transact business with his master, was a violation of the duty the railroad company owed the public. The declaration further alleges that the railroad company owes the duty to the public to have a station master competent in every respect, and with moral courage sufficient to enable him to protect people coming to the depot on business from ruffians and drunken desperadoes, and that the railroad company failed in this, and was grossly and willfully negligent in performing the duties due to this plaintiff and the general public, to the plaintiff's damage of \$5,000. The declaration shows that appellant relies for his right to recover against the railroad company on the failure of the depot agent to protect him from insult and abuse, but wholly fails to allege any facts which show that the railroad company owed appellant any duty whatever. This declaration was demurred to on several grounds; the main one being that it stated no cause of action. The lower court sustained the demurrer and dismissed the bill, and an appeal is prosecuted from this judgment.

[1] The railroad company is engaged in the business of public carrier, and its agents are placed in the depot for the purpose of aiding and assisting in the discharge of its public duties. When a person seeks to claim protection from insult and abuse, and to hold a railroad company liable for failure to give the protection, such person must prove that he was at the depot for the purpose of transacting some business with the agent in connection with the service he is to render the railroad company in discharging its duty to the public as a common carrier. We are not prepared to say that the liability of the railroad is any different, whether the person claiming the protection shall have gone to the depot to have dealings with the agent as a common carrier of goods or passengers, or any other service which the railroad undertakes to render the public as a common carrier. Sometimes, and in some places, the railroad company runs a telegraph office in its depot for the use of the public. If a person go to the depot to send a telegram, such person in such a case, by reason of his

contractual or intended contractual relations, possibly has the same right to claim the protection of the railroad company while at its depot for this purpose as would a person going to the depot for the purpose of transacting business with it as a common carrier of freight or passengers.

[2] But the declaration does not state that the appellant went to the depot to see the agent on any matter connected with the business of the company. The declaration merely alleges that appellant "went to the depot for the purpose of transacting business with the agent of defendant." But what character of business? Was it private business with the agent? Had he gone there to procure employment? A declaration must state a cause of action. The only duty resting upon the railroad company was the duty to protect when the business which took appellant to the depot was in connection with the business of the company. A railroad company does not owe the duty to the public of supplying general peace officers for the state.

[3, 4] The universal rule of pleading is that pleadings are to be construed most strongly against the pleader. *McCerrin v. Railroad Co.*, 72 Miss. 1013, 18 South. 420; *Powell v. Stowers*, 47 Miss. 577; *Clary v. Lowry*, 51 Miss. 879. If appellant went to the depot to transact business with the railroad company as a public carrier, through its agent, he should have so alleged, and stated what the business was. Failing to do this, he failed to state any cause of action. The facts alleged must show a duty, and a breach of that duty, before any liability can attach. Under the case of *Insurance Co. v. Keeton*, 95 Miss. 708, 49 South. 736, no judgment by default could have been taken in this case because it wholly fails to state any cause of action. If everything placed in the declaration be conceded to be true, there is no liability.

[5] Section 4867 of the Code of 1906 is not intended to make the depot agent a general peace officer of the state. The authority conferred upon them by the above section is intended for use as the agents of the railroad company, to enable them more completely to discharge the duty that rested on the railroad company before the enactment of the statute to protect any member of the public who goes to the depot to transact railroad business. The case of *King v. Railroad Co.*, 69 Miss. 245, 10 South. 42, is decisive of the above statement of the law. The court, speaking through Judge Campbell, says: "We reject the view that depot or station agents of railroad companies are, by 'An act to amend the railroad supervision laws of this state,' approved February 22, 1890, made officers of the state, and its representatives in the exercise of the powers conferred, so as to relieve their principals from responsibility for their acts. The act cited creates the power and the duty prescribed to be exercis-

ed and performed by depot or station agents, as such, and for their principals. Under the act they are neither more nor less than depot or station agents, with the additional power and duty prescribed by it, to be exercised and performed for and in behalf of their employers. The language of the act excludes the theory that they are made officers, for it provides that they shall 'arrest and deliver to the custody of the most convenient sheriff or constable, or other proper officer,' etc., thus showing that the power devolved on them is to be exercised at their place of business and in their capacity as its supervisor. The act is a part of the scheme of railroad supervision by the state, and its effect in the matter now being considered is to make it the duty of railroad companies, through their depot or station agents, to preserve order in the waiting rooms in their respective stations."

The case of *Andrews v. Railroad Co.*, 86 Miss. 129, 38 South. 773, is conclusive of the proposition that when a person goes to the depot on a private matter, and becomes involved in a difficulty about a private matter with the agent, the railroad company is not liable. In all the cases cited by counsel for appellant, where this court has held the railroad company liable for insult or abuse, the facts showed a duty on the part of the railroad company to protect by virtue of the actual or intended contractual relations with the railroad as a common carrier. In the case of *Rose v. L., N. O. & T. Ry. Co.*, 70 Miss. 725, 12 South. 825, 35 Am. St. Rep. 686, appellant was a passenger. In the case of *Krantz v. Railroad Co.*, 12 Utah, 104, 41 Pac. 717, 30 L. R. A. 297, appellant was a passenger, and the same is true in the cases of *Railroad Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689, and *Railroad Co. v. Minor*, 69 Miss. 710, 11 South. 101, 16 L. R. A. 627. Affirmed.

McLEAN, J. (dissenting, and concurring). The reporter will set out in full the declaration in this cause. The defendant demurred to the declaration, and the demurrer being sustained, plaintiff declined to amend, and prosecuted this appeal.

It is urgently insisted by appellee that the declaration shows that the plaintiff went to the depot, not for the purpose of transacting business with the defendant, but on private business with the agent of the defendant. It is true that the allegations of the pleadings are construed most strongly against the pleader, yet, when we examine the declaration as a whole, it is manifest that the plaintiff was at the depot for the purpose of transacting business with the defendant. Among other things the declaration alleges: "There was a depot in the town of Star, Rankin county, Mississippi, where the plain-

tiff lived, and the said depot was in charge of the agent of the defendant, and under and by the laws the said agent at Star was conservator of the peace, and it was his duty to preserve the peace and to protect all persons coming to the depot to transact business with the defendant. * * * On or about this day the plaintiff went to the depot, at Star, of the defendant, for the purpose of transacting business with the agent of the defendant." It is not debatable but what the reasonable construction to put on this language is that the business to be transacted was not with the agent individually and on private business with the agent, but that the plaintiff went there for the purpose of transacting business with the defendant. If not, why did he say "for the purpose of transacting business with the agent of the defendant"? The expression, "agent of the defendant," must necessarily mean in the agent's representative, and not in his individual capacity. To allege that he went to transact business with the agent of the defendant is equivalent to saying that he went to transact business with the defendant through its agent. Further, when he went to transact business with the agent of the defendant necessarily implies that he did not intend to transact business with him as principal, but with him as agent.

The insufficiency of the declaration is this: It fails to allege the kind and nature of the business that called plaintiff to the depot. It should specify such business as the defendant under the law is required to perform, either by statute or common law. At first I was inclined to the opinion that the declaration under our statute was sufficient; but my Brethren have convinced me otherwise, and I place my concurrence solely upon the ground that there is nothing in the declaration which discloses the particular business that called him to the depot. It may be that this business was such as required the defendant to protect him; but plaintiff should have set out this in the declaration. We cannot assume that he went to the depot for the purpose of transacting any particular kind of business. The declaration does not so state, and the allegations are construed most strongly against the pleader.

HUGHES et al. v. SPRATLING.

(Court of Appeals of Alabama. Jan. 9, 1912.)
1. SEALS (§ 5*)—WHAT CONSTITUTES SEALED INSTRUMENT—"L. S."

The mere addition of the letters "L. S." after the name of a signer, without any expression in the instrument of a purpose to seal it, does not make the instrument a sealed instrument.

[Ed. Note.—For other cases, see *Seals*, Cent. Dig. § 8; Dec. Dig. § 5.*

For other definitions, see *Words and Phrases*, vol. 5, p. 3947.]

2. BONDS (§ 128*)—ACTION—PLEADING VARIANCE—MATERIALITY.

Where the complaint is on a bond under seal, and the proof is of an unsealed promise to pay, the variance is fatal.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 98, 205-217; Dec. Dig. § 128.*]

Appeal from Circuit Court, Macon County; S. L. Brewer, Judge.

Action by John Spratling against John Hughes and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

O. S. Lewis, for appellants. H. P. Merritt, for appellee.

PELHAM, J. [1] The complaint declared on a bond under seal, and the writing introduced in evidence did not express or indicate in the body of the instrument a purpose to seal it, and the mere affixing of the letters "L. S." to the names of the subscribers does not make it a writing under seal. *Breitling v. Marx*, 123 Ala. 222, 26 South. 206; *Blackwell v. Hamilton*, 47 Ala. 470; *Carter v. Penn*, 4 Ala. 140.

[2] The defendants in the court below, appellants here, requested the general charge in writing, which was refused. There was a variance between the allegations and the proof, in that the appellee declared on a bond under seal, and the instrument introduced in evidence was not a bond under seal, but a promissory note, and the court was in error in refusing the general charge requested by appellants. *Phillips v. Americus Guano Co.*, 110 Ala. 521, 18 South. 104; *Breitling v. Marx*, supra; *Burton et al. v. Dangerfield*, 141 Ala. 285, 291, 37 South. 350; *N. Y. Life Ins. Co. v. McPherson*, 137 Ala. 116, 119, 33 South. 825.

For the error committed in refusing the general charge requested by appellants, the case must be reversed.

Reversed and remanded.

McCLOUD v. FLOURNOY.

(Court of Appeals of Alabama. Jan. 9, 1912.)

1. EXCEPTIONS, BILL OF (§ 36*)—TIME OF SIGNING—PURPOSE FOR WHICH CONSIDERED.

Where a bill of exceptions is presented to and signed by the trial judge within 90 days from the date of a judgment overruling the motion for a new trial, it is within the time prescribed by Code 1907, § 3019, and may be looked to for the purpose only of revising the rulings on that motion.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 36.*]

2. LOGS AND LOGGING (§ 3*)—SALE OF TIMBER—ACTION FOR PRICE—SET-OFF AND COUNTERCLAIM—WAIVER.

Defendant had a contract to cut from plaintiff's land timber suitable for cross-ties, and, after they were sold, he was to pay the plaintiff a fixed sum for each tie sold, and, after payment for a quantity sold, defendant began to haul out for sale the remainder of the

ties, and on a notice from plaintiff stopped hauling, and thereafter a part of the ties remaining were destroyed without fault of defendant, who afterwards in disregard of the notice, hauled away some ties. *Held*, that defendant, in disregarding the notice to stop hauling, had not so waived plaintiff's breach of the contract as to deprive himself of the right to set off against the price damages resulting from the destruction of the ties.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

Appeal from Circuit Court, Russell County; M. Sollie, Judge.

Action by J. W. McCloud against J. M. Flournoy on the common counts, and on a special contract for the price of certain cross-ties. Judgment for defendant, and plaintiff appeals. Affirmed.

In response to the complaint the defendant set up that he and plaintiff had a contract whereby the defendant was to cut from certain lands of the plaintiff all the oak timber suitable for making cross-ties, and that after they were cut and sold by the defendant he was to pay the plaintiff, out of the proceeds of the sale of the ties, the sum of 8 cents for each tie sold by him; that the defendant cut 1,314 ties, and from the ties so cut had sold 263 ties, and paid the plaintiff the sum of 8 cents per tie for said number, and had proceeded to begin to haul out for sale the remainder of said 1,314 ties, and thereupon the plaintiff notified the defendant to stop hauling the ties from said land, and in pursuance of said notice the plaintiff stopped, and in a short time thereafter a large number of said ties were burned without fault on the part of defendant, to wit, 708 ties, of the value of \$247.80, which sum the defendant seeks to set off against plaintiff's demand. As a reply, the plaintiff set up, in short, that the defendant waived the breach by plaintiff set up in said plea.

The motion for the new trial contains the following charges, among others, for grounds: "The court erred in refusing the following charges requested by plaintiff: (1) Affirmative charge on the plea of set-off. (2) 'I charge you, gentlemen, that should any breach of the contract on part of plaintiff be shown, said breach has been waived by the defendant.' (3) 'I charge you, gentlemen, if there was any breach of the contract on the part of the plaintiff by the notice testified to by the defendant, I charge you that such breach was subsequently waived by the defendant.'"

O. S. Lewis, for appellant. Glenn & de Graffenreid, for appellee.

WALKER, P. J. [1] The bill of exceptions was presented to the trial judge, and signed by him, within 90 days from the date of the judgment overruling the motion for a new trial. This being true, so far as it pertains to the motion for a new trial, it was presented and signed in time, and may be looked

to for the purpose only of revising the rulings on that motion. Code, § 3019; Cassells' Mill et al. v. Strater Bros. Grain Co., 166 Ala. 274, 51 South. 969. It follows that the motion to strike the bill of exceptions must be overruled.

[2] The principal contention of the appellant is that his motion for a new trial should have been granted on the grounds stated in it, which suggested that the court had erred in refusing certain written charges requested by him. In view of the nature of the controversy between the parties and the evidence bearing upon it, each of those charges might have been understood as involving the proposition that the defendant, by disregarding notices given to him by the plaintiff not to haul from plaintiff's land the cross-ties which the defendant had cut under the contract between them, so far waived the breach of that contract committed by the plaintiff in giving those notices as thereby to disable himself to set off or recoup damages he had sustained by the loss of cross-ties consequent upon the plaintiff's so denying him the right to remove them from the land. The defendant's claim of set-off or recoupment was based upon the loss of a lot of the ties by fire while he was kept off the land by the notices from the plaintiff. Referring to one of the notices, the defendant testified: "After I received the letter, the woods were burned over. It was about six weeks afterwards. From the receipt of the notice up to the time of the fire I did not go on the land." Certainly his going on the land afterwards, in disregard of the notice, and hauling away some ties which were left, did not operate as a waiver by him of a right to claim damages which already had resulted while he desisted from going upon the land in obedience to the notice, and in consequence of his being deprived in that way of the opportunity of getting the ties. That conduct may have operated as a waiver by the defendant of the right to treat plaintiff's breach of the contract as a discharge of the liability under the contract for the cross-ties he actually got in disregard of the notice from the plaintiff; but his acceptance of a part of the ties under the contract did not have the effect of destroying his claim against the plaintiff for damages sustained by the loss of other ties, to which he was entitled under the contract, in consequence of the plaintiff's breach of the contract. He could retain the ties which he hauled off in disregard of the plaintiff's notices, and for which he thereby made himself liable according to the terms of the contract, though the plaintiff had breached it; and, as against the plaintiff's claim on account of the ties so actually received by the defendant under the contract, the latter was entitled to set off or recoup the damages he had suffered by the loss of other ties in consequence of the plaintiff's breach of the

contract. In other words, the defendant's conduct in question may have operated as a waiver by him of the right to treat the plaintiff's breach of the contract as a discharge of all liability of the defendant under it; but it did not have the effect of depriving him of the right, in an action by the plaintiff on the contract, to set off or recoup whatever damages he may have sustained by the plaintiff's breach of its terms or obligations. Frith v. Hollan, 133 Ala. 583, 32 South. 494, 91 Am. St. Rep. 54; 3 Page on Contracts, § 1509. The court was not in error in refusing the charges above referred to nor in overruling the motion for a new trial.

Affirmed.

(130 La.)

No. 18,754.

CROSS v. LEE LUMBER CO.

(Supreme Court of Louisiana. Jan. 15, 1912.
Rehearing Denied Feb. 26, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§§ 185, 206, 231*)—INJURIES TO SERVANT—FELLOW SERVANTS—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

Where a toggle knocker, in the discharge of his duty, goes under one of the cars of a log train with the authorized understanding that the train will not be intentionally moved without notice to him until he gets through with his work, and the fireman, who has been left in charge of the locomotive, upon a signal from the brakeman (given in the presence and to the knowledge of the engineer, who has control of the train and of those working on it, and who, at the moment, is conversing with the superintendent), causes the train to move without such notice, thereby crushing the foot of the toggle knocker, the pleas (set up by way of defense to an action in damages) of assumption of risk, negligence of a fellow servant and contributory negligence, the latter based on the fact that in doing his work the toggle knocker had allowed his foot to get on the rail, cannot be sustained.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421, 547-549; Dec. Dig. §§ 185, 206, 231.*]

2. DAMAGES (§ 132*)—MEASURE—PERSONAL INJURIES.

In view of the decrease in the purchasing power of money, this court is of opinion that \$7,500 is not too much to allow a man who depends upon his manual labor for his livelihood for the loss, through the gross negligence of his employer, of a foot.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

Appeal from Thirteenth Judicial District Court, Parish of Rapides; W. F. Blackman, Judge.

Action by Henry Y. Cross against the Lee Lumber Company. From a judgment for plaintiff, defendant appeals, and plaintiff answers the appeal, praying that the amount of the award be increased. Judgment amended by increasing amount of award to \$7,500 and affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Blackman & Overton, for appellant. Grisham, Oglesby & Stennis and Hundley & Hawthorn, for appellee.

Statement of the Case.

MONROE, J. Plaintiff sues for damages for personal injuries sustained whilst discharging his duty as "toggle knocker" in defendant's employ. Defendant pleads assumption of risk, including risk of the negligence of a fellow servant, and contributory negligence.

The duty of the "toggle knocker" is to knock loose the "toggle" or "binder" chain, by which logs, loaded upon a car, are held in position, so that they may be released and unloaded. An ordinary log car consists of two trucks, upon which are fastened, about 14 inches apart, two squared timbers, called "reaches," 7 inches thick which extend from one truck to the other and hold them in their relative positions. Across the tops of the reaches and between the wheels of the car, are other timbers, called "bunkers," 14 inches thick, upon which the logs are piled lengthwise of the car. The reaches are 18 inches above the ground, and between them the distance from the logs to the ground is 39 inches. The toggle chain passes from the reach, underneath one side of the pyramidal pile of logs, over the top of the pile, and is hooked to a short chain fastened to the reach underneath the other side of the pile; and, in order to disengage it, the toggle knocker must crawl under the car, and with a short-handled ax knock the hook out of the link or ring, constituting what may be called the "eye," in the short chain. When the log train reaches its destination, the first thing to be done, in order to unload the logs, is to knock loose the toggle on each of the cars, and the toggle knocker is expected at once to proceed to the discharge of that duty, and to continue his work until all the toggles have been disengaged. In this instance, the destination of the train was a ramp, upon which about, say, five cars could be unloaded without further movement of the train, the logs, as taken from the cars, being rolled into an adjacent pond; and we infer from the testimony that plaintiff had knocked the toggles from, say, four cars that were on the ramp and were being unloaded, and was at work under the fifth from the locomotive, at the other end of the train, when he was injured.

He was lying at the time on his back under the reach to which, by means of the short chain, the toggle was hooked, and was trying to knock the toggle hook out of its eye; and, there being but 18 inches between the reach and the ground, he was not particularly attending to the position of his feet, one of which as it happened, was resting on one of the rails of the track, either against or quite near one of the wheels of the car, so that when, without warning of

any kind, the train was backed his foot was crushed, and had soon after to be amputated. The testimony shows that the car moved about two feet, when it was stopped by reason of a signal given to the fireman, who was handling the locomotive, and plaintiff was asked how much nearer than two feet his foot was to the wheel, to which question, and some others, he replied as follows:

"I can't say; I wasn't looking at my foot. I was looking at this piece of work. * * * I couldn't look at my foot and do the work at the same time. * * * They were supposed not to move until I got through, and in that way it is not dangerous. * * * A man goes under there; anybody who has done work before knows that it is easier for him to lay his legs out to do the work. * * * I suppose I would have [had room to spread his feet out, without putting either of them on the rail]; but, like I said a while ago, you get into all kinds of shapes, because you are not looking for the car to move. * * * Yes; it was dangerous in case the car should move [for him to have his foot on the rail]; but I wasn't looking for them to move."

Apart from any movement that may be caused intentionally by the movement of the locomotive, a car is sometimes caused to move by the vibration produced in relieving it of its load of logs, and we infer that such movement may be communicated to, perhaps, one or two of the nearer cars; and in such cases notice could hardly be given from the engine to the toggle knocker, as the person in charge of the engine would not himself be notified. Such movement does not, however, extend beyond from one to three inches, does not ordinarily take place when the car which is being unloaded is on a level track, and, as it appears to us, could readily be guarded against by chocking the wheels, either of the car from which the logs are being removed, or of that under which the toggle knocker is working. The car under which plaintiff was working did not move, and does not appear to have been in danger of moving, by reason of any movement resulting from the vibration of the car that was being unloaded at the moment of the accident. It moved because the fireman, who was in charge of the locomotive, upon a signal to that effect from the brakeman, caused the locomotive to move, and thereby moved the train; the purpose being to release one of the toggle chains which had already been knocked loose, but which had been fouled by a log in the process of unloading, and interfered with the work. Log trains are not unfrequently moved for that purpose, and they are also moved in order to clear the ramp of unloaded cars and place the loaded ones in position to be unloaded. So far as we can gather from the testimony of defendant's witnesses, no instructions are given by defendant looking to the safety of the toggle knocker in the event of the movement of the car under which he may be working, whether the movement be intentional or unintentional, or

whether it be a few inches, a few feet, or more. Mr. Cooper, defendant's superintendent, seems to think, and so testifies, that the toggle knocker may make himself perfectly safe by keeping his feet off the rails, and, in the event of any considerable movement of the car, by swinging himself up to the under side of the reach. He says (referring to the danger from the sand boards) that, if he (the toggle knocker) were a large man (i. e., so large that a sand board, extending down to within nine inches of the surface of the track, would not pass over him), and he did not swing himself up to the reach, or, being a smaller man, did not properly adjust his person upon the track, "seven to eight feet would catch him," but that, for the purpose of releasing a fouled toggle, the trains are not moved more than three or four feet. But Mr. Cooper has never knocked toggles, and Crowder, the engineer of the train on which plaintiff was working when injured, being examined as a witness for defendant, testifies as follows, in his examination in chief to wit:

"In unloading, the logs fall off on the skidder, and very often the chains catch between the log and the skidder, and the only way we can get them loose is to pull the engine, and that cuts the chains from underneath the logs. Q. About how much of the movement of the car does it usually take to loosen the chain, under those circumstances? A. I reckon six to ten feet."

Mr. Crowder was not on the locomotive when the accident occurred, but had placed Kyle, the fireman, in charge of it, whilst he had gone back to the ramp to assist in unloading the logs. At the very moment of the accident, however, he was engaged in conversation with Mr. Cooper, the superintendent. He says that he saw Hopkins, the brakeman, signal to Kyle to back the train, and he endeavors to excuse himself for not interfering for the protection of the plaintiff by saying that he did not know that plaintiff was then at work under one of the cars; that he thought he had had time enough to get through. The train was there, before his eyes, however, and showed for itself that some of the toggles had been knocked and others had not; and hence that the toggle knocker had begun and had partly completed his work, and, presumably, was still engaged at it beneath one of the cars upon which the toggle was not as yet knocked loose. The testimony of Mr. Crowder, on his cross-examination, reads, in part, as follows:

"Q. You are an engineer. Before backing or going forward, oughtn't the engineer to give a signal? A. It wasn't customary. Q. Wasn't that considered safe in unloading? A. We never do, unless we move way back; we blow three times. Q. Doesn't he ring a bell? A. Sometimes the fireman does, if he is there. Q. Ought the train to be moved without some kind of a signal? A. I guess on the main line they are required to do so. Q. Why? A. That is all the instructions we get. Q. You don't know why the signal is given? A. One is to notify

any one that the train is about to move. Q. Why do you want to let them know? A. So they can get out of danger. The crew is supposed to know that they are about to move. Q. The brakeman is supposed to know without a signal? A. No, sir. Q. The men that don't give signals and work, they are entitled to know? A. He should know that it is liable to move at any time. Q. He should have some kind of notice? A. Yes, sir. * * * Q. He [Hopkins] knew that Henry Cross was under the car? A. I don't know. Q. He ought to have known? A. I don't know; he knew that they had to be knocked. Q. He knew that all of them hadn't been knocked? A. I don't know about that. Q. You knew they hadn't? A. No, sir. Q. Why? A. Because I didn't have to go and look at all of them. Q. When they knock the toggles, don't it loosen it? A. Sometimes. Q. You wouldn't have given the signal to move the train without first knowing the toggle knocker was safe? A. Yes, sir. Q. You would have found out whether he was under there, wouldn't you? A. Unless we knew he was under there, I didn't look out for the toggle knocker at all. Q. Didn't pay much attention? A. No, sir. Q. To what extreme? A. When he was supposed to be under the car, we looked out. Q. At that time, he was supposed to be under the car, was he not? A. He had got plenty time to get out; I thought he had. Q. Now, I understand that you all, knowing that this man had to go under cars and do his work, that you did not pay much attention? A. I did. Q. Did you ever give a signal to move a train without knowing that the toggle knocker was out from under it? A. Yes, sir. Q. You would order a train moved, knowing that he was under there? A. I wouldn't; no, sir. Q. I understand that you wouldn't give any order to move that train without either knowing that he was out from under it, or without his knowing that it was going to be moved? A. Why, if it is a time that he is supposed to be under there, I wouldn't. Q. You had that much regard for the safety of the man you were working with. A. I did. Q. Any railroad man ought to have had that much regard for the safety of the man working with him? A. Don't know. Q. He ought to? A. I guess he did; yes, sir. Q. Oughtn't the engineer or man in charge of the engine to have either rung the bell or blown the whistle before moving? A. I suppose it would have been proper to have blown the whistle. Q. Railroad men all over the world give some kind of a signal when they move a train, don't they? A. They are supposed to give a signal."

Kyle, the fireman (called by defendant), testifies that he would not have moved the train if he had known that plaintiff was under the car; that he guesses ("I guess") he ought to have been notified; that the brakeman ought to have known whether he was under the car, or not, before giving the signal to move. Hopkins, the brakeman by whom the signal was given (called by defendant), testifies that he did not know, when he gave the signal, that plaintiff was under the car; that he thought he was through with his work; that he thinks he had had time to get through; that he would not have given the signal if he had known he was still under the car. Being asked why he would not move the train without giving the signal, even if the movement were to be only a few feet, he replied:

"I didn't want to cripple anybody. I wouldn't move it. It's an easy matter. If the one un-

der knows that it's going to move, he can catch the reach; but if he didn't know it— Q. What about the sand boards that hung down? A. Unless he was a large man, he could lay down; but I wouldn't take any chances. Q. Now, a man ought to be warned, if he is under there, that the train is going to be moved, so he could get prepared? A. Yes, sir; it is necessary for the workmen to get the warning. Q. Where should this signal come from? A. From the engine. Q. Should the bell ring? A. Yes, sir; I think it should."

Plaintiff, at the time of the accident, was about 20 years of age, and had worked on railroads and about sawmills probably from his twelfth or fourteenth year; but, until the engagement during which he was injured, he had never filled the place of toggle knocker, and had had no experience of its duties or dangers. It is true that he says that he had worked as "toggle binder" (the toggle binder hooks the toggle, and the toggle knocker unhooks it); but he did not have to get into the same constrained positions in that capacity, and it does not appear that there was the same likelihood or necessity for the movement of the car in the one case as in the other.

Plaintiff testifies that Lucas, whose place he took, told him to be careful and not get hurt, and that, if a car should happen to move, to get hold of the reach, and that would save him, but that he did not tell him why the cars were apt to move; nor does it appear that any one else told him, or that he knew why, or that it occurred to him that a car might move a few inches by reason of the vibration resulting from the unloading from it, or from an adjacent car, of a load of logs. Mr. Smith, the pond foreman, advised him to chock the logs on the car before knocking loose the toggle, in order, as we infer, to keep them from rolling off prematurely, and, perhaps, catching him unawares, with some part of his person outside the rail. It appears that about a week before the accident he had been requested by Lucas to take his place as toggle knocker, and a few days later had gone to work in that capacity, with the approval of Mr. Merritt, the woods foreman, who had immediate supervision of the logging operations from the woods to the ramp, and of Mr. Rhodes, the main line engineer, who had charge of what is called the "main line logging train," upon whose pay roll his name was entered, who had the power to discharge him, and who instructed him that his duty was to stay at the ramp and knock toggles from any trains that came in, and, as we infer, in the intervals between trains, to clean the track and burn sand for the locomotives. Some of defendant's witnesses say that it was also his duty to assist in unloading the logs, and that he might at times be called upon to go into the woods with the trains; but no one testifies that he was ever so informed, or that he was ever called upon, during the 5½ days that intervened between the date of his

employment and that of the accident, to perform such duties. In addition to the main line regular train, there appears to have been another irregular train, which, perhaps, obtained its supply of logs in a different territory from that in which the main line train operated, and which came into the ramp when a load was obtained, say, four or five times in a month, and it was that train, of which Crowder was engineer, and which had but one brakeman, whereas the regular train had two, on which plaintiff was working when injured. So far as appears from the record, plaintiff had never received any instructions from Crowder, and was working under the instructions given by Rhodes, to go under the cars and knock the toggles from the trains as they came in; and no one participated with him in the knocking of the toggles, or had anything to do with that work, save to refrain from running the train over him whilst he was engaged in it. Upon the case as thus presented, the judge a quo gave judgment for plaintiff in the sum of \$3,500. Defendant has appealed, and plaintiff has answered the appeal, praying that the amount of the award be increased.

Opinion.

[1] It is undisputed, or placed beyond dispute by the evidence, that plaintiff obeyed the instructions of his employer in going under the car in order to do the work for which he was employed; that he was in that position engaged in that work when, without warning to him, the car was moved and his foot crushed; that he went under the car with the distinct understanding on his part that the car would not be so moved without such warning; that his understanding of the matter was fully authorized by the existing conditions, and was shared in by those whom defendant had placed in control of the car, including plaintiff's immediate superior, defendant's vice principal, the engineer of the train of which the car in question formed part; that the engineer, as well as the fireman and brakeman, knew that it was plaintiff's duty to knock loose the toggle chains upon every car on the train, and had the evidence before their eyes that he was engaged in that work, as some of the chains had been knocked loose and some had not; and, that, though the brakeman gave the signal which caused the car to be moved, the engineer was on the spot, saw the signal given, might have interfered to prevent its being acted on, but did nothing. It is clear, then, we think, that plaintiff did not assume the risk that the car would be intentionally moved, without notice to him, while he was under it, and that, quoad such risk, he was guilty of no contributory negligence in allowing his foot to rest upon the rail, or in assuming any other position that he found necessary or conven-

ient for the doing of the work in which he was engaged. Whether he assumed the risk of such movement of the car under which he was working as might have resulted from the vibration produced by the unloading of the logs from another car on the same train is immaterial, since that was not the movement that caused the injury; nor can any one say that such a movement would have occurred, or, if it had occurred, that so slight a movement would have caused the injury. We may say, however, that, whilst it is shown that plaintiff was informed by the toggle knocker whom he succeeded that the car might be moved, and was advised that, in such case, he might save himself by swinging upon the reach, his admission upon that subject is coupled with the statement, which he repeats, that he was not looking for the car to move until he got through his work (meaning, as we understand his testimony, without notice to him), and, in the absence of any evidence to the effect that he was cautioned that the car might be moved without intention, and from the cause to which we are now referring, we conclude that he was ignorant of that possibility. The remaining proposition upon which defendant relies is stated by its learned counsel as follows, to wit:

"Where a crew of men working for the same employer, under a common foreman, and carried on the same pay roll, are engaged in the work of hauling cars loaded with logs to a lumber company's plant, and there unloading them, which crew consists of (1) an engineer, (2) a fireman, and (3) a brakeman, performing the usual duties attending such positions, accompanying the train to and from the woods, and, in addition, discharging the duty of unloading the logs, and, of a toggle knocker, whose duties are to assist in unloading the logs, and, while the train is gone with the other workmen, to remain behind and to clean the track and burn sand, and the toggle knocker is injured, through the alleged negligence of the brakeman and fireman, during the process of unloading, and while all the workmen are actively engaged exclusively in unloading, the brakeman, fireman, and toggle knocker are fellow servants, quoad the work of unloading, and the toggle knocker cannot recover for the injury thus received in a suit against the common employer."

The evidence shows that plaintiff was carried on the pay roll of Rhodes, the main line engineer, and, though there is nothing said on the subject, we infer that Kyle, the fireman, and Hopkins, the brakeman, of the train on which plaintiff was working when injured were carried on the pay roll of Crowder, the engineer of that train, who was, however, in control of the train and of the men actually working on it. As to plaintiff's duties, he testifies that they were to knock toggles on any train that came in—a function in which no one else participated—and in the intervals between trains to clean the track and burn sand. Defendant's

witnesses say that the toggle knocker was considered a member of the train crew, and was expected, when needed, to assist in unloading logs, and at times to accompany a train to the woods; but no one pretends to say that plaintiff was ever so informed, or that he was ever called on to perform such duties; and, as the matter is presented, it appears to us that he occupied about the same relation to the engineer, fireman, and brakeman of the train upon which he was working as would a mechanic, employed to go under and repair a disabled automobile, to the owner and chauffeur.

We consider it immaterial, however, whether Kyle, Hopkins, and plaintiff were or were not fellow servants; for the act of negligence by which plaintiff was injured was done in the presence and to the knowledge and with the acquiescence of Crowder, the engineer, who was representing the defendant, and upon whom plaintiff had the right to rely for his safety. *Bell v. Lumber Co.*, 107 La. 736, 31 South. 994; *Towers v. Railroad Co.*, 37 La. Ann. 632, 55 Am. Rep. 508; *Mattise v. Ice Co.*, 46 La. Ann. 1535, 16 South. 400, 49 Am. St. Rep. 356; *Evans v. Lumber Co.*, 111 La. 534, 35 South. 736.

[2] Our conclusion upon the whole case is that the accident to plaintiff was attributable exclusively to the gross negligence of the defendant. Upon the question of the quantum of damages, we have recently held that, in view of the decrease in the purchasing power of money, \$7,500 is not too much to allow a man who depends upon his manual labor for his livelihood for the loss, through the negligence of his employer, of a hand, and we are of the same opinion in regard to the loss by such man, and from a similar cause, of a foot.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by increasing the amount thereby awarded to plaintiff to \$7,500, and that, as thus amended, said judgment be affirmed, at the cost of the defendant, in both courts.

(130 La.)

No. 18,752.

MORGAN'S LOUISIANA & T. R. & S. S. CO.
v. JOHN T. MOORE PLANTING
CO., Limited.

(Supreme Court of Louisiana, Jan. 2, 1912.
Rehearing Denied Feb. 26, 1912.)

(Syllabus by the Court.)

On the Exceptions.

1. PLEADING (§ 332*)—FILING AND SERVICE
—DOCUMENTS REFERRED TO.

This court will not dismiss a suit because an exception has been filed that the

petition is vague because a copy of a map referred to therein has not been served on the defendant. The map was filed with the petition and is among those documents which need not be served.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 332.*]

2. EMINENT DOMAIN (§ 191*) — PLEADING — SUFFICIENCY OF ALLEGATIONS.

As the plaintiff set forth the use for which the land was intended, and the allegations were sufficiently explicit to allow the defendant to meet the issues, the exception of vagueness was properly overruled.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 509-518; Dec. Dig. § 191.*]

On the Merits.

3. EMINENT DOMAIN (§ 196*) — NECESSITY OF CONDEMNATION — EVIDENCE.

The evidence leads to the conclusion that the property sought to be expropriated is necessary for the railroad purposes of the plaintiff and that under its right of eminent domain it is entitled to the land after paying proper damages.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 196.*]

4. EMINENT DOMAIN (§ 234*) — AWARD — SUFFICIENCY.

The findings of the commission on the question of damages are correct.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 234.*]

Monroe, J., dissenting.

Appeal from Twentieth Judicial District Court, Parish of Terrebonne; W. P. Martin, Judge.

Action by Morgan's Louisiana & Texas Railroad & Steamship Company against John T. Moore Planting Company, Limited. Judgment for defendant, and plaintiff appeals. Amended and affirmed.

Suthon & Wurzlów and Hall, Monroe & Lemann, for appellants. Beattie & Beattie and J. P. Blair, for appellees.

BREAUX, C. J. Plaintiff brought this action against the defendant for the expropriation of land fully described in its petition. The land is necessary, as it alleged, for accomplishing the object for which the railroad company was organized. It represents that it needs additional space to lay tracks at Shriever and to enlarge its embankment, also space to improve the means of access to its tracks and depots, and further space to be utilized in other needed drains along its railroad embankment.

This is the second appeal between plaintiff and defendant. In the first appeal, judgment was for plaintiff, decreeing plaintiff entitled to certain servitudes at and near Shriever Junction, and generally "for the use of its railroad across defendant's plantation," including "the ditches along the railroad embankment," including "the turntable, embank-

ment, and space on which its machinery was," and "including the inner and outer slope of the ditches," also over the section house and over the space between the two depots occupied as a flower garden; and recognizing the railroad company as owner of the space expropriated for the right of way of the Houma Branch Railroad; decreeing the plaintiff company the owner of the land over which the servitude extends and to be in possession of all the other spaces included in the first suit.

On rehearing, the matter of drainage received further attention, and its extent and nature were particularly defined. We are particular in referring to drainage by reason of the fact that in the case before us for decision there is some difference of view in regard to the interpretation of the first decree rendered, which will be considered later. See *John T. Moore Planting Company v. Morgan's La. & Texas R. R. Co.* (No. 17,026) 126 La. 840, 53 South. 22.

The defendant filed an exception to plaintiff's suit on the ground that no copy of the map referred to in plaintiff's petition in this present suit was served on defendant; and defendant filed another exception on the ground of vagueness and that plaintiff had not alleged the object in-seeking to expropriate defendant's property, and the use plaintiff intended to make of the land. The exceptions having been overruled in the district court, the exceptions will be considered hereafter.

Afterward the court appointed three commissioners—one selected by plaintiff, another by defendant, and the third by the court. The district court in its reasons for judgment made mention of the commissioners at some length, as highly qualified and equipped to compose the commission. They owned land near Shriever. They were among the most prominent and best citizens of the state. One was Col. W. H. Price, owner and manager of large interests; the other was Senator Shaffer, also owner of large areas of land and a highly successful planter. Mr. Shaffer was the cashier of the Bank of Thibodeaux, interested in sugar property near Shriever, and all citizens of unquestioned integrity and ability, impartiality, and well versed in the value of property.

These commissioners held their sessions at Shriever and heard a number of witnesses, and made a report of their finding, which was approved by the court.

At this point, defendant answered plaintiff's petition. Defendant in the answer controverted the grounds alleged in the answer, and specifically alleged that there was no necessity on the part of plaintiff to expropriate defendant's land; and further alleged that it has no use for the land, no interest to serve; that the drainage proposed is ill

advised, unwarranted, and unjustifiable and was calculated to injure respondent without plaintiff subserving its own interest. In the alternative, if the court decides for plaintiff, then, in the answer as to the value of the property, defendant claims \$47,669, as set forth in different sums, aggregating that amount.

We have sufficiently stated the pleas as set forth in the pleadings.

The following is a summary of the facts: The civil engineer by whom the survey was made of land plaintiff seeks to expropriate, and whose plat of survey was filed in evidence, was heard by the commissioners as a witness. His testimony and that of other witnesses furnished the information necessary to identify the different tracts of land.

The second witness for plaintiff had been in the sugar planting business about 35 years, and had been manager of Wauban plantation for about nine years, and is a successful planter. He thought that about \$150 an acre would be an average price for plantation property, and that the land beyond the cultivable lands on Wauban plantation are worth about one-half that amount. He thought that \$1,250 would pay for the damage of passing through the field and the obstruction at crossings.

The superintendent of the plaintiff road, E. E. Shackford, testified: That the land is necessary in particular places for additional tracks; in other places for improved drainage owing to the widening of the banks and in strengthening them; and in other places around the depot to get to the depot and to receive and handle baggage, express, and passenger traffic. That the tract described in the petition under No. 1, on the east end of the plantation, is necessary for the construction of a second or double track, required for the exigencies of the railroad and public business. That the next tract described in the petition and colored yellow on the map, which begins on the west side of the public road and extends to the west end of the plantation on the north side of the railroad, also tract No. 1, a continuation of tract marked 2, were to be used in the alteration of the switch. That there is not sufficient berm at present; that is to say, no flat line between the toe of the slope or to the edge of the ditch, as there should be, and that that is also another reason for seeking a judgment of expropriation.

He mentioned other particulars in connection with these improvements and other facts as a reason for the suits, such as a team track in the yard at Shriever; that five or six cars length are necessary, where teams could get to the cars to unload the contents; that there is no place for a car load of lumber or coal or a car load of furniture to be delivered into wagons, unless placed in front

of the depot platform and carried through the warehouse.

"It would be a rather difficult and ridiculous way of handling freight."

He also said that there was a heavier tonnage of freight of late years. The engines were larger—twice as large now, and the weight twice as great.

In reference to the land described in No. 3, he said that it was absolutely necessary for entrance and exit and the only public road in the vicinity to get to and from the depot. About one of the buildings which the defendant had moved, he said that it had been moved on the land sought to be expropriated after the suit had been brought, and that defendant company knew that they would require the expropriation of that land before the building was constructed.

Unless the officers of the road are not telling the truth—and that we will not assume—the railroad needs the property. It will be borne in mind that these witnesses stated to the commission and in presence of other witnesses and the bystanders that the railroad could not properly handle the freight and transfer passengers, and that the commission was in session several days.

The fourth of plaintiff's witnesses was a planter residing near Morgan City, who had bought and sold land. He fixed the value of the swamp land, part of which plaintiff sought to expropriate, at \$5 or \$6 an acre, and he thought that the land near by and near the embankment was worth about the same amount. Also the land spoken of as the barrow pit lands. These last lands had been spaded out. For cultivation, they would have to be filled, which would be expensive. The barrow pit and other lands, which plaintiff seeks to expropriate, are about on a level with the swamp; that is, about seven feet below the surface.

The land in Shriever, to which his attention was called, he valued at \$250 an acre, and valued cane lands at \$150 an acre, which was the price at which he fixed the agricultural lands of the plaintiff, except those near the swamp, which he valued at \$20 an acre, and the swamp land at \$8. The land for ditching he valued at \$50 an acre, and, returning to Shriever, he said that lots there were worth about \$100 each. He saw no prospect at that place (Shriever) for a lumber yard, or for a storage plant, or for a wholesale grocery; that it would probably offer some inducement for a retail grocery. He also stated that lands along the embankment were not in the best condition; that there are milk weeds there and Johnson grass.

The fifth witness for plaintiff was also a sugar planter of many years experience, who had bought and sold lands. The land west of Shriever he estimated as worth about

\$125 per acre. This witness must have been partial to cane fields, for he was decidedly of the opinion that Shriever would not lose by being converted into a cane field. He said there is a grocery store in the place, a saloon, hotel, restaurant, and a fruit stand. There had been a drug store and there is a livery stable. The drug store was closed temporarily for all we know. The timber lands of defendant he valued at \$10 an acre; also the swamp lands and the barrow pit lands.

The sixth witness for plaintiff was a real estate agent and notary public. He spoke of \$150 as a fair value for agricultural lands; was not very familiar with land values in Shriever. Subsequently, in testifying, he spoke of lots in Shriever as worth from \$500 to \$1,000, provided they were easily accessible. When told that they were not, he answered that they were of very little value.

The mayor of Morgan City, who is a lawyer, was the next witness. He had no practical experience. He had frequently conversed with his clients and others about the value of sugar plantations, and thought that \$100 to \$150 an acre was a fair valuation. The swamp lands he valued at \$5, and the lands on which the ditches were he considered of very little value. On a strip of land immediately between the embankments on the south side of the track he placed a value of \$250. He had frequently stopped at Shriever on his way to Houma and had never noticed any improvement; does not seem to have been impressed with the land as of particular value. He spoke of Shriever now as being what it was many years ago. He insisted that he would make no deductions in regard to the market value of lands simply because some one had paid a handsome price for a particular lot. This referred to the purchase in the town of Shriever of a lot of land by a Mr. Toups for a very considerable price.

The eighth witness who testified for plaintiff agreed in the main with those who had previously testified.

The right of way agent of the Morgan road, Mr. B. C. Watkins, who in that capacity had charge of the company's lands and also charge of the construction of tracks, the public highway, and railroad crossings, testified that he, as the representative of the road, had used every effort that he could think of to buy the land from the defendant, and specified different attempts he had made to purchase the land; but all in vain. The purpose, he swore, is to build a second main track through the Wauban plantation of standard construction, with a roadbed having a slope of 1 vertical foot to 1½ feet horizontal, so that, of the 14 feet between track centers, there will be 9 feet for slope of embankments, from 5 to 8 feet for the berm, and the remainder for drainage purposes and

operation of the block signal line, consisting of a line of telegraph wires.

There will, this witness says, be in the near future a new main track over the right of way. This is referred to in order to add that, according to the officers who have testified as the representatives of the defendant company, within a reasonable time it is proposed to improve the track as stated in the testimony of witnesses.

Several other witnesses testified in regard to the value of property, and their testimony did not vary very much from that of the witnesses to whom reference has heretofore been made.

Now as to defendant's testimony:

The first witness on behalf of the defendant was the vice president, Mr. Chas. V. Moore. He testified about rents and the different amounts collected as rental, upon which he based value of the property. For instance, a lot and store thereon, in Shriever, he swore that it brought an income of \$1,800 per year at one time, and, at the date of the trial, \$1,500 per year. That that rental represented a value of \$15,000 a year at 10 per cent. He valued the property at \$10,700. The next building which brings the highest rent was the hotel, restaurant, and stable, with the residence near the stable. The hotel and dormitory he estimated at \$1,300, the restaurant and residence at \$1,800, and the stable at \$600. The rental collected on this property is \$600 per year—a capital of \$6,000 at 10 per cent.

The refreshment stand he valued at \$500. The barber shop, because of the rental collected, he valued at \$122. A residence across the bayou, at \$350. He testified that he had an offer of \$5,000 for the ground covered by the store. He said that the land in Shriever had other than agricultural value; that they have demands constantly for residences, but, for sentimental reasons, they have not parted with any land, although applications have been made to buy from them; that, with the opening of Bayou Terrebonne, lands will continue to increase in value; that a drainage district has been formed and contracts let for the dredging of the bayou; and that several miles had already been dredged. He stated that Shriever would be a pretty good wholesale center and distribution point in time, especially if Bayou Terrebonne be opened.

Witness stated that it was absolutely necessary to keep up the drainage along the railroad embankment. He agreed with other witnesses for defendant in regard to the value of agricultural land of Wauban plantation; that is, from \$150 to \$200 an acre.

Another important witness was Mr. Toups, who bought a small lot in 1896 from defendant for \$800. Having acquired standing room in the town of Shriever, he testified he had been reasonably successful since. The purchase was an advantageous one to him

and one which he did not regret. We conclude, as to this last property, this purchase can hardly be said to be a criterion of value in the town of Shriever.

The secretary of the company, in the main, corroborated the testimony of the vice president. He did not testify to anything showing higher value or less value, although his testimony necessarily differs from that of the vice president. No two witnesses testifying as to a number of facts can agree in all the particulars.

The overseer at this time on Wauban also testified, and as to value he did not very much differ from that of the other witnesses for the defendant.

A witness, who is connected with a lumber and sawmill plant in the town of Houma, Mr. A. T. Gerrans, also was under the impression that the lands at and near Shriever were of considerable value, and corroborated other witnesses for the defendant upon the subject. He said that he had a general knowledge of conditions, and that he at one time thought of locating at Shriever and thought of buying 40 acres of land at or near the Shriever Junction, and that it was his intention to offer a rental of \$1,500 or \$1,800 a year. He considered lots at Shriever as having value as business property. He was inclined to a high estimate. We do not find it possible to make it the basis of a judgment after having considered all the evidence given on the trial. He, we infer, has seen industry develop and become quite prosperous. It is certainly to be considered in fixing values. None the less, these elements of wealth are not controlling when not sustained throughout and in the face of a large number of witnesses who generally take a less optimistic view. It is all a question of opinion of expert witnesses.

Another witness, Mr. Garland B. Miller, was even more hopeful as to the prosperity the future has in store for the little town of Shriever. He owned that he was not familiar with local conditions. In short, without for a moment entertaining the least doubt about his earnestness and good intention, the commission did not agree with him, and neither can we. Although in a very short time he made a study of the resources of the place and the prospect of its becoming a commercial center, the few hours study he had given to the subject, the great zeal and altruism which led him to conclude that Shriever is a strategic business point of great importance, destined in the near future to become a considerable commercial town, evidently did not impress the commissioners.

The testimony of all the witnesses was considered by the commission, appointed as before mentioned. They arrived at the conclusion that the weight of the testimony was with the plaintiff. They made a report to the court from which the following is an excerpt:

We find that the rights and servitudes sought should be expropriated.

Land in Yellow, North Side of Railroad.

No. 1. Land lying east of Thibodeaux-Houma public road to east end of plantation, comprising 1.02 acres, at \$30 per acre.....	\$ 30 60
No. 2 A. Land lying west of above-mentioned road to engineer's station No. 2906-17, 0.43 acres, at \$500 per acre.....	215 00
No. 2 B. Land lying between engineer's station 2906-17 and engineer's station 2926-00, 0.9 acres, at \$300 per acre.....	270 00
No. 2 C. Land lying between engineer's station 2920-00 and engineer's station 2936-00, 1.43 acres, at \$200 per acre.....	286 00
No. 2 D. Land lying between engineer's station 2936-00 and engineer's station 2980-00, 1.93 acres, at \$150 per acre.....	289 50
No. 2 E. Land lying between engineer's station 2980-00 and west end of plantation, 2.24 acres, at \$30 per acre.....	67 20

Land in Yellow, South Side of Railroad.

No. 5 (Part) Land lying between engineer's station 2951-00 and engineer's station 2980-00, 0.79 acres, at \$150 per acre.....	118 50
No. 5. (Part) Land lying between engineer's station 2980-00 and section house, 1.34 acres, at \$30 per acre.....	40 20
No. 6. Land lying between section house and west end of plantation, 0.22 acres at \$30 per acre.....	6 60
No. 3. "X," triangle fronting the Thibodeaux-Houma public road 0.19, acres (no servitude) see note.....	1,000 00
No. 4. South of and around freight depot, comprising an area of 0.37 acres, at \$500 an acre.....	185 00
(A). Refreshment building. Nothing allowed for moving, which defendant may do at its own costs. The defendant was notified by plaintiff that this land would be expropriated and proceeded to erect the building thereon at its own peril.....	0 00
(B). Fruit stand. We have allowed for moving same.....	50 00
(C). Stable. We have allowed for moving same.....	300 00
(D). Dwelling (cabin). We have allowed for moving same.....	175 00
(E). Family residence. Damage to same on account of the extra noise, smoke, etc.....	00 00
(F). Plantation crossings, increased trackage—damage caused by same..	1,000 00
(G). Road south side of the depot—allowance for damages.....	15 00
(H). Road north side of railroad, north of depot, allowance for damages	15 00
(I). Sidewalks—damage to same and cost of removal.....	5 00
(J). Increased insurance rates.....	0 00

Land Colored in Brown.

No. 10. Between section house inclosure and ditch in front of same, consisting of .08 acres, at \$30 an acre	2 40
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Land Colored in Blue.

No. 11. Land known as "Old Turntable site," consisting of an area of .08 acres, at \$500 an acre.....	40 00
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\$4,121 00

Note to No. 8:

Inasmuch as the valuation set on No. 3 seems to be out of proportion to the values set on other properties belonging to defendant company, which are sought to be expropriated, the commission makes the following explanation, to wit: "Tract No. 8 is the only piece or particle of land sought to be expropriated that has a frontage on a public road and which can be approached without the sufferance of the defendant company, with the exception of two small (almost insignificant) tracts of land which have a frontage on the public road," both of which are incumbered with a servitude of poles and wires.

In the report to the court, the commissioners stated that they found no difficulty in interpreting the Supreme Court decision in case No. 17,026, and made their finding accordingly. Because of difference of opinion between plaintiff and defendant, they made valuation of the property so as to meet either view. In case it be as contended by defendant, then they appraised the property to carry out defendant's theory at \$228.60.

The judge of the district court affirmed the report of the commission in a well-prepared opinion, and, as found by the commission, rendered a decree in favor of defendant affirming its finding.

Exceptions.

[1] The exception before noted is now before us for decision. The objection was that the map referred to in the petition should have been served on the defendant. Were the grounds well taken, it would hardly be possible in law to reverse the decision and remand the cause at this time unless the error was prejudicial. The objection does not commend itself as sufficient to dismiss the suit. The map was filed at the same time with the petition. It may be considered in the nature of a document which need not be served provided it is filed. In *New Orleans Terminal Co. v. Teller*, 118 La. 735, 37 South. 624, 2 Ann. Cas. 127, the court did not set aside the judgment, for reasons, we think, are controlling.

[2] An exception was filed on the ground of vagueness (we have stated above) in that plaintiff did not state the purpose for which plaintiff sought to expropriate the land. The resolution of the board of directors directed one of the officers of the defendant to institute the suit. The petition stated the purpose at length and the use it intended to make of the land. It alleged that which can here be expressed in few words. It was to supplement its right of way, its drainage, and to enlarge the station grounds and acquire other needed space. The allegation was sufficiently complete to enable the defendant to meet the issues, and at no time during the trial does it appear that any one concerned was at a loss about the issues because of vagueness in alleging them.

The facts were detailed at length.

The exceptions in our view were properly overruled.

On the Merits.

The Wauban place is one of the large and valuable sugar plantations along the Gulf Coast of southern Louisiana. The lands are fertile and valuable. Shriever, which is stationed on the Morgan Railroad on the plantation, was established years ago. There are few houses within the limits of the town and few inhabitants. The business is not particularly large, but a fair return to those engaged in business is obtained. A few have realized sufficient from their business to branch out and become successful merchants and owners of land.

Shriever, with the exception of one lot, is owned by the defendant, and for sentimental reasons the owners have not been willing to sell any part of the place. As the lands of the plantation enhanced in value, family ties no doubt grew, and the owners were not willing to part with their lands. The refusal to sell lots at the active station at Shriever has had the effect of concentrating the business and of enabling the owners to recover a very fair rental, more in amount than is generally paid in larger towns and even cities.

At first, in the history of the hotly contested litigation, an attempt made by the railroad company to lay a new track was met by an injunction obtained by defendants. Soon thereafter, the railroad company brought suit against the defendants to expropriate the property. In its petition plaintiff averred that it had a right of way across the plantation; that it wished to make certain improvements and drains and to acquire further facilities for accommodating passengers and handling freight at Shriever and to put in another track. In the litigation that followed, the plaintiff's servitude over defendants' land was defined and the right between the parties delimited.

In time thereafter, plaintiff brought another suit to supplement the servitude and right which it had across the plantation. That is the suit now before us for decision.

It is urged by the defendants that the commission was placed at disadvantage by the heat in June and the want of convenience and comfort in Shriever, and that, in consequence, despite their good will, they could not give the attention to the subject that they would otherwise have given. We will state here, however true this is, it was none the less advisable to hold the sessions on the ground which plaintiff sought to expropriate and within view of the property, which was pointed out to the witnesses at the time that they testified, and which commissioners and witnesses had every opportunity to inspect, and which they did inspect during the trial. The commissioners may have erred in their appreciation of the value of the property. We have not found error save in very minor particulars. They might have erred at any other place, even though surrounded by all the comforts and con-

conveniences possible and not subjected to the hot weather of June. Throughout the trial the commissioners seem to have evinced close attention and to have intelligently followed every step in the development of the case. They overlooked nothing that we have discovered.

As to the finding of the commission, we will state: Appellate courts, unless for manifest good reason, will not interfere with the amount of damages. The most manifest error only will warrant a change. *United States v. Dumas*, 149 U. S. 282, 13 Sup. Ct. 872, 37 L. Ed. 734.

The following is sustained by repeated decisions: Juries have to some extent the character and authority of experts, supposed to have some personal knowledge of the matters submitted to them, and authorized to act on their own opinion as well as on the testimony adduced before them. Their verdicts are indeed subject to revision by appeal, and may be amended when manifestly inadequate or excessive; but they are entitled to great respect and will not be interfered with except in case of gross and manifest error. For convenience of reference, we insert a list of decisions: *City of Shreveport v. Youree*, 114 La. 184, 38 South. 135, 3 Ann. Cas. 800; *Kansas City-Shreveport & Gulf R. R. Co. v. Heirs of Smith*, 51 La. Ann. 1079, 25 South. 955; *Railroad Co. v. Rabasse*, 44 La. Ann. 179, 10 South. 708; *Railroad Co. v. McNeely*, 47 La. Ann. 1299, 17 South. 798; *Telegraph-Cable Co. v. Railway Co.*, 43 La. Ann. 525, 9 South. 119.

Defendant, naturally enough, thinks that the damages were not assessed in a sufficient amount, and therefore complains. The right of complaint should never be denied. If well founded, it should be remedied; if not, there is an end of the controversy. The complaint of the defendant is that too much land was allowed to the plaintiff, and that, if entitled to the servitude claimed, plaintiff was entitled to recover rights and servitudes only inch by inch.

In support of that contention, defendant quotes the decision in *Jefferson & Pontchartrain R. R. Co. v. Hazeur*, 7 La. Ann. 182. The text of the cited opinion does not sustain the close interpretation which the words "inch by inch" indicate, for the court said in the cited case, in the absence of all proof to the contrary, the district judge correctly considered the land already owned by them as sufficient.

[3] This is entirely different from the case before us for decision. Here the plaintiff, beyond question, needs all the land claimed. We learn from the record that the business of the railroad has very much increased of late years all along the line, and that the business at Shreveport also has increased, while the accommodation at and near the depot is one of the poorest, and the track for a considerable distance not what it should be because of the want of space.

The extent of the servitude allowed did not appear excessive to a number of witnesses, but the defendant insists that only 14 feet should have been allowed. After having read the testimony, the thought at once suggests itself that this would reduce the space of the railroad to a small space upon which to construct an additional or double track. The evidence shows that there are berms needed and other space, very important and even necessary, which could not be had if the space reduced to only 14 feet. We are not of the opinion that 14 feet would be sufficient. In this we are sustained by the finding of the commissioners and the evidence of the witnesses.

We leave that subject and take up the question growing out of plaintiff's claim for a space near the depot (measuring 75x68) and the valuation made. Plaintiff's contention is that this space is of the greatest importance. The claim was specifically considered and correctly disposed of by the commission. They were within a stone's throw of the space, saw for themselves, and were able in every way to judge of its necessity *vel non* and of the value of the property. As relates to this and other strips of land: They must have seen something of the handling of freight and of the movement of passengers while they were holding their sessions and had every opportunity to conclude for themselves as to the necessity of the expropriation.

A point of defendant is that the commission erred because it did not attach sufficient importance to the rental value of some of the property, and the sale of one piece of land, 30x100 feet several years ago. We can say in answer that the rental of a few lots at this time and the sale of one lot years ago are not a fair criterion of value. Taking into account the favorable circumstances, and the fact that they were controlled by defendant (there was no competition) they do not establish the market value.

We pass to the defendant's objection that the land sought to be expropriated east of the bayou and to the west of engineer's station 2939 is not needed by plaintiff for a double track. The objection makes it very evident that defendant is very much opposed to the laying of a double track over its plantation. Its contention is that, even if the land be expropriated for a double track, it may not be used for years. In this connection, we will state that, of the 400 miles of tracks of plaintiff company, there are already 40 miles of double track. The railroad proposes, as we learn from the testimony, at as early a date as possible, to construct the new tracks. The subject has been debated among the officers, and everything leads to the inference that it is the determined purpose of the plaintiff to construct this new track. It is not conceivable that it would incur the present expenses and the

veration of litigation unless for the purpose of carrying out a settled plan. Witnesses representing the company swore that such is the determination of the company. There is no room for assuming to the contrary.

Now as to the strips of land on either side of the track, colored green on the map: There are two ditches in these strips on either side of the track, and plaintiff petitions the court to be permitted to close these two ditches and to open two other drains, parallel to and very near the old ditches, on either side of the tract colored green. The commission found that there was good reason for closing the old ditches and opening others near and along the line of the old.

At this point, the issue is whether the question is substantially closed by the former decree of this court, in which, as before stated, in different words, the court held, to quote from the decree:

"It is now ordered, adjudged, and decreed that there be judgment recognizing the Morgan's Louisiana & Texas Railroad & Steamship Company to have a servitude of passage, and, generally, for the use of its railroad across Wauban plantation of the John T. Moore Planting Company, Limited, and extending the entire width of the space occupied by the railroad embankment of said railroad, across said plantation, down to the toe of said embankment, and including the ditches, their inner and outer slopes along said embankment."

The position of plaintiff is that the decree is conclusive and final, and that the opinion is no part of the decree. The position of defendant is that it does not convey the meaning that plaintiff seeks to give to it; in short, that it means "using the ditch in all the ways in which it had been using it"—that is, in substance, the complete judgment, or rather that it should be so construed. That, in the light of the court's opinion, no other reasonable conclusion was possible than that which has just been expressed.

We cannot agree with the latter view. In our opinion the decisions do not sustain the proposition pressed upon our attention. The opinion may give a reasoning which had no part in the decree. The latter governs unless it is ambiguous; and it is not ambiguous.

In *Keane v. Fisher*, 10 La. Ann. 261, this court held:

"The judgment is free from ambiguity and is conclusive upon the surety. He cannot go behind it to inquire into the reasons upon which it was founded. The reasons for judgment, strictly speaking, form no part of the judgment itself, although they may properly be consulted to explain an ambiguity. *Mercadi No. 38, p. 35.*"

Judge Spofford said, among other things:

"But, in no court, with whose jurisprudence we are conversant, do the reasons for judgment form part of the decree." *West Feliciana R. R. Co. v. Thornton*, 12 La. Ann. 736, 68 Am. Dec. 778.

"Reasons form no part of the judgment." *Davidson v. Carroll-Hay & Co.*, 23 La. Ann.

108; *Chaffe & Bro. v. Morgan*, 30 La. Ann. 1307.

There are other decisions upon the subject, but these are sufficient to sustain the proposition that the rule *stare decisis* applies.

Now, as defendant is concluded by the opinion, it has no good ground to object to the filling and closing of its ditches for railroad purposes; nor has it good ground of objection to the transfer of the drain of its land to the ditches on either side. Plaintiff is not compelled to any specific performance; it is the plaintiff that has to open the new ditches, and through them similar drain will exist as heretofore.

Now as to the dwelling house or cabin: The complaint of defendant is that it has been condemned to move this house; that, instead, it is entitled to the price. We think the demand is correct. The evidence is that it is worth about \$250. That amount is allowed, and the plaintiff, after payment, will be the owner in absolute right.

Heretofore defendant was allowed \$175 exclusively to move the house or cabin. As by the payment before mentioned it is the owner, it makes a difference of \$75 in the total of the judgment.

As to the plank walk, \$5 has heretofore been allowed for moving it.

Value of whole walk.....	\$50 00
One-half on defendant's land.....	25 00
	<hr/> \$25 00
Less amount paid to move it, heretofore allowed, which is now placed to plaintiff's credit; it being made evident that plaintiff is the owner....	5 00
	<hr/> \$20 00

The amount is increased by \$20.

There was an agreement between parties in regard to land not fully shown on Exhibit A. This seems to have escaped attention. The agreement was: If the railroad company had to pay anything for the land covered by new earth, measure to be taken to find out just what was covered thereby, and payment will be made on the basis of the valuation fixed for similar land under similar conditions. As the matter is brought up, the decree will reserve the right to carry out the agreement, as it is stated that the agreement will be performed after judgment.

While the difference is small in our opinion regarding our former decree, as herein stated, we have no idea that in law and justice it should be allowed, and therefore, in this respect, we fully agree with the commission.

Plaintiff asks the court's sanction to close these ditches and utilize the space within the limit of its track and to dig new ditches near the old ditches on the outer edge on either side or near the outer edge; these new ditches to be subject to use in every

way, and to the same extent as relates to all concerned, as were the old ditches closed with the court's sanction.

The necessity for expropriation must be shown, and the statute followed. It was shown in the case under consideration, step by step. There is a right of expropriation. Then the only question here is of adequate compensation.

The commission thought that there was ample compensation. It has not been pointed out wherein they have erred.

As relates to rent and sale of a lot at Shriever:

We do not attach great importance to either. Rent is not always a fair criterion of value; particularly is it the case here, where the property is owned by one owner and there was no competition.

As to the sale, it is attended with facts and circumstances which do not recommend the price of the lot sold as an absolute criterion of value. One sale does not establish the market value of property.

Now as to the ditches: To us it seems that one ditch is as good as another under conditions just the same, and that no one can thwart the attempt to exercise the right of eminent domain, by the declaration, when all conditions have been complied with, "To this ditch on a highway you can go, but no further."

The commission considered the rights of parties and found that one ditch could be used instead of another, and declined to find other damages than before stated, although, as before stated, they made a report in the alternative so as to include the two theories, one of plaintiff and the one of defendant. They had specially good opportunity to judge whether or not further damages should be assessed. They saw and examined the drains. The difference between plaintiff and defendant, according to the valuation of the commissioners, is \$250; that is, if defendant was entitled to an amount for the ditches. We are not of the opinion that they are, and therefore that amount is not allowed.

We pass to another item: A small strip was valued at \$200. The right of way agent offered to buy it for \$250 at the time that he was endeavoring to settle amicably with the defendants. This offer was declined by defendant. No effect can be given to the offer. It is the policy of the law to favor compromises, and to encourage them.

We will not detail the number of facts connected with the valuation of the property, and those connected with or growing out of the necessity vel non of making the expropriation. The valuation was fairly conducted and fairly made, as to the necessity of the expropriation, it was made evident by the testimony. The use to which the property will be subjected was fully explained,

step by step, and is sustained by ample testimony.

In conclusion, it can well be said that the commission performed remarkably well the task assigned to it by the court.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by increasing the amount heretofore allowed to \$4,216, with legal interest from time such interest was heretofore allowed. It is further ordered, adjudged, and decreed that plaintiff is the owner of the house or cabin on lands on which plaintiff has acquired a right as before stated, and also owner of that part of the sidewalk on said land. It is further ordered, adjudged, and decreed that the right to recover, under agreement of counsel, certain property be reserved (property in regard to which there is an agreement as to amount, if an amount be due). As amended, the judgment is affirmed on appeal. Costs of appeal to be paid by appellee.

MONROE, J., dissents.

(180 La.)

No. 19,168.

HORTON v. HARALSON et al.

(Supreme Court of Louisiana. Jan. 29, 1912.
On Application for Rehearing, Feb. 26, 1912.)

(Syllabus by the Court.)

1. ACCOUNT, ACTION ON (§ 7*)—SUFFICIENCY OF EVIDENCE.

In a suit on open accounts, where the witnesses refresh their memories by the books, and the general trend of the business shows that the goods have been sold and delivered, it is not necessary to prove the actual delivery of each and every item. The testimony made out at least prima facie proof, and it was then incumbent upon the defendants to show wherein the proof was insufficient.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 13-17; Dec. Dig. § 7.*]

2. EVIDENCE (§ 366*)—DOCUMENTARY—CERTIFICATION.

The offer of original pleadings, not certified by the proper authority, is insufficient to prove a bankruptcy proceeding, and the objections to their admission should have been sustained.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 366.*]

3. EVIDENCE (§ 366*)—DOCUMENTARY EVIDENCE—CERTIFICATION OF PAPERS.

The referee in bankruptcy is the custodian of the papers and documents in a bankruptcy proceeding, and they must be authenticated by him before they can be introduced in evidence in another proceeding, or, where they have been forwarded to the clerk of the bankruptcy court, they should be certified by him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1522½; Dec. Dig. § 366.*]

Appeal from Eighteenth Judicial District Court, Parish of Acadia; William Campbell, Judge.

Action by H. M. Horton against Mrs. E. F. Haralson and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Smith & Carmouche, for appellant. Story & Pugh, for appellees.

BREAUX, C. J. Plaintiff, assignee of a number of claims due by the "Estate of E. Barousse," a commercial partnership, brought this suit against Mrs. Eugenie Florence Hayes, widow of Edgar Barousse, deceased, now wife of Fred W. Haralson, against Mrs. Joseph Barousse, wife of Edward Daigle, as well as against Edward Daigle, husband in community of the said Eva Barousse, alleged of the firm known by the name of "Estate of E. Barousse," to recover a sum of about \$20,000 made up of different accounts of a number of merchants who had sold merchandise to the firm—that is, they are all sued as partners except Daigle, against whom these claims are asserted on the ground that, as a partner in community of one of the heirs, he is liable in solido for the amount of the debt.

It is a part of the history of the business of defendants that on the 13th day of May, 1907, a petition by Rosenberg & Company and other creditors of that firm was filed to the end of compelling these defendants to surrender the assets of this firm into bankruptcy. On the 26th day of June, 1907, the partnership and its individual members were adjudicated and declared bankrupts. The bankrupts never applied for a discharge, and were never discharged. The claims here were filed for approval and allowed by the referee in bankruptcy, and no opposition was filed against these claims.

As a business proposition as against Edward Daigle, plaintiff's contention is that he is liable in solido with the other defendants by reason of his being the husband of Eva Barousse, one of the defendants; that Eva Barousse was a member of the partnership; that the debts were contracted by her and the partnership.

It is in time to state that Edward Daigle never went into bankruptcy; that he personally was in no way connected with Eva Barousse, his wife. Plaintiff's position is that because of her participation in the affairs of the partnership she is liable, and by reason of that fact her husband also is liable.

Petitioner claims that he is the owner of the claims against the "Estate of E. Barousse," which were proved up in bankruptcy.

The exception of no cause of action filed by defendant was, on the order of the district judge, referred to the merits, and thereafter the answer of general denial was filed by all defendants, and they admitted that the notes sued on were made by the "Estate of Barousse," except one denied indebtedness thereon, and alleged that the notes were transferred to plaintiff after maturity.

Edward Daigle, in a separate answer of some length, took issue with plaintiff on every ground alleged to hold him liable. He alleged in addition that plaintiff's is a litigious claim and speculative; that plaintiff was not holder of these claims; that he paid nothing for them, and other allegations about to the same effect; and that he had naught to do with the bankruptcy proceedings, as he never received the least notice; that if he had been notified he might have protected himself and saved the business of the "Estate of E. Barousse" from the wreck brought about by the inconsiderate and hard proceedings of the creditors. He pleaded estoppel by conduct and acquiescence of the creditors in his regard. He alleged (and his allegation is sustained by the testimony) that a number of the creditors, after they had been informed that the suit had been brought against him for an amount which he did not owe, requested plaintiff not to continue with the suit against him, but that plaintiff refused to comply with the request.

During the trial, counsel for plaintiff offered in evidence the claim of a commercial firm, creditors.

Defendants, the Barousse people, objected to the admissibility of the transfer as evidence on the ground that the transfer had not been proven, and, furthermore, that there was no proof of the authority of the liquidator to sign as liquidator of the company. The written transfer was produced and sufficiently proven to admit it in evidence. As to the authority of the transferor, no objection having been previously urged in the exception or in the waiver, it was too late to object to the liquidator's authority.

It must be remembered that the relations between the parties were created by law, and not by contract.

The objections should have been pleaded before going to trial. Blaffer et al., Commissioners, v. La. National Bank, 35 La. Ann. 251.

Besides, the liquidator testified that he is the liquidator, and that the account was assigned to plaintiff, and that, of itself, is proof sufficient to meet the objection.

[1] Another objection of defendants was that some of the accounts were not sustained by sufficient proof.

They were proved up in the usual manner, and witnesses, doubtless, refreshed their memories from the books, and the general trend of the business, and showed that the goods had been sold and delivered. It was not necessary to prove the actual delivery of each item of the different accounts as that is impossible. The sales were proven and everything combined in showing delivery. The testimony made out at least prima facie proof, and it was then for the defendants to prove wherein the testimony was not sufficient for the purpose offered.

As to defendant's objection that accounts over \$500 must be proved other than by one witness and corroborating circumstances, we can only say one witness testified to their correctness and there were corroborating circumstances.

Regarding attested accounts offered and admitted, the objection was that they can only be introduced on confirmation of default and not after answer is filed, citing Code of Practice, art. 312, amended by Act No. 31 of 1890.

[2] At this point it becomes necessary to consider whether or not there is sufficient proof of the alleged bankruptcy before noted. In proof of this alleged bankruptcy, plaintiff offered the originals of the documents filed in the bankruptcy proceedings taken in the district court, entitled "Estate of Edgar Barousse," consisting of the petition asking for the adjudication in involuntary bankruptcy of the partnership, consisting of defendants as members, and offered a number of other documents in the same connection.

Defendants objected to these documents as not making proof as they were not identified, besides they were not certified to by the proper officers, but the court overruled the objection and admitted the papers.

The objection should have been sustained.

[3] It was not proven that the book said to be a book of the late T. T. Taylor, referee, was his book of record; moreover, the present incumbent in the referee office certified that he forwarded all documents to the federal court, and, in consequence, he is the proper custodian. It results that there is not sufficient proof of the bankruptcy proceedings.

The requirement of the Code of Practice is that there shall be proper authentication of record. *Lehmann Co. v. Rivers*, 110 La. 1087, 35 South. 296; Code of Practice, art. 752; U. S. Rev. St. § 905 (U. S. Comp. St. 1901, p. 677).

There is sufficient evidence before us to satisfy us that there were proceedings in bankruptcy, and that plaintiff can prove all that is pertinent to the points here involved. As to the effect of this evidence, that presents another issue, none the less the papers should be authenticated and regularly offered in evidence.

For reasons stated, the judgment is avoided, annulled, and reversed; the case is remanded to enable parties to prove the proceedings in bankruptcy by offering duly certified copies.

The appellee to pay costs of appeal.

On Application for Rehearing.

PROVOSTY, J. Plaintiff's ownership of the Adler claim has not been proved, there being no proof in the record of Jacob Adler

having been appointed the liquidator of A. Adler & Co.

The case is remanded solely for further evidence on this point, and with reference to the proceedings in bankruptcy.

The decree of this court is amended in so far as it condemns appellee to pay the costs of appeal, and it is now ordered that said costs abide the final judgment.

(180 La.)

No. 19,080.

STATE v. McCROCKLIN.

(Supreme Court of Louisiana. Feb. 12, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1080*) — APPEAL—OBJECTIONS IN LOWER COURT.

Where one has been convicted of perjury for having sworn falsely in a case where the accused was charged with a crime against nature, and in the perjury proceedings no bill of exceptions was reserved, no demurrer filed, or motion to quash the indictment made, on the ground that the act charged did not come within the statute denouncing crimes against nature, this court on appeal will not set aside the conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2621; Dec. Dig. § 1080.*]

2. CRIMINAL LAW (§ 1090*) — APPEAL—REVIEW—SCOPE—ABSENCE OF BILL OF EXCEPTIONS.

In the absence of a bill of exceptions, this court will not review the judgment of the lower court, except when there is error patent on the face of the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2789, 2803-2827; Dec. Dig. § 1080.*]

3. CRIMINAL LAW (§ 972*)—ARREST OF JUDGMENT—"RECORD."

The "record" in a criminal case includes a statement of the time and place of holding court, the indictment or information, with the indorsement thereon, the arraignment, the plea of the accused, the impaneling of the jury, the verdict, and the judgment of the court; and a motion in arrest of judgment will be sustained only when it is patent on the face of the record that there has been some irregularity in relation to one of the above-enumerated steps of the proceeding.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2423; Dec. Dig. § 972.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6008-6014; vol. 8, p. 7781.]

4. CRIMINAL LAW (§ 1139*)—APPEAL—MATTERS REVIEWABLE.

This court cannot consider evidence not introduced, and not admissible if it had been offered, on the motion in arrest of judgment, in determining whether an act charged comes within a criminal statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3000; Dec. Dig. § 1139.*]

5. CRIMINAL LAW (§ 1144*)—APPEAL—PRESUMPTIONS—JURISDICTION.

As there is a presumption that the court which tried Whitaker had jurisdiction, and as the want of jurisdiction does not appear on the face of the present record, and cannot be shown otherwise, this court will conclude that the lower court had jurisdiction of the offense charged against Whitaker, and that the verdict

and judgment were correctly rendered until the contrary appears.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3020; Dec. Dig. § 1144.*]

Appeal from Criminal District Court, Parish of Orleans; Joshua G. Baker, Judge.

Mary McCrocklin was convicted of perjury, and appeals. Affirmed.

H. N. Gautier (Girault Farrar, of counsel), for appellant. St. Clair Adams, Dist. Atty., A. D. Henriques, Jr., Asst. Dist. Atty., and Warren Doyle, Asst. Dist. Atty., for the State.

BREAUUX, O. J. The defendant was charged with perjury. The district attorney presented an information to the court, in which he averred that the defendant had committed perjury in the case of the State v. E. S. Whitaker. She was tried and found guilty, and condemned to serve 12 months at hard labor in the state penitentiary.

The one point in the cause was raised by a motion in arrest of judgment, which was overruled and a bill of exceptions reserved. The contention of the defendant is that the district court had no jurisdiction in the case of the State v. E. S. Whitaker, in which he was prosecuted for a crime against nature and found guilty. After the record in his appeal to this court had been filed, he departed this life, and, in consequence, the appeal abated.

[1] To the end of sustaining its contention, the defense urged that the information did not denounce a crime under Act 69 of 1896. Edward Stanley Whitaker was charged with the crime against nature, and was found guilty by a jury. There is no evidence before the court to sustain the ground of want of jurisdiction in matter of the Whitaker Case. No bill of exceptions was taken as relates to the point now urged that the indictment in the Whitaker Case was illegal and null, and that, in consequence, the court was without jurisdiction. It has been repeatedly decided, where a point is not brought up by bill of exceptions, no demurrer or motion to quash, or assignment of error, it will not be reviewed on appeal.

[2] A similar question was presented to this court in State v. Bush, 117 La. 466, 41 South. 793, in which the trial judge had charged the jury, in writing, in regard to the law applying in words that gave rise to very serious contentions as to the correctness of the charge. The charge was not excepted to. The court held that, even if the charge given in writing in full did not follow the law applying, the court would not disturb the verdict, because no exception was taken. The question was discussed at length, and the court held, no bill of exceptions having been taken, it would adhere to the position previously announced in sev-

eral decisions, and overruled those decisions not in accord with the principle laid down; that, in all instances on appeal, the rule referred to must be followed. It did not admit of an exception, and since that decision was rendered the ruling has been considered as binding. A number of decisions have been rendered and the verdict affirmed in accordance with the views expressed in the Bush Case, supra. Upon that statement alone, the case was disposed of on appeal. There is no good reason to set aside the ruling. In the cited case, the defendants were found guilty of murder without capital punishment. The court said:

"As there is no error on the face of the papers, no bill of exceptions was taken, the case is not reviewable on appeal." State v. Wilson, 109 La. 74, 33 South. 85.

On the same ground, the judgment was affirmed in State v. Marks, 119 La. 1035, 44 South. 856. In a case of that gravity, the rule here announced was expressly adhered to. The failure to take a bill of exceptions to the judge's charge is the same in effect to the failure to take a bill of exceptions on motion in arrest of judgment. The present case is much stronger by reason of the fact that, if the evidence had been introduced to establish the illegality of the indictment against Whitaker, it would not have been admissible.

There are therefore two illegalities: First, the evidence was not admissible if it had been offered, and if it had been admissible it was not offered, and no bill of exceptions, therefore, could have been taken as relates to the first point urged, which cannot be brought up in a motion in arrest of judgment.

[3] We are lead to inquire whether there is error patent on the face of the record. This leads us to the inquiry, What is the record? A definition answers the question. It includes the caption in a criminal case, a statement of time and place of holding the court, the indictment or information with the indorsement, the arraignment, the plea of the accused, mention of the impaneling of the jury, verdict, and judgment of the court. United States v. Taylor, 147 U. S. 695, 13 Sup. Ct. 479, 37 L. Ed. 335. There was no error found in the foregoing records. The records are before the court in the required form, and disclose no error.

[4] But, as the defendant insists that the motion in arrest does present the point, it becomes necessary to determine what issues can be considered. The cause must be limited to them. They are objections which are apparent on the face of the record, but no objections to sustain which evidence must be received. State v. Kline, 109 La. 606, 33 South. 618; State v. Summerlin, 116 La. 450, 40 South. 792. We have not found a

*For other cases see same topic and section-NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

well-considered decision, forming part of the jurisprudence of this state, holding to the contrary. In other jurisdictions, it is not different. Century Digest, vol. 15, p. 238, par. 2423. The following is an excerpt from Bishop on New Criminal Procedure, 4th Ed. vol. —:

"At the common law, this motion will be sustained for defects apparent on the face of the record; no others."

[5] The next contention of defendant that the court had no jurisdiction is presented with great earnestness by learned counsel. If the facts were as urged, the conclusion of defendant would be unavoidable. They are not. The indictment in the Whitaker Case is not before the court on appeal, was not offered in evidence by the state on the trial in this case in the district court, and was not part of the record, if offered.

The court had jurisdiction to try the case against Whitaker. We will not assume that it was without jurisdiction, as the fact to prove its want of jurisdiction is not before this court. As the want of jurisdiction charged does not appear on the face of the record, it cannot afford good ground for dismissing the suit. See *State v. Fink*, 127 La. 191, 53 South. 519, in which the court held that evidence aliunde will not be considered to the end of determining that the court was without jurisdiction. The presumption is that the court had jurisdiction, and the burden is upon the defendant to show affirmatively that the court had no jurisdiction. This plea itself to the want of jurisdiction was not evidence. Mere allegations are not evidence in favor of the one by whom they are made. A verdict and judgment are taken as correct until reversed.

Affirming the legality of proceedings against one of the opposite sex, sometimes weak and easily influenced, is not an easy task. We, none the less, must enforce the law as it is written, and we will not consider evidence not introduced, and not admissible if it had been offered, on motion in arrest of judgment.

The verdict and judgment are affirmed.

(130 La.)

No. 18,805.

KERLEC et al. v. NEW ORLEANS
LAND CO.

(Supreme Court of Louisiana. April 24, 1911.
On the Merits Feb. 12, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 429*)—NOTICE OF APPEAL—WAIVER.

After appellees have asked for the dismissal of an appeal on the ground that all the necessary parties have not been made parties to the appeal, and allow appellant to cite the necessary parties, an appellee who has accept-

ed service on the petition of appeal cannot be heard to urge that the service of notice of appeal should have been made before the return day.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2168-2172; Dec. Dig. § 429.*]

2. APPEAL AND ERROR (§ 329*)—PARTIES—BRINGING IN NEW PARTIES—DISMISSAL—DELAY.

Where an appellant has been ordered to make certain persons parties to an appeal, the appeal will not be dismissed on the ground of delay unless there is an unreasonable delay, especially where the one asking for the appeal has accepted service on the petition of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 329.*]

On the Merits.

3. EXECUTORS AND ADMINISTRATORS (§ 29*)—APPOINTMENT—DENIAL.

Where one has qualified as the administrator of a succession and has performed acts of administration, he will not be heard to deny that he was the administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 173; Dec. Dig. § 29.*]

4. VENDOR AND PURCHASER (§ 98*)—RESCISSION BY VENDOR—ACCEPTANCE OF BENEFITS—ESTOPPEL.

Where one has received part of the proceeds of a sale and has accepted her attorney as a debtor for the balance due her, and has never returned, or made an effort to return, the money so received, she will be estopped from denying that there has been a sale.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 98.*]

5. EXECUTORS AND ADMINISTRATORS (§ 388*)—SUCCESSION SALE—RIGHTS OF PURCHASERS.

One who purchases property in good faith at a sale ordered by the court having jurisdiction of the succession which owned the property need not look beyond the validity of the order of court authorizing the sale. If the order on its face is valid, the innocent purchaser will be protected.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1579-1582; Dec. Dig. § 388.*]

6. EXECUTORS AND ADMINISTRATORS (§ 380*)—SUCCESSION SALE—ACTION TO VACATE—FRAUD.

An order for the sale of succession property being in the nature of a judgment, a suit to set aside the sale made under the order, on the ground that the order was obtained by fraud, must be brought within the year from the discovery of the fraud.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 380.*]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by Marie L. Kerlec and others against the New Orleans Land Company. Judgment for defendant, and plaintiffs appeal. Motion to dismiss denied, and judgment affirmed.

James B. Rosser, for appellants. Chas. Louque, for appellee.

BREAUX, C. J. Appeal of Mrs. Armand Kerlec and others from judgment rendered in the civil district court.

Appellee moved to dismiss the appeal alleging that some of the appellees have not been cited.

The order of appeal was dated November 2, 1910.

In due time thereafter, the record of appeal was filed in this court.

The day after it had been filed, appellee's motion to dismiss the appeal was filed.

The court sustained the motion to dismiss the appeal, and remanded the case in order that the parties to the judgment might all be made parties.

This order was made on the 31st day of January, 1911.

In March following, the appellees accepted service of the petition for an appeal and of the order of appeal.

Appellant asks that it be decided that, as relates to service, the law has been complied with, and that it be decreed that all parties appellees are now properly before the court.

The New Orleans Land Company, appellee, through learned counsel, urges that a citation of appeal should always be served before the return day of the appeal, and that it was now too late, although the parties have accepted service as before mentioned.

This appellee further urges that this court is without jurisdiction *ratione materiae*.

We take up the first ground, to wit, that appellant has lost her right of appeal because of delay.

As relates to this ground, we cannot agree with learned counsel.

There were parties plaintiff and defendant before the court when it was ordered that all appellees be made parties.

There was no extraordinary delay after the court's order had been issued granting leave to the appellants to make other parties to the appeal.

There were a number of appellees; one of the appellees did not reside in this city.

[1] By this acceptance of service the parties who made themselves parties to the appeal cannot be heard to urge that plaintiff and appellant has lost her right of appeal by her delay in matter of citation of appeal.

It is true, as contended, that the motion to dismiss was filed after the return day, but no mention was made of that fact at the time that the motion to dismiss (because some of the appellees were not made parties) was filed.

The only complaint is that all the appellees were not parties.

[2] When it does not appear that the neglect to make parties is owing to some intention to take advantage, this court has always permitted the making of other parties to the appeal.

In Succession of Romero, 25 La. Ann. 534, parties were made by order of this court.

The right has never been denied since.

Now as to the want of jurisdiction suggested by appellees in argument only:

That will have to be considered later.

The only question now is as to the parties to the appeal.

For reasons stated, it is ordered, adjudged, and decreed that those who accepted service in this case and waived citation are now parties to the appeal as appellees, and as such are before the court. It follows that the application of plaintiff and appellant is granted in this respect, and that the argument of defendant and appellee in opposition is not sustained.

On the Merits.

Plaintiff seeks to recover a square of ground in the city of New Orleans. The lot for which she sued was sold at public auction in accordance with an order of court for the purpose of paying debts of the succession of A. Kerlec.

J. Vic LeClerc became the adjudicatee of the property. He afterward sold this property to the defendant.

The defendant to the end of meeting the attack upon its title filed two exceptions. In one, defendant pleaded estoppel; in the other, the prescription of one year. The estoppel was based upon a settlement made between Maloney, the attorney, and the plaintiff.

This action was brought on March 16, 1910. The plaintiffs are Louise Delay, the widow in community of Armand Kerlec, the father and grandfather of the parties to the suit; Marie Louise Kerlec is the wife of John Beldini, the administrator; Mrs. Clothilde Maria Pauline Folse, widow of Armand Richard Kerlec, a son of Armand Kerlec, appeared as natural tutrix of her minor children, Marcelle Armand Kerlec and Philip Ferdinand Kerlec.

The property devolved to Mrs. Marie Kerlec, widow of Armand Kerlec, on the 16th day of August, 1906. At the death of Armand Kerlec, Marie Kerlec owned one undivided half of the property, and the other half devolved to his (Armand Kerlec's) children, issue of the marriage with Marie Kerlec, to wit, Marie Louise Kerlec, wife of John Beldini, Mrs. Clothilde Kerlec, Hugo Kerlec, Gabrielle Kerlec, and Armand Kerlec, in the proportion of one undivided fifth of the undivided half. Mrs. Marie Kerlec as survivor in community was usufructuary of one undivided half of the property in addition to the ownership of the other undivided half.

Armand Kerlec, the husband of Louise Delay, and the father and grandfather respectively of the petitioners, in addition to other movable property, was the owner and in possession at his death of the following described property, to wit:

A certain square of ground in the second district of the city, designated as number seven, and further designated by map or plat of Joseph E. Dupuy, surveyor, deposited in the office of Charbonnet, notary.

John Beldini, to the knowledge of Marie Kerlec, widow, opened the succession on Au-

gust 28, 1905, and became its administrator. The averment is that Marie Kerlec was led to believe at the time that the only object of opening the succession was to obtain an amount on insurance policy which had been issued on the life of her late husband, Armand Kerlec.

The plaintiff alleged that Robert Maloney fraudulently and by deception obtained the appointment of John Beldini as administrator of the succession of Armand Richard Kerlec, the son of Armand Kerlec without her authority or knowledge.

That Maloney used the machinery of the court to have the lot of ground they owned and which they now claim conveyed in the probate proceedings pursuant to an adjudication on the 14th day of December, 1905; that these proceedings were null and void, as well as the proceedings in the succession of Armand Kerlec, and did not divest them of their ownership, as they were conducted without their consent or knowledge.

The procès-verbal of adjudication, plaintiff declared, was signed in error owing to the deception by the said Maloney, and that it was fraudulently cited in the act that the asserted purchase price by J. Victor LeClerc was turned over by the auctioneer who made the public sale to John Beldini; that this declaration in the deed was untrue, as they never received the proceeds of the sale; that, whether acting as administrator of Kerlec, senior, or Kerlec, junior, John Beldini's administration was for reasons stated of no effect. Furthermore, it is charged that Robert J. Maloney, November 10, 1905, filed a petition in the name of Beldini, administrator, for an order of sale to pay debts of his father-in-law, Armand Kerlec; that he falsely represented that Beldini was the administrator of the succession, although he was not his administrator. It none the less appears that the application of the administrator was granted on a statement of debts by him amounting to \$160.

The complaint at this point is that this statement was not verified by the oath of the applicant for the sale, although such an oath is required by order of court, as alleged by petitioners.

They also aver that all the debts of the succession had been paid; that the proceedings in which it appears that J. Vic LeClerc bought, and that he (J. Vic LeClerc) afterward sold to the defendant, the New Orleans Land Company were petitioners, and of no effect for that reason.

The defendant filed the plea of no cause of action and of the prescription of one year, and the plea of estoppel which the district court maintained.

Evidence was taken on the trial of these pleas.

It is proven that, shortly before Maloney's trouble became known, Mrs. Kerlec submitted to her attorney at the time (Mr. Duffy)

an account which had been presented to her by Maloney. He examined the account and read the items therein, and the largest amount was \$500 which she claimed Maloney owed her.

The property was sold for \$2,500, and she received credit for \$500. Maloney also gave a check for \$143 which Mrs. Kerlec received.

Mrs. Kerlec at that time said to the attorney that the property had been sold to Mr. LeClerc.

Two of her daughters were also aware of this sale.

The administrator was at the sale and entered into some understanding or, possibly, agreement with the purchaser, LeClerc.

The charge of fraud is directed against Robert Maloney, who was the regularly employed attorney. Mrs. Kerlec knew of the sale and it was regularly advertised, and on December 14, 1905, the auctioneer adjudicated the property to LeClerc, and on February 6, 1906, a notarial act in confirmation of the adjudication was passed and recorded. On April 30, 1907, LeClerc sold the property to the defendant.

The defendant acted on the faith of an order of sale and adjudication, and of the title, put of record, and went into possession on April 30, 1907.

On February 16, 1908, we find plaintiff settling with Maloney, the attorney of the administrator, for the proceeds of the sale.

It is clear that defendant, an innocent third person, is protected by the order of court.

The judgment of the district court decreed that plaintiff had no case.

Widow Armand Kerlec, owner of one-half of the property in community (dissolved at the death of her husband) and usufructuary of the other half, has not appealed, nor have the other heirs, and the only appellants are the minor heirs of Armand Richard Kerlec represented by their tutrix.

The judgment as to the former is final as it was signed in October, 1910.

The testimony is not in accord with the position of defendant that the administrator was not appointed. He took the required oath in each succession, furnished bond, and was present at the sale of the property sold at his instance as administrator.

There is not the least force in his allegations that he did not know that he was administrator, as the record of the courts disprove these allegations and the evidence of witnesses also disprove it.

[3] It would be extraordinary if one, who has qualified as legal representative of a succession, were so oblivious as to what he was doing that he did not know that he had qualified regularly as an administrator.

[4] After the sale, the surviving widow, Marie Kerlec, after conferring with her attorney, received amounts from the purchase price of the property, and she still has those

amounts and has never made the least attempt to return them. The one who has been benefited by receiving the price, or part of the price of the sale of property cannot recover the property without making the least offer to return the amount received. Restitution was due. *Sharkey v. Bankston*, 30 La. Ann. 891.

The statement of debts, upon which the judge presiding over the probate court issued the order of sale, was a sufficient compliance with law. This statement was filed before the order of sale was issued, and the sale on the face of the papers was regular. It cannot be treated as an absolute nullity; and as a relative nullity it leaves plaintiff without good ground to assail the proceedings at this time.

Assuming *arguendo* that the grounds heretofore stated are not controlling:

The innocent third person is protected by the order of the court authorizing an act to be done. The proceedings as to these must be held to have some validity, for, were it otherwise, sales might prove a loss to men who have acted in the utmost good faith. *Succession of Hebrard*, 18 La. Ann. 488.

If the court has jurisdiction and the order has been issued in due form, the purchaser is not affected. *Porter's Heirs v. Hornsby*, 32 La. Ann. 337. *Thompson v. Tolmie*, 2 Pet. 166, 7 L. Ed. 381.

[5] The administrator opened the succession and had the property sold. Plaintiff seeks to have these proceedings annulled on the ground that it was not her act, but that of her attorney. Without sufficient evidence to sustain that contention, plaintiff will have it that they were defrauded by their attorney. Evidently there is no good ground to stand in judgment against the present owner.

[6] The order being in the nature of a judgment, the purchaser is protected by the prescription pleaded.

The action for annulling the judgment must be brought within a year after it has been discovered.

Our learned brother of the district court applied this prescription, and we are not inclined to find that he was in error as between these parties and an innocent third purchaser.

The time had elapsed, and not the least complaint was made. The defendant bought and had gone into possession. It has the appearance of acquiescence on the part of plaintiffs.

If one is imposed upon by his attorney, he should seek to protect himself and others from the effects of the wrong act practiced upon his rights. We say again the evidence does not show that plaintiffs did not know of the action taken by the attorney in matter of the sale in question.

For reasons stated, the judgment is affirmed.

(130 La.)

No. 18,542.

VICTORIA LUMBER CO., Limited, v.
MONTGOMERY et al.

(Supreme Court of Louisiana. Jan. 29, 1912.
Rehearing Denied Feb. 26, 1912.)

(Syllabus by the Court.)

1. PARTNERSHIP (§ 160*)—TRANSACTIONS WITH PARTNER—SCOPE OF AUTHORITY.

When one deals with a member of a partnership, and the latter apparently exceeds his authority to bind his firm, the one dealing with him is put on inquiry, and should ascertain at his risk whether or not the member is acting for himself, or for the partnership, with the sanction or authority of his partners.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 160.*]

2. BILLS AND NOTES (§ 370*)—LIABILITY OF MAKER—ASSIGNMENT OF DEBT BEFORE MATURITY.

When a member of a partnership tenders notes to a cotton factor, who applies the proceeds to the liquidation of the individual indebtedness of that member, the maker having assigned these notes before maturity, it (the maker) cannot successfully claim that they should be returned to it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 963; Dec. Dig. § 370.*]

Appeal from Third Judicial District Court, Parish of Calbarne; B. P. Edwards, Judge.

Action by the Victoria Lumber Company, Limited, against George E. Montgomery and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Herndon & Herndon and McClendon & McClendon, for appellant. T. T. Land, Richardson & Richardson, and J. E. Moore, for appellees.

BREAUX, C. J. Plaintiff brought this suit to recover \$5,748.58 from the defendant, an amount paid without consideration. Plaintiff is a manufacturer of lumber, and buys timber for supplying its mill. On the 18th day of April, 1903, it entered into a written contract with G. E. Montgomery, of the firm of Montgomery-Ferguson & Co., who assumed to act for the firm, whereby he sought to bind the firm to sell to plaintiff 2,250 acres of land, known as the Barbe land, for the sum of \$7,000. After this agreement had been entered into between plaintiff and G. E. Montgomery, plaintiff executed 10 promissory notes of \$700 each, dated the 16th day of April, 1903; one due in 60 days thereafter; the others, in equal installments in 9 annual payments, drawn to the order of plaintiff, and by it indorsed in blank. These notes were delivered by plaintiff to G. E. Montgomery, who assumed to act for the firm of Montgomery-Ferguson & Co., as just stated.

The understanding at the time was that these notes were to be returned to plaintiff, in the event that the seller could not make title to the land above mentioned. As de-

defendant could not make title to the land, plaintiff called for the return of the notes, and asked that the contract be annulled. This could not be complied with by Montgomery; for he had pledged and delivered the notes to Wm. T. Hardie & Co., commission merchants of New Orleans, in order to secure his own indebtedness to Hardie & Co. It appears that plaintiff paid \$5,748.58 to recover these notes.

The commercial firm was composed of Montgomery, Ferguson and others, and continued its existence during the years 1903 and 1904. The main business of the partnership was the planting of cotton, and, in order to operate their place, they borrowed from Wm. T. Hardie & Co.

The firm denies that the partnership ever bound itself to sell lands to the Victoria Lumber Company, and alleged that G. E. Montgomery, whose name is signed to the contract sued on, had no power to bind the partnership in any way. The further contention on the part of these defendants is that they had no knowledge that these notes were given or had been pledged and delivered to Hardie & Co., until they were sued; and that whatever notes were given in the name of the partnership to Hardie & Co. were given without authority, and were a forgery. Defendants deny that Hardie & Co. had the right to credit their account with the proceeds of these notes; for the partnership owed them nothing after the fall of 1903. It is also stated on the part of the defendants that the name of Montgomery-Ferguson & Co. does not appear on the contract in question.

The testimony is conflicting. There is no question, however, that the amount of \$5,003.81 was a balance due by G. E. Montgomery to Hardie & Co., and that this indebtedness was treated and considered as if an indebtedness of the firm of Montgomery-Ferguson & Co. by Wm. T. Hardie & Co.; but, according to the weight of the testimony, G. E. Montgomery had no authority to secure his indebtedness of \$5,003.81 in the manner that he attempted. It is proven that he did not have the least authority to thus transact in the name of the firm of which he was a partner at the time.

In addition to executing his note in the name of the firm, which he left with Hardie & Co. to represent an asserted indebtedness of the firm, he entered into an agreement with Hardie & Co. to ship 800 bales of cotton to them, or, if he failed in shipping that number of bales, then to pay a stated commission. In this, also, he does not appear to have had the authorization of the firm. In fact, the managing partner was J. L. Ferguson, who held the power to transact business for the firm, and not Montgomery.

From the proceeds of the shipments of cotton made by Montgomery-Ferguson & Co. to Hardie & Co., the latter satisfied the note in their hands of \$5,003.81, and canceled it.

They never advised Montgomery-Ferguson & Co. that they had applied that much of the proceeds of the cotton to the satisfaction of the said indebtedness of Montgomery. After Montgomery's note had been satisfied, as just mentioned, Hardie & Co. did not send it to the firm of Montgomery-Ferguson & Co., but sent it canceled, with the statement, to G. E. Montgomery. The evidence of the two partners of Hardie & Co. is that they thus returned the note to Montgomery personally, because they took it for granted that he was fully authorized by the partnership.

Another note of \$5,000 figures in the transaction. One of G. E. Montgomery's contentions was that the firm of Montgomery-Ferguson & Co. owed him individually over and above the amount of his indebtedness to Hardie & Co. This is denied by all the members of his firm, who said emphatically that the firm owed him nothing.

The Victoria Lumber Company aver that Montgomery-Ferguson & Co. were without title or interest in or to any of the notes issued by the said company, as they issued them without consideration, and were wrongfully and tortiously pledged to Wm. T. Hardie & Co.; and their contention is that Montgomery-Ferguson & Co. is without right to the remaining notes. Montgomery-Ferguson & Co.'s contention is that they have no concern in these notes; that they had naught to do with the transaction between John R. Jones, representing the Victoria Lumber Company, and G. E. Montgomery, nor with the transaction between Montgomery and the firm of Wm. T. Hardie & Co.

Judgment was rendered in favor of defendant, rejecting plaintiff's demand, and from this judgment the plaintiff appealed.

[2] We have before noted that plaintiff issued notes, negotiable in form, and placed them in the hands of G. E. Montgomery, who was without authority to receive them for the firm of Montgomery-Ferguson & Co.; and that these notes were issued upon the mere promise of Montgomery to transfer lands in satisfaction therefor. These notes, having passed into the hands of a third person without notice, were treated as the notes of the holder. Plaintiff's contention now is that the proceeds realized from these notes were used for the benefit of the firm of Montgomery-Ferguson & Co.; and that, having been so used, the defendant should be condemned to pay them to plaintiff.

The position would be entirely correct if it were sustained by the facts. The proof is that Hardie & Co. appropriated the proceeds of the cotton of Montgomery-Ferguson & Co. to pay the individual note of Montgomery; and that this was done without the authority of the firm. This leaves no ground upon which to base the claim that the defendant has been benefited.

It seems that the firm of Hardie & Co. is still indebted to the firm of Montgomery-

Ferguson & Co. In casting the account between these two, Hardie & Co. and Montgomery-Ferguson & Co., the latter are entitled to the proceeds of the cotton thus appropriated, and when that is taken into account it is not made to appear that they have been benefited by Montgomery's personal transaction. Whatever amount of the notes he pledged, and which, on the face of the notes, he had a right to pledge, went to the benefit of the defendant toward paying the amount which had been illegally appropriated, and cannot be recalled. It is a complete transaction which binds all parties concerned. Things cannot be undone now so as to return an amount, applied as before mentioned, to plaintiff. The firm of Hardie & Co., were, to all appearances, influenced by the fact that these notes were transferable by delivery; for one of the firm, Mr. W. T. Hardie, testified that they did not know whether these notes belonged to Montgomery individually, or to the firm with which he was connected. It devolved upon plaintiff to prove the benefit which it alleged the defendant received in the transaction.

Now, as relates to the land which Montgomery had promised to transfer to the Victoria Lumber Company, he had no authority from the firm to involve it in a land and timber speculation. The firm did not own the land, the Barbe tract, which Montgomery had promised to transfer; and therefore it was out of his power to transfer it as he had promised to do. The partners, other than Montgomery, knew nothing about the promise to transfer land, or about the notes executed by plaintiff and pledged, as before mentioned. The firm owed nothing to Montgomery. The latter had no authority to receive notes from the Victoria Lumber Company, as he was not the manager and representative of the firm of Montgomery-Ferguson & Co. The notes were not a source of benefit to the defendant partnership; for in the settlement they did not receive as much as they were entitled to from the firm of Hardie & Co. Montgomery pledged the notes as a member of the firm of Montgomery-Ferguson & Co.; but the \$5,008.81 was a balance due by G. E. Montgomery individually.

The methods of G. E. Montgomery as a business man have not always been of the best, and this was known to plaintiff. Plaintiff's representative testified that he thought he had changed, and his manner of doing business had become more regular. The fact remains that these parties transacted with him without the least regard for the firm, with which they never took the trouble to enter into communication. They assumed more than they should have. In regard to the promise to transfer the land, they seem to have been somewhat indifferent. At any rate, they so acted as to render it impossi-

ble now to consider the defendant partnership liable.

[1] In the transaction with Hardie & Co., we have not found that the business was conducted in such a way as to inform the parties concerned of what was done. Amounts were appropriated to the satisfaction of debts which were individual debts, to the knowledge, it seems, of those with whom the transactions were entered into. When the acts of a partner are evidently beyond the limits of his authority, third persons must ascertain at their risk whether he has the assent of his partners. *Allen, Nugent & Co. v. Cary et al.*, 33 La. Ann. 1455. There was no attempt whatever made in that direction, and too much was taken for granted from the first.

There is only one alternative left to us; it is to affirm the judgment. It is therefore ordered, adjudged, and decreed that the judgment appealed from is affirmed, at appellant's costs.

PROVOSTY, J., takes no part, not having heard the argument.

(130 La.)

No. 19,071.

CITY OF SHREVEPORT v. SMITH.

(Supreme Court of Louisiana. Jan. 29, 1912.
Rehearing Denied Feb. 26, 1912.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 14*)—CONSTRUCTION—GENERAL RULES.

In interpreting the words of the Constitution, the presumption is in favor of their natural and popular meaning at the time that they were used, unless the subject or text suggest that they were used in a technical sense; and the reason and spirit which superinduced their use should be considered.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 11; Dec. Dig. § 14.*]

2. INTOXICATING LIQUORS (§ 46*)—LICENSE TAX—"MALT LIQUOR."

The term "malt liquors," as used in the provision of article 229 of the Constitution, which reads, "This restriction shall not apply to dealers in distilled, alcoholic or malt liquors," and whereby political corporations, throughout the state, are left free to impose license taxes upon the dealers thus mentioned, without regard to the action or nonaction of the state in such cases, must be regarded as applying to malt liquors which are, or may be, used as beverages, and which are intoxicating, and as having no application to malt liquors which are not, or may not be, so used, and are not intoxicating.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 46.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4314, 4315.]

Appeal from First Judicial District Court, Parish of Caddo; E. W. Sutherland, Judge.

Rule by the City of Shreveport to Charles Smith to show cause why he should not pay

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

a license tax. From a judgment for defendant, the city appeals. Affirmed.

G. W. Jack, City Atty. (W. P. Hall, of counsel), for appellant. Alexander & Wilkinson, for appellee.

Statement of the Case.

MONROE, J. The city of Shreveport ruled defendant to show cause why he should not pay a license for selling "near beer," or discontinue the business, alleging that, under a city ordinance, he was liable for a minimum license of \$200, and, under section 20 of Act No. 171 of 1898, it was entitled to proceed against him by rule. Defendant interposed an exception of "no cause of action," and, answering, admitted that he was engaged in selling a nonintoxicating nonspirited malt beverage, known as "hiawatha," for the sale of which, he alleges, the city has no authority to impose a license tax, for the reason that the state has imposed no such tax, and, under the Constitution, the city can impose no tax upon such business in excess of that imposed by the state. He further alleges that the ordinance relied on is illegal, in that it purports to impose a penalty which the city is without authority to impose; but, as the ordinance imposes no penalty, that ground was abandoned in the district court. The judge a quo in an able and exhaustive opinion sustained the defense first above mentioned, and the city has appealed.

Opinion.

[2] The ordinance here called in question purports to fix the license for the "business of selling nonintoxicating, malt liquor, known as near beer, hiawatha, or any other name that may be used to designate it." It was admitted that the member of the city council by whom it was introduced would testify that the purpose was to aid in enforcing the prohibition ordinances and laws, rather than to provide a revenue, and that the business of selling nonintoxicating malt liquor is being used as a cover for the sale of intoxicating malt liquor.

Article 229 of the Constitution contains the provision:

"No political corporation shall impose a greater license tax than is imposed by the General Assembly for state purposes. This restriction shall not apply to dealers in distilled, alcoholic, or malt liquors."

It is not contended that a political corporation can impose a license tax where the state has imposed none, save in the cases specially excepted, but it is said that by the provision thus quoted there are excepted two classes of cases, to wit, the case of the dealer in distilled and alcoholic liquors, including malt liquors that are intoxicating, and the case of the dealer in malt liquor that is not intoxicating. The question, then, is, What did the framers of the Constitution mean by the use of the words, "malt liquors,"

in the connection in which they used them? The three words, "distilled," "alcoholic," and "malt" are used as adjectives, qualifying the noun, "liquors," and the lexicographers give us the following information concerning their meaning when so used:

"Distilled * * * liquors, ordinarily alcoholic liquors, obtained by distillation," etc.

"Alcoholic. Of or pertaining to alcohol, or partaking of its qualities."

"Alcohol. * * * One of the products of vinous fermentation and contained in wine (hence called spirit of wine), beer, whisky and the other fermented and distilled liquors, of which it is the intoxicating principle."

"Intoxicating. * * * Some of the courts include under this term all liquors that are shown to produce intoxication; and all courts take judicial notice of the nature of the ordinary intoxicating liquors, such as brandy, whisky, wine, beer, gin," etc.

"Malt liquor; beer—slang or colloq."

"Malt liquor (in minor col.). A fermented liquor, as beer made with malt."

Webster's New Int. Dic. (1911).

"Intoxicating Liquors—(1) In General. In the absence of a statutory definition, this term is understood to include any liquor intended for use as a beverage or capable of being so used which contains such a proportion of alcohol that it will produce intoxication when imbibed in such quantities as it is practically possible for a man to drink."

"Liquor or Liquors. Either of these terms, standing alone, is too wide to have a precise legal signification, unless explained by the context or by necessary inferences from the subject matter of the statute. When thus explained, however, the terms are commonly understood as including all varieties of intoxicating beverages, whether spirituous, vinous or malt."

23 Cyc. pp. 57, 61.

"Malt Liquors. This term, in its common and popular usage, includes such liquors as beer, ale, porter and stout, and is clearly inapplicable to wines and cider."

23 Cyc. pp. 57, 60, 61.

"Liquor. A liquid or fluid substance, as water, milk, blood, sap. * * * (2) A strong or active liquid of any sort. Specifically—(a) An alcoholic or spirituous liquid, either distilled or fermented; especially, a spirituous or distilled drink as distinguished from fermented beverages, as wine or beer."

"Malt. * * * (2a) Pertaining to, or containing, or made with malt,—malt liquor, a general term for an alcoholic beverage, produced by the fermentation of malt, as opposed to those obtained by the distillation of malt or mash."

Century Dic.

The last definition, above quoted from Cyc., goes on to say that the courts decline to take judicial notice of all the varieties of malt liquor, or to rule judicially that all malt liquors are intoxicating, unless it is so declared by statute; that question being left to the juries in particular cases. And it is further said that:

"If the statute specifically forbids the unlicensed sale of malt liquors, the question of the intoxicating properties of the liquor sold is immaterial. It is only necessary to determine whether it was a malt liquor"—citing *Eaves v. State*, 113 Ga. 749, 39 S. E. 318, and *State v. O'Connell*, 99 Me. 61, 58 Atl. 59.

That there are malt liquors which are not intoxicating is undisputed, and is admitted in this case, and it is also beyond dispute that there are such liquors which are not intended to be, and are not capable of being, used as beverages. And this latter proposition is equally true of distilled and alcoholic liquors, naphtha and attar of rose being distilled liquors (in the broadest sense of the word liquors); and a large proportion of the preparations enumerated in the pharmacopœa being alcoholic liquors in the sense that alcohol is an important ingredient, but in the one case the liquors, though distilled, are not intoxicating, and in neither case are the liquors intended to be, or capable of being, used as beverages.

[1] On the other hand, it is plain from the foregoing citations that, where from the subject-matter to which they are applied or the context it appears that the words, "distilled, alcoholic or malt liquors," are used with reference to the evil of intemperate drinking, their usual and popular meaning is distilled, alcoholic or malt liquors that are, or may be, used as beverages, and, when so used, are capable of producing intoxication. The question in this case, therefore, is not in how many senses the words mentioned might have been used, but in what sense, or senses, were they used? And, in order to answer that question correctly, we must attribute to them their ordinary, and not an unusual, and perhaps unheard of, meaning.

"The words and terms of a constitution, like those of a statute, are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates, or the text suggests, that they have been used in a technical sense. The presumption is in favor of the natural and popular meaning in which the words are usually understood by the people who have adopted them." 8 Cyc. p. 734. "The words and terms of a constitutional article, like those of a law, are to be understood in their most usual signification; and, in order to ascertain the true meaning of a statute, the reason and spirit of it should be considered, and also the cause which superinduced its enactment." *Shreveport Gas & Co. v. Assessor*, 47 La. Ann. 65, 16 South. 650.

When, in 1898, the present Constitution was adopted, it is safe to say that but few persons in this state had ever heard the term, "near beer" or had ever heard of "hiawatha" (spelled with a small "h," and applied to a beverage), and we think it equally safe to say that there were none who, reading the language which we are now endeavor-

ing to interpret, and, finding the words, "distilled alcoholic or malt liquors" used together for the obvious purposes of vesting in the local authorities a wider control in matters affecting intemperate drinking than in other matters, would not unhesitatingly have concluded that each of those words was intended to apply to intoxicating beverages, and not to nonintoxicants.

The framers of the Constitution knew that the traffic in intoxicating liquor is fraught with evil, but they did not know, and could not anticipate, that the traffic in one nonintoxicant (and one of which they had probably never heard) would any more than the traffic in another serve as a cover for the traffic in intoxicants. We are, therefore, of opinion that in framing the provision relied on by plaintiff the intention was that it should apply to distilled, alcoholic, and malt liquors which are, or may be, used as beverages, and which are intoxicating, and that it was not intended to apply to malt liquors, or any other liquors, which are not so used and are not intoxicating.

In the case of *State v. Maroun*, 128 La. 829, 55 South. 472, this court had occasion to interpret the act No. 4 of 1910 (extra session), which provides that, in prohibition territory:

"The term 'grog' or 'tippling shop,' as used in the statutes * * * is hereby declared to mean any shop or place where intoxicating, spirituous, vinous, or malt liquors are sold or served at retail by any person, association or corporation, who charges for said liquors or for service thereof, or charges for providing lockers or other places for conveniently handling or using said liquors, or for icing said liquors, or shall make any charge of whatever nature for the handling, keeping, serving or furnishing accommodations for persons using or drinking said liquors," etc.

And it was held that the act must be "construed as including only malt liquors that are intoxicating." The learned counsel for plaintiff think that the conclusion thus reached does not establish a precedent which can be applied in the case at bar. We are much inclined to think that it does, but will not lengthen this opinion by attempting to reason the matter out. It is quite certain that there is no conflict between the views which were there expressed and those upon which we predicate the conclusion reached in the instant case.

For the reasons thus assigned, the judgment appealed from is affirmed, at the cost of the appellant.

(130 La.)

No. 19,022.

CITY OF SHREVEPORT v. SMITH.(Supreme Court of Louisiana. Jan. 29, 1912.
Rehearing Denied Feb. 26, 1912.)*(Syllabus by Editorial Staff.)***INTOXICATING LIQUORS (§ 15*)—LICENSE TAXES—BUSINESS SUBJECT—CONSTITUTIONAL PROVISIONS.**

A city ordinance imposing a tax on the business of selling nonintoxicating malt liquors, known as "near beer," "hiawatha," or any other name that may be used to designate them, where the state imposes no such tax, is violative of Const. art. 229, providing that no political corporation shall impose a greater license tax than is imposed by the General Assembly for state purposes, except as to dealers in distilled, alcoholic, or malt liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 17, 18; Dec. Dig. § 15.*]

Appeal from City Court of Shreveport; L. C. Blanchard, Judge.

Prosecution against Charles Smith for violation of an ordinance of the City of Shreveport. From a judgment for defendant, the City appeals. Affirmed.

G. W. Jack, City Atty. (W. P. Hall, of counsel), for appellant. Alexander & Wilkinson, for appellee.

MONROE, J. This case was argued with the case bearing the same title, No. 19,071, 57 South. 652, this day decided. In that case, the same defendant, having been proceeded against by rule in a civil proceeding, to compel him to pay a license tax under an ordinance of the city of Shreveport imposing such tax upon "the business of selling nonintoxicating malt liquors, known as 'near beer,' 'hiawatha,' or any other name that may be used to designate it," attacked the ordinance, as in conflict with so much of article 229 of the Constitution as provides that "no political corporation shall impose a greater license tax than is imposed by the General Assembly for state purposes," and as not within the exception, "this restriction shall not apply to dealers in distilled, alcoholic or malt liquors," and, the district court having sustained the attack, its judgment was affirmed. In the instant case the defendant was proceeded against criminally for nonpayment of the same tax; and, having first demurred on the ground that the affidavit charged no offense known to the laws of the state, parish, or city, he, in the event of his demurrer being overruled, moved to quash the affidavit upon the same grounds that were set up by him in the civil proceeding; and, the motion having been sustained, the city has appealed. Having held in the case above referred to that the ordinance relied on by the city which imposes the tax in question was unconstitutional, and having

given our reasons therefor, it is unnecessary to repeat them.

For the reasons this day assigned in the case the city of Shreveport against this same defendant, No. 19,071, of the docket of this court, it is therefore ordered, adjudged, and decreed that the judgment herein appealed from be affirmed.

(130 La.)

No. 18,548.

LA BARRE v. BURTON-SWARTZ CYPRESS CO. (BAKER-WAKEFIELD CYPRESS CO., Intervener).(Supreme Court of Louisiana, Jan. 29, 1912.
Rehearing Denied Feb. 26, 1912.)*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 1210*)—REMAND—PROCEDURE.**

Where a case was remanded because the judge a quo erred in dismissing an intervention after trial on the merits, the judge properly refused to allow a trial de novo, and properly took the case under advisement. *Saint v. Martel*, 127 La. 78, 53 South. 432, reaffirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4670; Dec. Dig. § 1210.*]

2. LIBEL AND SLANDER (§ 140*)—SLANDER OF TITLE—EVIDENCE.

In a jactitation suit, a plaintiff or intervener alleging slander of his title must prove actual possession of the premises in order to maintain the action.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 897-401; Dec. Dig. § 140.*]

3. LIBEL AND SLANDER (§ 140*)—SLANDER OF TITLE—DEFENSES.

Want of actual possession of the premises in the plaintiff or intervener may be pleaded by the defendant by way of exception.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 897-401; Dec. Dig. § 140.*]

4. LOGS AND LOGGING (§ 3*)—PURCHASE OF TIMBER—RIGHT TO POSSESSION.

An intervener whose title deed to the timber on a tract of swamp land prohibits him from deadening, cutting, pulling, hauling, or removing any of the trees thereon until the payment of certain notes, given for the remainder of the purchase price, has no present title to possession of said timber; and his possession of a railroad right of way on the premises cannot be considered as extending to the boundaries of the tract.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Appeal from Twenty-Seventh Judicial District Court, Parish of Assumption; Paul Leche, Judge.

Action by Gustave J. La Barre against the Burton-Swartz Cypress Company. The Baker-Wakefield Cypress Company intervened. Judgment for intervener, and defendant appeals. Reversed, and intervention dismissed.

Pugh & Lemann and Beattie & Beattie, for appellant. Marks, Wortham & Le Blanc, for intervener.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

LAND, J. This case was before us in 1910, and we, being of opinion that the trial judge erred in not deciding the intervention on the merits, remanded the cause for further proceedings according to law. See 126 La. 982, 53 South. 113.

The plaintiff brought a jactitation suit, based on alleged actual possession of the premises and slander of his title by the defendant. The defendant, after filing several exceptions, further excepted that plaintiff was not, nor had he ever been, in possession of the timber in dispute, and averred that the defendant had itself been in possession as owner of both land and timber for more than one year previous to the institution of the suit.

The intervenor then interpleaded, and set up possession in itself and authors for many years of said land and timber, and denied the alleged possession of the same by the plaintiff or by the defendant. Intervenor further alleged that both plaintiff and the defendant were slandering its title.

Defendant, under reservation of its exception as to possession, set up against plaintiff title in itself, and pleaded the prescription of 10 and 30 years. Defendant filed similar pleadings against the demand of the intervenor, who in turn pleaded against the title set by defendant the prescriptions of 10 and 30 years.

The result of the first trial has been already stated.

The case was remanded, and the judge took the case under advisement on the record as it stood, and rendered judgment in favor of the intervenor on the issues, both as to possession and as to title. Defendant alone appealed. Plaintiff has not appealed or joined in the appeal by answer. Hence as to him the judgment below cannot be disturbed.

[1] The case was properly taken under advisement by the trial judge, because it was remanded, not because it had not been heard on the merits, but because it had not been decided on the merits. See *Saint v. Martel*, 127 La. 73, 53 South. 432.

The timber in dispute between the intervenor and the defendant is in the N. W. $\frac{1}{4}$ of section 54, township 12 S., range 15 E.

The intervenor acquired all the cypress and saw timber on said quarter and other subdivisions of sections in February, 1907, by conditional purchase from Charles W. Moore, Robert Moore, Jr., and the minor, Leah Moore. The sales were made for part cash, and balance on terms of credit, represented by notes maturing December 1, 1907, 1908, 1909, and 1910. The deeds contained the following stipulation:

"It is distinctly agreed and understood between the parties to this act, that no timber, except such as may be necessary for a right of way for railroad across the land upon which the same rests, or any part thereof, to reach

adjacent lands belonging to the Baker-Wakefield Cypress Co., Ltd., shall be deadened, cut, pulled, hauled or removed from any of the lands hereinabove described and conveyed until the two first payments, represented, etc., * * * shall have been fully paid and satisfied; the balance of said purchase price to be fully secured to the satisfaction of the holder of the said notes at that time before the removal of said timber."

In July, 1907, the defendant, holding title under a recorded chain of conveyances going back at least to 1889, surveyed and staked several lines of tramway through the N. W. $\frac{1}{4}$ of section 54. In August, 1907, the intervenor commenced the construction of a tramway through the northern part of the same quarter section for the purpose of reaching other lands beyond the land in suit. Plaintiff instituted the present suit on September 12, 1907, and on November 30, 1907, the petition of intervenor was filed. The case as made up presented the conflicting claims of the three different litigants to actual possession of the same tract of virgin timber at the same time. These contentions suggest the dubious nature of the claims of at least two of the parties to the controversy. The claim of plaintiff has been eliminated. The claim of defendant rests on the survey and staking of the lines of a proposed tramway, and the claim of the intervenor rests on the partial construction of another tramway through the same tract, as already stated. The construction work of the intervenor did not impinge on the staked right of way of the defendant, and vice versa. Both parties intended merely to pass through the tract with their tramways.

[4] The purchase of the timber by intervenor was subject to the condition that he paid certain notes to become due, and at the same time secured the payment of the remainder of the notes given for the price. It follows that intervenor by the sale acquired no present rights of possession, and the contract could not be enforced until the event happened. *C. C. 2043*. Under the very letter of the conditional contract of sale, the intervenor had no right to take possession of the timber for any purpose.

As a matter of fact, the intervenor had no actual possession of the timber, but was merely exercising the right of way for railroad purposes granted in the acts of sale.

The question of title can be raised and determined under Act 38 of 1906.

We therefore conclude that defendant's exception of want of possession in intervenor should have been sustained.

It is therefore ordered that the judgment below as between the intervenor and defendant be reversed, and it is now ordered that the intervention be dismissed, and that intervenor pay the costs occasioned by its intervention and the costs of this appeal.

DAILEY v. HORTON. (No. 15,568.)
(Supreme Court of Mississippi. Feb. 26,
1912.)

**WILLS (§ 738*)—CONSTRUCTION—ACCRETAL OF
RIGHT TO DEVISE.**

A will provided that the executor should furnish testator's wife, during her life or widowhood, and his children, with a sufficiency from the income and corpus of his estate to enable them to live comfortably, but economically, and directed that the executor should give each of testator's sons a collegiate education, and a professional one if the estate would afford it, and that the estate should not be divided until the youngest son then living should reach 21 years and should have finished his college and professional education. A codicil, executed after the subsequent birth of a daughter, provided that she should share equally with the other children in all the property. *Held* that, after all the sons had become of age and were self-supporting, while the daughter was 14 years of age and still in school, the income from the estate, after allowing for the support of the widow, should be applied to the maintenance and education of the daughter, and any surplus added to the corpus of the estate, and after the arrival of the daughter at the age of 21 the executor should then divide the estate, and that, until she reached that age, no part of the estate should be used for any purpose, except the support of the widow and the maintenance and education of the children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1819-1846; Dec. Dig. § 733.*]

Appeal from Chancery Court, Grenada County; I. T. Blount, Chancellor.

"Not to be officially reported."

Bill in equity by Sarah Louise Horton against R. Dailey, executor. From a decree for complainant, defendant appeals. Affirmed.

This is a friendly suit for the construction by the court of the will of R. Horton, deceased. Mr. Horton left a last will and testament, in which he gave his homestead and all appurtenances to his wife during her lifetime or widowhood, as a home for herself and their children. The will provided, further, that the executor "shall furnish my said wife during her lifetime or widowhood, and my said children, with a sufficiency from the income of and from the corpus of my estate to enable them to live comfortably but economically." At the time the will was written the appellee, his youngest child and only daughter, had not been born; but a codicil is attached to the will which provides that "she shall share equally with my other children in all my property."

The will also contains the following provisions: "I will and direct that my said executor shall give each one of my said sons a collegiate education and also a professional one if my estate will afford it, even if he should have to dispose of property herein to do so, but I wish him to use his best discretion in the matter of disposing of the property as well as of giving the education above. I desire, will and direct that their said es-

tate shall not be divided until the youngest one then living shall arrive at the age of 21 years and shall have finished his collegiate and professional education."

At the time of the filing of this petition, all of the three sons of deceased had become of age and were self-supporting, and the appellee, the daughter, was 14 years of age and still in school. The executor construed the will to mean that he should collect the rents and profits of the estate and distribute same equally among the children, after setting aside a reasonable amount for the support of the widow. The income from the estate was not sufficient, if thus divided, to give the appellee the education to which she felt, under the terms of the will, she was entitled, and she filed this petition asking a construction of her father's will. It is the contention of the appellee that, until she completes her education or arrives at the age of 21, the income from the estate, after allowing for the support of the widow, shall be applied to the support, maintenance, and education of the appellee, and any overplus shall be added to the corpus of the estate, and after the arrival of the appellee at the age of 21 the executor should then divide the estate, and that until her arrival at the age of 21 no part of the estate, corpus or income, should be used for any purpose, except the support of the widow and the support and maintenance and education of the children, until they leave the family homestead and become self-supporting, and that it was testator's purpose that each of the children should obtain a liberal education, collegiate and professional, if desired.

The court so construed the will, and entered the decree accordingly, and granted an appeal to settle the principles of the case.

S. A. Morrison, for appellant. W. M. Mitchell, for appellee.

PER CURIAM. A careful reading of this will convinces us that the distinguished chancellor took the correct view in construing it. It is obvious that the testator intended to so leave his property as that it would supply his place towards his family after his death as nearly as this might be accomplished by property. It was the testator's design to provide for the support and care of his wife during her lifetime or widowhood, and to provide for the care and education of his children during their infancy, and possibly after maturity, if a child stood in actual need of assistance. All of the children, except complainant, are now self-sustaining and have received their education from the revenues of this property.

The will expressly directs that the property shall not be divided until the youngest shall have reached the age of 21, and the

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dominant purpose of the will, as gathered from the instrument, is that the property shall be made to support and educate the children as the father would have done if he had been living. The bill shows that the property is insufficient to give this care and education to the youngest child, if the proceeds are to be divided up into equal shares between herself and the other three children. In keeping with the dominant purpose of this will, the property should be used, so far as is necessary, for the support and education of the now only dependent child, and, when she shall have reached 21 years of age, the remaining property shall then be divided as provided for in the will.

For these reasons, the case is affirmed.

TAYLOR v. GARRETT. (No. 13,847.)
(Supreme Court of Mississippi. Feb. 28, 1912.)

MARRIAGE (§ 50*)—EVIDENCE—SUFFICIENCY.

Testimony of complainant and her son that in 1878 her former husband was taken sick and carried to the county poorhouse, that she was afterwards informed that he had died, that she took what household effects had been theirs, that neither of the witnesses afterwards saw her former husband, and that she married again in 1883, was sufficient to establish the validity of the second marriage, in the absence of any opposing evidence that the first husband was not dead.

[Ed. Note.—For other cases, see Marriage, Dec. Dig. § 50.*]

Appeal from Chancery Court, Issaquena County; M. E. Denton, Chancellor.

"To be officially reported."

Bill in chancery by Kate Taylor against Willis Garrett. From a decree for defendant, complainant appeals. Reversed and remanded.

Appellant filed her bill in chancery, alleging that Samuel Garrett and his brother, Willis Garrett, purchased and became tenants in common of certain land in Issaquena county. About the year 1893 Samuel Garrett died without issue, leaving, as the bill alleged, as his only heir at law, the appellant, his wife, now Kate Taylor. The bill alleges that the land is incapable of partition, and prays for a sale of same and distribution of the proceeds between herself and Willis Garrett. The bill alleges, further, that said land was sold for taxes one year, and it became necessary for the complainant to redeem same from tax sale, and that she had made demand upon the defendant for her part of the property of her deceased husband, and prays for an accounting for rents and profits, less whatever taxes were paid by defendant. The bill does not waive answer under oath. The defendant answered, denying generally all the allegations of the bill, and he attempts to swear to the answer on information and belief.

On the hearing the testimony of the complainant, who testifies in her own behalf, as does her son, shows that some time prior to 1879 she was married to a man named Joshua Whitfield; that she left him about the year 1878, when he was taken sick, and carried to the county poorhouse; that she was afterwards informed that he had died, and that she took what household effects had been theirs. Her son, who was a small boy at that time, corroborates her testimony. Neither of these witnesses saw Joshua Whitfield after his death, and no witnesses are produced who did see him. Afterwards, in the year 1883, appellant married Samuel Garrett. Appellant had never heard of Joshua Whitfield since his reputed death, and never doubted that she had been correctly informed as to his death. It was attempted to be shown, in cross-questioning these witnesses, that Joshua Whitfield is not dead, and that appellant's marriage to Samuel Garrett was null and void; but no proof is offered by appellee. Appellant testifies that she lived on the land with Samuel Garrett and helped him clear it up, and that a short while before his death they had separated. The defendant below offered no testimony at all, other than the answer, which is attempted to be sworn to on information and belief, which is simply a general denial of all the allegations of the bill.

On the hearing the chancellor entered a decree dismissing the bill, from which comes this appeal.

W. E. Mollison and Green & Green, for appellant. John N. Bush and McLaurin, Armistead & Brien, for appellee.

WHITFIELD, C. We cannot concur in the view of the learned chancellor of the court below, whose view must have rested upon the idea that the evidence was not sufficient to establish the marriage. We think the evidence clearly shows a marriage.

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein indicated, the decree is reversed, and the cause remanded.

BALDRIDGE v. STRIBLING et ux.
(No. 15,400.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

1. WITNESSES (§ 159*)—COMPETENCY—ACTIONS AGAINST ESTATE—EVIDENCE BY CLAIMANT.

In a suit by one heir to compel an accounting of money converted by defendant, another heir, after decedent's death, defendant testified that, shortly before his death, decedent came to defendant with money in his hand and said he wanted to give it to defendant, upon the understanding that she would care for him for life and bury him, and that he then delivered the money to her. Code

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1906, § 1017, provides that no person shall testify as a witness to establish his own claim or defense against the estate of a deceased person, which originated during his lifetime. *Held*, that defendant's evidence was not admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 664-682; Dec. Dig. § 159.*]

2. EVIDENCE (§ 378*)—BEST EVIDENCE—FOUNDATION.

A witness could testify that she received a certain letter, in order to lay a foundation for its introduction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1648-1655; Dec. Dig. § 378.*]

3. EVIDENCE (§ 183*)—BEST EVIDENCE—SECONDARY EVIDENCE.

A copy of a letter was not admissible in evidence, where no foundation was laid for its admission by accounting for the absence of the original.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. § 183.*]

4. EVIDENCE (§ 278*)—HEARSAY—DECLARATIONS AGAINST INTEREST.

Verbal or written declarations by a decedent, if relevant, are admissible in evidence as between third persons, upon showing that declarant is dead, and that the declaration was against his pecuniary interest, and concerned a fact within his own personal knowledge, and which he had no motive to falsify, so that, in a suit brought by one heir for an accounting of money claimed to have belonged to a decedent and converted by defendant after his death, evidence that decedent stated several times that he had given his money to another, who was to care for him, though hearsay, was admissible as a declaration against interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1137, 1138; Dec. Dig. § 278.*]

5. GIFTS (§ 47*)—UNDUE INFLUENCE—BURDEN OF PROOF.

The burden was upon one seeking to invalidate a gift of money *inter vivos* to prove that the gift was induced by undue influence.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 81-86; Dec. Dig. § 47.*]

6. GIFTS (§ 49*)—VALIDITY—UNDUE INFLUENCE.

The mere suspicion of undue influence in making a gift *inter vivos*, however strong, is insufficient to set aside the gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. § 49.*]

Appeal from Chancery Court, Lowndes County; J. F. McCool, Chancellor.

Suit by Elizabeth Baldridge against S. R. Stribling and wife. From a decree for defendants, complainant appeals. Affirmed.

Mrs. Baldridge filed a bill in the chancery court against S. R. Stribling and wife for an accounting. The bill alleged that one P. Cates, father of complainant and of Mrs. Stribling, died, leaving certain property which by will he had devised equally to his two daughters, Mrs. Baldridge and Mrs. Stribling; that for some time prior to his death he had lived with Mrs. Stribling, and that she and her husband had taken possession of his property, which consisted of money, and had unduly influenced the decedent to part with same; and that they had converted it to their own use, etc. Defendants

filed separate answers, denying that they had possession of any of decedent's property, admitting that he had lived with defendants for some time before his death, and averring the fact to be that some time prior to his death he had drawn all of his money from the bank, and had given \$3,600 to his daughter, Mrs. Stribling, upon condition she would take care of him the balance of his life, and give him what spending money he needed, and pay doctors' bills, funeral expenses, etc.

On the trial, Mrs. Stribling and her husband testified to these facts, and their testimony is substantiated by their son and son-in-law, Gryder, and by the cashier and teller of the bank, who testified that decedent came in person to the bank and withdrew his money, and that the following day Mr. Stribling deposited \$3,600 to his wife's credit. The bank books substantiated this testimony. Mrs. Stribling testified that her father, in his old age (being nearly 90 years old), was very feeble and spent most of his time alternately between his two daughters; that a few years before his death Mrs. Baldridge had moved to Florence, Ala., to live with her married daughter, Mrs. Price; that when their father left Florence, and came to the home of the Striblings at Columbus to spend a while with them, Mrs. Stribling received a letter from Dr. Price, the son-in-law of Mrs. Baldridge, with whom she had been living, stating that they could not board the old man any longer as their house was crowded and they needed the spare room for other purposes. Mrs. Stribling testifies that after her father had stayed with her for awhile he broached the subject of returning to Florence to spend a while with Mrs. Baldridge, and it was then that she informed him of the contents of Dr. Price's letter, and that he seemed very much distressed, and stated that he was sorry he had divided all his property among his children (as he had done some years before), and that he had made a will leaving the balance equally to Mrs. Baldridge and Mrs. Stribling, but that, as the will never had been filed, he would now give Mrs. Stribling the balance of the money he had on hand, on condition she would take care of him for his remaining years, which she agreed to do.

Depositions were taken, and a motion was made by complainant to suppress the depositions of Mrs. Stribling as to the gift made to her by her father a short while before his death, because it was an effort to assert a claim against the estate of a deceased person, and to suppress that part of her testimony relative to the contents of the letter which she had received from Dr. Price, as the original letter was the best evidence. The court overruled the motion, and entered a decree for the defendants, and complainant appeals.

W. J. Lamb, for appellant. E. T. Sykes, for appellees.

McLEAN, J. [1] One of the defendants in the court below, Mrs. Jane Stribling, testified that, a short time before her father's death, he came to her with a roll of money in his hand, and said that that was all the money he had left; that he wanted to give it to her, with the understanding that she was to take care of him during his life, and after his death to give him a decent burial; that he actually delivered to her the money, \$3,800. The appellant, complainant in the court below, objected to this evidence on the ground that the witness was establishing her own claim against the estate of a deceased person. The chancellor overruled the objection. The appellee contends that this witness was not testifying to establish her own claim against the estate of a deceased person, as the deceased had no estate of any kind at the time of his death in this money, and hence that section 1917 of the Code of 1906 does not apply to the testimony of this witness, and in support of the contention relies upon *Snell v. Fewell*, 64 Miss. 655, 1 South. 908. The counsel misconceives the opinion of the court in this case. The witnesses in that case were held competent, for the reason that neither of them was seeking to assert any claim or interest in the property. To say, as appellee contends, that the deceased, the father of Mrs. Mary Stribling, had no estate or interest in the property in controversy, is to assume as true the very point in question. The testimony of this witness was in the teeth of the statute, which declares that "no person shall testify as a witness to establish his own claim or defense against the estate of a deceased person which originated during the lifetime of such deceased person, or any claim he has transferred since the death of such decedent." The claim of Mrs. Stribling to this money arose during the lifetime of the deceased, and the object and purpose of the Legislature in enacting this statute was to prohibit this testimony. The following authorities are squarely on the proposition: *Burnett v. Smith*, 93 Miss. 566, 47 South. 117; *Cockrell v. Mitchell*, 15 South. 41; *Jackson v. Smith*, 68 Miss. 53, 8 South. 258.

[2, 3] Mrs. Stribling was a competent witness to prove that she received the letter written by Dr. Price, for the purpose of laying the foundation for the introduction of the letter. *Cole v. Gardner*, 67 Miss. 670, 7 South. 500; *Harper v. Lacy*, 62 Miss. 5. What purports to be a copy of the letter is attached, as an exhibit, to the defendant's answer; but the letter itself was not introduced, nor was there any evidence accounting for the absence of the original—nothing to show that it was lost or destroyed—and consequently no foundation was laid for the

introduction of its contents, and hence all the evidence relating to the contents of this letter was clearly inadmissible.

[4] The defendant also objected to the testimony of Wm. P. Stribling, S. R. Stribling, and W. C. Gryder, on the ground, chiefly, that their testimony is hearsay. All of the witnesses testified that the deceased, P. Cates, stated to them at different times that he had given his money to Mrs. Mary Jane Stribling, and that she was to take care of him. While these statements of the deceased may be regarded as hearsay, yet they are declarations against interest, and accordingly are admissible; the rule being that declarations, whether verbal or written, made by a deceased person as to facts presumably within his knowledge, if relevant to the matter of inquiry, are admissible in evidence as between third parties (1) when it appears that the declarant is dead; (2) that the declaration was against his pecuniary interest; (3) that it was of a fact in relation to a matter of which he was personally cognizant; and (4) that the declarant had no possible motive to falsify the fact declared. Notes to 94 Am. St. Rep. 673; A. & E. Ency. of Law, vol. 9, p. 8.

[5, 6] The gift or transfer of this money was assailed upon the ground of undue influence; but the complainant failed to meet the burden imposed upon her, and mere suspicion, however strong, is insufficient upon which to set aside the transaction. *Powell v. Plant*, 23 South. 402.

Objections were made to other portions of the evidence; but, as no harm could possibly be done to either party, either by the admission or rejection of this evidence, we do not consider it necessary to refer to it.

Disregarding entirely the incompetent testimony, there is ample evidence to support the decree, and the same is affirmed.

PERRY NAVAL STORES CO. v. CASWELL et al.

(Supreme Court of Florida. Feb. 5, 1912.)

(Syllabus by the Court.)

1. BANKRUPTCY (§ 425*)—DISCHARGE—UN-SCHEDULED DEBT.

Where a creditor of a bankrupt has notice or actual knowledge of the bankruptcy proceedings in time to prove his claim in due course, the claim will be discharged by the bankruptcy proceedings, even though the creditor was not designated as a creditor in the bankruptcy proceedings and his claim was not scheduled.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 775; Dec. Dig. § 425.*]

2. BANKS AND BANKING (§ 116*)—KNOWLEDGE OF OFFICERS—NOTICE TO BANK.

The knowledge acquired by the president, directors, cashier, and tellers, while engaged in the business of the bank in their official capacities, will be notice to the bank. So far as

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either has authority to act for the bank, his acts are the acts of the bank; but mere private information, obtained beyond the range of his official functions, will not be deemed notice to the bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 282-287; Dec. Dig. § 116.*]

3. BANKS AND BANKING (§ 116*)—KNOWLEDGE OF OFFICERS—BINDING EFFECT ON BANK.

Where the cashier of a bank, as such, has actual knowledge of bankruptcy proceedings as to property of a debtor of the bank, such knowledge will bind the bank in its rights affected by the bankruptcy proceedings.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 116.*]

Appeal from Circuit Court, Taylor County; Ira J. Carter, Judge.

Bill by L. M. Caswell and W. M. Beaty against the Perry Naval Stores Company. Decree for complainants, and defendant appeals. Affirmed.

W. B. Davis, for appellant. Hendry & McKinnon, for appellees.

WHITFIELD, C. J. The appellees brought proceedings in equity in the circuit court for Taylor county for the cancellation of a judgment rendered against them in favor of the Taylor County State Bank and assigned to the appellant. As a ground for this relief it is alleged that after the rendering of the judgment the appellees were adjudged bankrupts and in due course were discharged of all their liabilities in the bankruptcy court, and that the Taylor County State Bank was the holder and owner of the judgment at the time of the said discharge in bankruptcy of appellees. Such proceedings were had that the following statement of facts was filed by agreement:

"(1) That the Taylor County State Bank obtained a judgment against the complainants on the 23d day of January, 1908, upon the default theretofore entered against complainants in a certain civil action upon promissory note for the amount alleged in complainant's bill.

"(2) That the complainants filed their petition in bankruptcy on February 21, 1908; that the original note upon which said judgment was obtained was scheduled in said petition as a liability, said schedule showing that C. A. Owens, the original payee of said note, was the creditor; that said judgment was not scheduled as a liability, nor was said Taylor County State Bank therein designated as a creditor.

"(3) That W. B. Davis was a director of the said Taylor County State Bank upon the 21st day of February, 1908, and until January 1, 1909, and that said Davis was one of the creditors named in said petition in bankruptcy, and that he had due notice of the filing of the petition of complainants, and knew all of the said proceedings, includ-

ing the complainants' application for discharge pursuant to the adjudication in bankruptcy.

"(4) That W. A. Hendry was from the 21st day of February, 1908, to the 1st day of January, 1909, the cashier of said Taylor County State Bank in liquidation; that he was duly authorized by the board of directors to collect liabilities due said bank.

"(5) That the said W. A. Hendry had a general knowledge of said bankruptcy proceedings in behalf of complainants from about the time of the filing of complainants' said petition, and that about the month of October, 1908, the complainant W. M. Beaty stated to W. A. Hendry that the business of Caswell and Beaty, the complainants, was then in process of adjudication in the bankruptcy court, and that, such being the case, the judgment which the said Taylor County State Bank then held against the complainants could not be paid, as they were seeking by their said petition in bankruptcy to have all their liabilities discharged.

"(6) That the complainants obtained their discharge in bankruptcy on the 30th day of December, 1908; that there were no dividends paid to the creditors, there being no available assets.

"(7) That the Taylor County State Bank did not file or make application to file its said claim against bankrupts, the complainants herein.

"(8) That in the latter part of 1908, when the bank was about to sell said judgment to D. G. Malloy, J. H. Malloy, and J. H. Scales, counsel for the Taylor County State Bank advised J. H. Scales that said judgment was valid, because the bank had not been scheduled as a creditor, and the bank had had no notice of the bankruptcy proceedings, and that such advice was acquiesced in by the directors then present.

"(9) That J. T. Blair was from the 21st day of February, 1908, to January 1, 1909, the president of the said Taylor County State Bank, and that he did not have any notice of the bankruptcy proceedings of Caswell & Beaty, as he now remembers, and that it was some time after said proceedings had been instituted, and possibly after the discharge had been granted, before said Blair knew that such proceedings had been instituted, and that said J. T. Blair believes that the said bank never had any notice of said proceedings.

"(10) That the directors of said Taylor County State Bank during the year of 1908 were J. T. Blair, J. H. Scales, E. J. Courtney, W. A. Hendry, W. B. Davis, J. H. Courtney, and J. R. Kelly."

On final hearing the court granted the relief prayed, and the defendant appealed.

The bill of complaint was not demurred to, and as it appears to be sufficient in its al-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

legations to warrant the relief prayed, if borne out by the facts, the criticisms of the pleading will be passed, and the agreed statement of facts considered, in determining whether the decree is erroneous.

Section 17 of the bankrupt law of 1898 provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy. * * *

[1] It appears that the judgment held by the Taylor County State Bank was not scheduled as a liability and the bank was not designated as a creditor in the bankruptcy proceedings; but, if the bank had notice or actual knowledge of the bankruptcy proceedings in time to prove its claim in due course, the judgment is discharged by virtue of the bankruptcy proceedings. *Elder v. Mannheim*, 78 Minn. 309, 81 N. W. 2; *Morrison v. Vaughan*, 119 App. Div. 184, 104 N. Y. Supp. 169, 18 Am. Bankr. Rep. 704.

The actual knowledge of the proceedings contemplated by the section is a knowledge in time to avail a creditor of the benefits of the law, in time to give him an equal opportunity with other creditors, not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate, or to deprive him of his share of the dividends, if any are to be declared. See *Birkett v. Columbia Bank*, 195 U. S. 345, 25 Sup. Ct. 38, 49 L. Ed. 231.

[2] In this case the cashier, who was also a director, and other directors of the bank had actual knowledge of the bankruptcy proceedings in time for the bank to have an equal opportunity with the other creditors. If the knowledge of these officers of the bank is imputable to the bank, it had notice or actual knowledge of the proceedings in bankruptcy as contemplated by the act, and, as it did not have its judgment proved with the claims of other creditors, the bankrupts are discharged from their liability to pay the judgment, and it should be canceled.

The knowledge acquired by the president, directors, cashier, and tellers, while engaged in the business of the bank in their official capacities, will be notice to the bank. So far as either has authority to act for the bank, his acts are the acts of the bank; but mere private information, obtained beyond the range of his official functions, will not be deemed notice to the bank. 1 *Bolles on Banking*, p. 404; *Casco Nat. Bank of Portland v. Clark*, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705.

[3] It appears by the agreed statement of facts that W. A. Hendry was cashier of the

bank during the entire bankruptcy proceedings, that he was duly authorized to collect the liabilities of the bank, that he had actual knowledge of the bankruptcy proceedings from the filing of the petition therein, and that at least two months before the discharge of the bankrupts he was told by one of the petitioners in bankruptcy that the business of the bankrupts was then in process of adjudication in the bankruptcy court, and that the judgment obtained by the bank could not be paid, as the bankrupts were seeking to have all their liabilities discharged. Notwithstanding this actual knowledge by the cashier of the bank, who had authority to act for it, the bank did not file or make application to file its claim. Independent of the actual knowledge of the bankruptcy proceedings had by other directors of the bank, as shown by the agreed facts, the actual knowledge of the cashier, who was also a director, was, under the circumstances shown, sufficient to impute notice to the bank.

This being so, the bank "had actual knowledge of the proceedings in bankruptcy," and the judgment was discharged by the discharge of the bankrupts in the bankruptcy proceedings.

The decree is affirmed.

TAYLOR, SHACKLEFORD, COCKRELL,
and HOCKER, JJ., concur.

LANE et al. v. STATE ex rel. ATTORNEY GENERAL.

(Supreme Court of Florida. Feb. 5, 1912.
Rehearing Denied Feb. 27, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 25*)—BOUNDARIES—ESTABLISHMENT.

Even if the description of territory incorporated as a municipality by a special law, when properly construed, would cover noncontiguous lands, the law is not thereby rendered unconstitutional.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 62; Dec. Dig. § 25.*]

2. MUNICIPAL CORPORATIONS (§ 24*)—INCORPORATION—DESCRIPTION OF TERRITORY.

Where the description of territory incorporated as a municipality by a special law does not utterly fail to cover some area, and the description is not so uncertain as to make it impossible to determine the territory intended to be included in the municipality, the law is not void for uncertainty of description.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 60; Dec. Dig. § 24.*]

Error to Circuit Court, Polk County; F. A. Whitney, Judge.

Quo warranto by the State, on the relation of the Attorney General, against E. B. Lane and others. From a judgment of ouster, defendants bring error. Reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Tucker & Tucker, for plaintiffs in error.
H. K. Olliphant, for defendant in error.

WHITFIELD, C. J. The Attorney General brought quo warranto proceedings in the circuit court for Polk county to test the legality of the municipal government of the town of Auburndale. By answer the respondent municipal officers aver the lawful organization of the municipal government under chapter 6324, Acts of 1911, which establishes the town of Auburndale.

On a demurrer to the answer the court held that the mentioned act under which the municipal government was organized "is void for uncertainty because the territory of the said alleged town of Auburndale, as set out in said act, is so vague and indefinite that the said territory cannot be located properly with reference to the said territory being contiguous, or of such character that the same could not be regarded as incorporated for town purposes." The demurrer to the answer was sustained, and a judgment of ouster entered, to which a writ of error was taken.

The question for determination is whether the boundary description of the municipal territory designated in the act establishing the municipality is so indefinite and uncertain as to render the act inoperative and of no effect.

The description is as follows:

"Its territorial boundaries shall be as follows: Sections two (2) and ten (10), except S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 10 and the west three-fourths (W. $\frac{3}{4}$) of sections two (2) and eleven (11), and the northeast quarter (N. E. $\frac{1}{4}$) and the north half (N. $\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$) of section nine (9), township twenty-eight (28) south, of range twenty-five (25) east. Also the south half (S. $\frac{1}{2}$) of section thirty-four (34), and the west half (W. $\frac{1}{2}$) of the southwest quarter (S. W. $\frac{1}{4}$) of section thirty-five (35) and south half of the southeast quarter (S. E. $\frac{1}{4}$) of section thirty-three (33) in township twenty-seven (27) south, of range twenty-five (25) east."

It is contended that the first part of the description of the "territorial boundaries" of the municipality, viz., "Sections (2) and (10), except S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 10 and the west three-fourths (W. $\frac{3}{4}$) of sections two (2) and eleven (11)," is fatally uncertain as to the portions of sections 2 and 11 included in the municipal territory. If the portion of the description reading "and the west three-fourths (W. $\frac{3}{4}$) of sections two (2) and eleven (11)" be regarded an exclusion, it renders the territory noncontiguous and excludes a portion of section 11, which section is not otherwise referred to or included in the description. If the portion of the description last above quoted is regarded

as being preceded by a comma, and as intended to include, and not to exclude, the west $\frac{3}{4}$ of sections 2 and 11, there will be an inclusion of the west $\frac{3}{4}$ of section 2 that had already been included in its entirety.

[1] There is no constitutional provision regulating the statutory descriptions of municipal territory; but, on the contrary, section 8 of article 8 of the Constitution expressly provides that "the Legislature shall have power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time." Under this broad authority it is within the power of the Legislature by valid enactments to prescribe the territorial limits of a municipality as it deems proper when no provision or principle of organic law is violated. Even if the description of the territory in the special act establishing the town of Auburndale, when properly construed, would cover noncontiguous lands, the Constitution is not thereby violated.

[2] This is a special act establishing the municipality and not an incorporation under the general law. The description does not utterly fail to inclose some area, and it is not so uncertain as to make it impossible to determine the territory intended to be included in the municipality. Therefore it cannot be said that the description is so uncertain as to render the legislative act creating the municipality void and ineffectual. See *State ex rel v. Sammons*, 57 South. 196, decided at the last term. It seems that a fair construction of the description used indicates an intention to include and not to exclude "the west three-fourths (W. $\frac{3}{4}$) of sections two (2) and eleven (11)." This construction comports with the manifest intent of the statute, which is the controlling consideration; and, as so construed, the municipal territory is contiguous.

The judgment is reversed.

TAYLOR, SHACKLEFORD, COCKRELL,
and HOCKER, JJ., concur.

INVESTMENT CO. v. TRUEMAN.

(Supreme Court of Florida. Feb. 5, 1912.)

(Syllabus by the Court.)

1. STATUTES (§ 39*)—ENACTMENT—PUBLICATION.

Although as printed in the General Statutes of 1906, section 1969, relating to discovery in ejectment, refers to sections 1971 and 1972 of such statutes, which have no relevancy whatever to the subject-matter of such section 1969, in the copy of such General Statutes on file in the office of the Secretary of State, which was the one actually adopted by the Legislature, such section 1969 refers to sections 1534 and 1535, which regulate the procedure in regard to interrogatories, and pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

vide that the answers given thereto "shall be evidence against, but not for, the party making them." The section as it appears in the copy filed in the office of the Secretary of State, and not as it appears in the printed and published volume, must govern.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 42; Dec. Dig. § 39.*]

2. DISCOVERY (§ 67*) — INTERROGATORIES — AMENDMENT OF ANSWERS.

Where a defendant in an action of ejectment has, without objection, filed answers to interrogatories propounded under the statutes, seeking a disclosure of the title upon which such defendant relies, which answers are made by the statute evidence against such party, and the defendant waits until the case is actually being tried, and then seeks by motion to amend one of such answers by making a material change therein, no reason or excuse being offered for the delay, such motion is properly denied.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 79; Dec. Dig. § 67.*]

3. ACKNOWLEDGMENT (§ 54*) — DOCUMENTARY EVIDENCE—ADMISSIBILITY.

An objection to the admission in evidence of a certified copy of a deed on the ground that such deed was "not acknowledged as required by law, in that the acknowledgment thereto did not recite that the grantors in such conveyance were known to the officer taking said acknowledgment," is properly overruled, when it appears that the statutes in force at the time such deed was acknowledged contained no such requirement.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 278-289; Dec. Dig. § 54; Evidence, Cent. Dig. §§ 1412, 1420, 1423.]

4. ACKNOWLEDGMENT (§ 53*) — ADMISSIBILITY TO RECORD—STATUTORY PROVISIONS—SUBSTANTIAL COMPLIANCE.

A substantial compliance with the requirements of statutes governing the acknowledgment or proof of the execution of instruments for the purpose of having them recorded is sufficient.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 270-277; Dec. Dig. § 53.*]

5. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR — ADMISSION OF EVIDENCE.

Where the plaintiff and defendant in an action of ejectment claim through a common source of title, errors committed in allowing improper evidence of such common title are harmless.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

6. TRIAL (§ 170*)—TAKING CASE FROM JURY — DIRECTION OF VERDICT.

Where the evidence fully makes out the plaintiff's case, and there is no evidence to contradict or rebut it, a peremptory charge for a verdict in the plaintiff's favor is proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 390-395; Dec. Dig. § 170.*]

Error to Circuit Court, Alachua County; J. T. Willis, Judge.

Action by J. Albert F. Trueman, for the use of Thornton B. Stringfellow, against the Investment Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Robt. E. Davis, for plaintiff in error. W. S. Broome, for defendant in error.

SHACKLEFORD, J. This is an action of ejectment instituted by the defendant in error against the plaintiff in error for the recovery of the possession of certain described real estate. No point is made on the pleadings, the declaration being in the usual form, to which the defendant filed a plea of not guilty. A trial was had before a jury, and, at the close thereof, upon motion of the plaintiff, the trial judge directed the jury to return a verdict in favor of the plaintiff, which was done and judgment entered accordingly. This judgment the defendant seeks to have tested here by writ of error. Nineteen errors are assigned, several of which are expressly abandoned. We shall discuss such of those that are argued which we think merit treatment.

After the filing of the declaration, the plaintiff filed certain interrogatories to an officer of the defendant corporation, thereby seeking a disclosure of its "title and every link thereof," as is provided by section 1969 of the General Statutes of 1906. The defendant, after the filing of its plea, propounded like interrogatories to the plaintiff. Both the officer of the defendant corporation to whom such interrogatories were addressed, and the plaintiff answered all of the interrogatories so respectively propounded, without objection. From such answers of the respective parties it appeared that the plaintiff and defendant claimed the land in dispute through a common source of title. The plaintiff offered in evidence the interrogatories addressed to one of the officers of the defendant corporation together with his replies thereto, to the introduction of which the defendant objected upon certain grounds, which were overruled, and one of the errors assigned is predicated upon such ruling, but it is expressly abandoned, and we think properly so, as the grounds of objection urged were without merit. Later on in the trial, the defendant made the following motion:

"Thereupon counsel for the defendant moves to strike the interrogatories propounded by counsel for plaintiff to the defendant, through B. F. Williamson as vice president and general manager, and for leave to withdraw the answers to said interrogatories upon the ground that there is no authority under the laws of Florida for the issuance of said interrogatories, but that the same are without legal force and effect."

[1] The denial of this motion is assigned as error. Section 1969 of the General Statutes of 1906 reads as follows:

"1969. (1514) Discovery in ejectment.—Either party to a suit in ejectment may avail himself of the proceedings by interrogatories provided by sections 1971 and 1972, to obtain a disclosure from the other party of the title and every link thereof, upon which such other party sues or defends."

Upon turning to sections 1971 and 1972,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

referred to therein, it is obvious that they have no relevancy whatever to the subject-matter of section 1969. Unfortunately for the contention of the defendant, upon examination of the copy of the General Statutes on file in the office of the Secretary of State, which was the one actually enacted and adopted by the Legislature, signed by the President of the Senate and Speaker of the House, and approved by the Governor, we find that the numbers of the sections referred to in the printed section are typographical errors. In the section in such copy so on file reference is made to the proper sections relating to such subject-matter, which appear in such General Statutes as sections 1534 and 1535, which regulate the procedure in regard to interrogatories and provide that the answers given thereto "shall be evidence against, but not for, the party making them." The section as it appears in the copy filed in the office of the Secretary of State, and not as it appears in the printed and published volume, must govern. Ex parte Sam Bush, 48 Fla. 60, 37 South. 177, and Strobhar v. State, 55 Fla. 167, 47 South. 4. Section 1969, which we have copied above, expressly authorizes either party to an action in ejectment to avail himself of the procedure provided for in sections 1534 and 1535, erroneously printed as 1971 and 1972. It necessarily follows that the ruling of the trial judge was proper; therefore this assignment has not been sustained.

[2] Later on in the trial the defendant filed a motion for the amendment of the answer to one of the interrogatories to the granting of which the plaintiff objected upon certain specified grounds. Such motion was denied, and this ruling is assigned as error. We deem it unnecessary to set out either the motion or the grounds of objection interposed thereto. As we have already said, the officer of the defendant company had answered such interrogatory without objection. He was presumed to know the facts concerning which he was interrogated and undertook to answer, and he had the privilege of selecting his own language in which to couch his reply. We would further call attention to the fact that the transcript discloses that the answers to such interrogatories were filed on the 20th of March, 1911; that the defendant filed interrogatories to the plaintiff on the 1st day of May, 1911, to which the plaintiff filed his answers on the 8th day of such month, and yet the defendant waits until 7th day of June, 1911, when the case is actually being tried, and after the interrogatories and answers had been introduced by the plaintiff in evidence, before it sought permission of the court to amend one of its answers. If the defendant had made a mistake in such answer, with the exercise of ordinary care and diligence, it should have discovered that fact before it entered upon the trial of the action. The defendant must be presumed to know the law, and that un-

der the statute the answers to such interrogatories could be introduced in evidence against it, and yet it waits until the trial, when, after some adverse rulings to it on the evidence had been made, it seeks to materially change the answer to one of the interrogatories, no reason or excuse being offered for its delay. See the discussion in Hartford Fire Insurance Co. v. Brown, 60 Fla. 83, 53 South. 838, as to the discretion vested in trial judges as to permitting or refusing amendments of pleadings. What we said there applies with equal force here. As we also said in Wilson v. Johnson, 51 Fla. 370, 41 South. 395: "Courts of justice exist for the administration and furtherance of justice, and in the conduct of trials generally much must be left to the discretion of the trial judge." No abuse of discretion upon the part of the trial judge in refusing to permit the amendment to the answer to the interrogatory has been made to appear to us, consequently this assignment fails.

[3, 4] One of the assignments is based upon the admitting in evidence a certified copy of a deed, offered by the plaintiff, over the objection of the defendant, the ground of objection urged being that such deed was "not acknowledged as required by law, in that the acknowledgment thereto did not recite that the grantors in said conveyance were known to the officer taking said acknowledgment." It is contended that for this reason such deed was not entitled to record; therefore a certified copy thereof was not admissible in evidence under the provisions of section 21 of article 16 of the state Constitution of 1885. Sections 2428, 2482, and 2486 of the General Statutes of 1906 are cited and relied upon. We are of the opinion that this contention is not tenable. The deed in question bears date the 10th day of June, 1885, and was executed and acknowledged in Alachua county, Fla. The statutes in force at that time would seem not to have required that the certificate of the officer taking the acknowledgment of a party executing and acknowledging a deed within this state should recite that such party was known to such officer to be the party described in and who executed the deed, even if it be conceded that such requirement is now in force. See section 10 on page 216 of McClellan's Digest. As was held in Einstein's Sons v. Shouse, 24 Fla. 490, 5 South. 380: "A substantial compliance with the requirements of statutes governing the acknowledgment or proof of the execution of instruments for the purpose of having them recorded is sufficient." The reasoning in this cited case will be found to be well in point in the instant case. The certificate of acknowledgment to the deed in question recites that the persons who are referred to as the grantors "personally appeared" before such officer and acknowledged that they "executed, signed, sealed and delivered the said deed of conveyance for the uses and purposes therein con-

tained and expressed." See, also, *Carpenter v. Dexter*, 8 Wall. 513, 19 L. Ed. 426, approvingly referred to and cited in *Einstein's Sons v. Shouse*, supra. We would also refer to the following decisions of this court: *McCoy v. Boley*, 21 Fla. 803; *Summer v. Mitchell*, 29 Fla. 179, 10 South. 562, 14 L. R. A. 815, 30 Am. St. Rep. 106; *Platt v. Rowand*, 54 Fla. 237, 45 South. 32; *International Kaolin Co. v. Vause*, 55 Fla. 641, 46 South. 3.

[5] Another principle will dispose of some of the assignments adversely to the contention of the defendant. As we have previously said, the plaintiff and defendant claimed the land in dispute through a common source of title. This being true, error in admitting improper evidence of such title is harmless. *Rhodus v. Hefferman*, 47 Fla. 206, 36 South. 572, and *Mansfield v. Johnson*, 51 Fla. 239, 40 South. 196, 120 Am. St. Rep. 159.

[6] A careful examination of all the evidence adduced convinces us that such evidence fully made out the plaintiff's case, and that the jury could not have lawfully found for the defendant. This being true, the trial judge properly directed the jury to return a verdict in favor of the plaintiff, in accordance with the provisions of section 1496 of the General Statutes of 1906. See *Bell v. Niles*, 61 Fla. 114, 55 South. 392.

No reversible error having been made to appear to us, the judgment must be affirmed.

WHITFIELD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

FAULK v. RICHARDSON.

(Supreme Court of Florida. Feb. 5, 1912.)

(*Syllabus by the Court.*)

SALES (§ 339*)—BREACH OF CONTRACT TO PURCHASE—DAMAGES.

When A. contracts with B. to purchase from the latter an automobile at the factory in Michigan, to be delivered in Florida, but before the car is shipped notifies B. to cancel the order, he is not liable for the difference between the contract price and what B. sold the car for in Florida, in the absence of notice of the sale, or that B. refused to cancel the order.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 924, 926; Dec. Dig. § 339.*]

Error to Circuit Court, Santa Rosa County; J. Emmett Wolfe, Judge.

Action by C. W. Richardson against W. H. Faulk. Judgment for plaintiff, and defendant brings error. Reversed.

Cook & McRae, for plaintiff in error. Laird & McGeachy, for defendant in error.

COCKRELL, J. Faulk agreed to purchase through Richardson an automobile from the factory at Lansing, Mich., to be delivered at Pensacola. The contract is alleged to have been an oral one, evidenced by certain correspondence. On April 30, 1910, Faulk who

lived at Chipley, Fla., telegraphed to Richardson at Milton, Fla., to "wire order in for four-cylinder car complete, check to follow." and on the same date wrote, inclosing a check for \$100, as the first payment, and directing that the contract be filled out as agreed upon and sent him for signature; also that he be posted as to when to expect the car. Five days thereafter Faulk writes: "I wired you in ample time to cancel order. I also wrote you a day or so ago, before getting your letter. I am inclosing the contract unsigned." Payment on the check was stopped.

We are not advised what reply, if any, was made by Richardson to this letter of May 5th; but at some time he sold the car in Pensacola for \$315 less than the contract price, but at "the highest price obtainable in the market," and in this action recovered judgment for \$300.

The declaration does not measure the damages by the difference between the contract and the market price, but it is measured by the difference between the contract price and the sale price of this machine in Pensacola. It is not denied that Richardson was notified, as asserted in Faulk's letter of May 5th, made part of the declaration, "in ample time to cancel the order" before the car left the shops in Michigan, nor does it appear that Faulk was ever advised that the car had left the shops until this action was brought. Richardson upon his own showing owed some duty to Faulk to keep him advised of the status, and cannot be permitted to pile up the damages against one whom he had kept in the dark. See *Benjamin on Sales*, p. 807.

For aught that appears, the prompt cancellation of the order at the time Richardson was notified would have entailed but nominal loss to either party, and we have no proper basis on this record for allowing a substantial recovery.

Judgment reversed.

WHITFIELD, C. J., and SHACKLEFORD, TAYLOR, and HOCKER, JJ., concur.

SHAYLOR et al. v. CLOUD.

(Supreme Court of Florida. Feb. 5, 1912.)

(*Syllabus by the Court.*)

1. VENDOR AND PURCHASER (§ 251*)—VENDOR'S LIEN—NATURE OF RIGHT.

A vendor's lien upon land conveyed by him does not result from agreement, but it is a right given by implication of law and enforceable in equity where the vendor is entitled to it.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 624-635; Dec. Dig. § 251.*]

2. VENDOR AND PURCHASER (§ 278*)—VENDOR'S LIEN—ENFORCEMENT—TIME TO SUE.

Where land is conveyed and a note is taken for the purchase price without any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

collateral security or contract mortgage upon the property to secure the payment of the purchase price, the law by implication gives to the vendors a right in the nature of a lien upon the property for the purchase price, which right, if not waived or abandoned, may be enforced in equity at any time before the remedy by action on the note is barred by the statute of limitations.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 776, 777; Dec. Dig. § 278.*]

3. VENDOR AND PURCHASER (§ 278*)—VENDOR'S LIEN—ENFORCEMENT—TIME TO SUE.

A vendor's lien is a right created by law as an incident to the debt, and ceases to be available in equity when the debt is not enforceable at law.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 776, 777; Dec. Dig. § 278.*]

4. VENDOR AND PURCHASER (§ 278*)—VENDOR'S LIEN—ENFORCEMENT—TIME TO SUE.

Where, in a suit to enforce a vendor's implied lien, it clearly appears by the specific allegations of the bill of complaint admitted by the demurrer that the remedy for recovery of the debt for the purchase price of land conveyed is barred by the statute of limitations, the vendor's implied lien will not be enforced; and, in the absence of other equities to sustain the bill of complaint, it is subject to appropriate demurrer.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 776, 777; Dec. Dig. § 278.*]

Appeal from Circuit Court, Alachua County; J. T. Wills, Judge.

Bill in equity by S. T. Shaylor, as executor, and others, against J. L. Cloud. From an order sustaining a demurrer to the bill, complainants appeal. Affirmed.

T. B. Ellis, Jr., and Geo. U. Walker & Son, for appellants. F. Y. Smith, for appellee.

WHITFIELD, C. J. It appears that in March, 1903, John N. D. Cloud conveyed certain land to J. L. Cloud, the consideration being \$1,100, for which a note was given by J. L. Cloud to John N. D. Cloud payable January 1, 1905. John N. D. Cloud died in 1904. By will he bequeathed the land and the note to his mother, Nancy J. Cloud, who being a resident of Georgia and non compos mentis, B. F. Langford was there appointed guardian of her person and property. S. T. Shaylor qualified in August, 1904, as executor of the will of John N. D. Cloud. The note for the purchase price not having been paid, this suit was instituted March 23, 1911, by S. T. Shaylor as executor, Nancy J. Cloud, by her next friend, and B. F. Langford, as her guardian, against J. L. Cloud to enforce a vendor's implied lien upon the land for the unpaid purchase price of it, represented by the note given by the vendee to the vendor at the time of the conveyance.

A demurrer to the bill of complaint upon the specific grounds of laches, and that the note was barred by the statute of limitations and the vendor's lien being merely an inci-

dent to the debt is also barred, was sustained with leave to amend, and the complainants appealed from such order, which is assigned and argued as error.

By section 1725 of the General Statutes (section 1294, Revised Statutes), an action upon any contract, obligation, or liability founded upon an instrument of writing not under seal must be commenced within five years. This suit is to enforce a vendor's lien upon land that is raised only by implication of law, and the suit was not commenced within five years from the date of the conveyance of the land or from the date of the maturity of the note not under seal given for the purchase price.

[1] A vendor's lien upon land conveyed by him does not result from agreement, but it is a right given by implication of law and enforceable in equity while the vendor is entitled to it. See *Johnson v. McKinnon*, 45 Fla. 388, 34 South. 272; *McKinnon v. Johnson*, 54 Fla. 538, 45 South. 451.

[2, 3] Where land is conveyed and a note is taken for the purchase price without any collateral security or contract mortgage upon the property to secure the payment of the purchase price, the law by implication gives to the vendors a right in the nature of a lien upon the property for the purchase price, which right, if not waived or abandoned, may be enforced in equity at any time before the remedy by action on the note is barred by the statute of limitations. But, where the remedy by action at law on the note is barred by the statute of limitations, the vendor's lien given by implication of law will not be enforced in equity. The lien is a right created by law as an incident to the debt, and ceases to be available in equity when the debt is not enforceable at law. A vendor can ordinarily have no greater right by implication of law than he has by contract when the implied right is an incident to the contract right. In this case no collateral security or mortgage was taken, and the note given for the purchase price was not renewed or put in judgment so as to continue the right to recover the debt.

[4] Where, in a suit to enforce a vendor's implied lien, it clearly appears by the specific allegations of the bill of complaint admitted by the demurrer that the remedy for recovery of the debt for the purchase price of land conveyed is barred by the statute of limitations, the vendor's implied lien will not be enforced; and, in the absence of other equities to sustain the bill of complaint, it is subject to appropriate demurrer. See 2 *Jones on Liens* (2d Ed.) § 1099; 2 *Warvelle on Vendors*, § 709; 29 *Am. & Eng. Ency. Law* (2d Ed.) 759; *Trotter v. Erwin*, 27 *Miss.* 772; *Stephens v. Shannon*, 43 *Ark.* 464; *Borst v. Corey*, 15 *N. Y.* 505; *Howard v. Windom*, 86 *Tex.* 560, 26 *S. W.* 483.

A contrary rule in Maryland seems to be based on analogy to the English statute of limitations as to the right of entry. See *Baltimore & O. R. R. Co. v. Trimble*, 51 Md. 99. The Alabama cases and possibly others do not accord with the decided weight of authority. In *Browne v. Browne*, 17 Fla. 607, 35 Am. Rep. 96, and *Jordan v. Sayre*, 24 Fla. 1, 3 South. 329, the lien was created by a mortgage under seal, and the court held that, there being in the mortgage an express promise to pay the debt, the statute of limitations respecting instruments under seal is applicable where the contract mortgage is being foreclosed, even though the note evidencing the debt is barred by the five-year statute of limitation.

The order is affirmed.

TAYLOR, SHACKLEFORD, COOKRELL,
and HOCKER, JJ., concur.

SPRINGSTEAD et al. v. CRAWFORDVILLE STATE BANK.

(Supreme Court of Florida. Feb. 5, 1912.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 481*)—ACTIONS ON NOTE—PLEADING—DEMURRER.

Where, in an action brought by indorsees of a note, there is a plea alleging a failure of consideration for the note, and breach of warranty, of which the indorsees had knowledge at the time of the indorsement to them, the plea is not obnoxious to demurrer because of the failure to allege such knowledge.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1530-1532, 1559-1561; Dec. Dig. § 481.*]

2. BILLS AND NOTES (§ 460*)—ACTION ON JOINT NOTE—DISMISSAL.

Where an action is brought on a joint and several note against all the makers, who appeared and pleaded, and in the midst of the trial the plaintiff elected to dismiss the action as to two of the makers, the effect of this action was to discontinue the suit as to all the defendants, because the plaintiff might have sued them all jointly, or each of them severally, but might not sue a part of them jointly, under the circumstances mentioned.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1434-1443; Dec. Dig. § 460.*]

Error to Circuit Court, Hernando County; W. S. Bullock, Judge.

Action by the Crawfordville State Bank against J. W. Springstead and others. Judgment for plaintiff, and defendants bring error. Reversed, with directions.

Davant & Davant, for plaintiffs in error.
F. B. Coogler, for defendant in error.

HOCKER, J. In 1908 the defendant in error as plaintiff brought an action of assumpsit in the circuit court of Hernando county against the plaintiffs in error as defendants, and M. P. Mickler and H. C. Mickler filing the following amended declaration:

"The Crawfordville State Bank, a corporation organized and existing under the laws of the state of Indiana, plaintiff, by its undersigned attorney, sues J. W. Springstead, O. W. Rice, A. F. Burns, J. C. Burwell, S. E. Mickler, W. A. Fulton, W. P. Tucker, W. Hop Smith, M. P. Mickler, H. C. Mickler, and W. R. Ayers, defendants, in an action of assumpsit, and thereupon plaintiff alleges and says:

"That the defendants did on the 22d day of January, A. D. 1906, according to the custom and usage of merchants, make their certain promissory note in writing, commonly called a negotiable note, the date whereof is the day, month, and year aforesaid, and then delivered the same to J. Crouch & Son, a copartnership composed of Jephtha Crouch and George Roland Crouch, whereby for value received they jointly and severally promised and agreed to pay to the said J. Crouch & Son or their order, on October 1, 1907, after date thereof, the sum of one thousand (\$1,000.00) dollars, together with interest from date at the rate of 8 per cent. per annum until paid, interest payable annually, together with reasonable attorney's fees if suit was brought on said note, payable at Hernando State Bank of Brooksville, Fla. And the plaintiff says that the said J. Crouch & Son afterwards and before maturity indorsed and delivered the said note in due course, while the same was unpaid, to the said plaintiff. And the said plaintiff avers that afterwards, to wit, on the 1st day of October, 1907, when, according to the tenor and effect thereof, the said note became due and payable, the same was presented and shown for payment at the Hernando State Bank of Brooksville, Florida, but the said defendants did not, nor did either of them, nor did any other person, then pay the sum of \$1,000 and interest as specified in the said note. Wherefore plaintiff brings this suit and claims the sum of one thousand dollars with interest thereon at the rate of 8 per cent. per annum from the 22d day of January, 1906, until paid, interest payable annually, together with a reasonable attorney's fee for bringing this suit. Yet the said defendants, although often requested, have not, nor has either of them, as yet paid the plaintiff the said sum of \$1,000 as above demanded, or any part thereof, or the interest thereon as aforesaid, but the same to pay have hitherto wholly neglected and refused, and still do neglect and refuse to pay the same, to the damage of the said plaintiff \$2,000."

After several pleas had been filed and demurrers thereto sustained, the defendants filed the following plea:

"And for amendment to their third plea the defendants say:

"That the note sued on was given by them to J. Crouch & Son in consideration of a cer-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

tain stock-horse or stallion, to the said defendants sold and delivered by J. Crouch & Son, the payee of the said note, on or about the 22d day of January, 1906, with the contemporaneous agreement and guaranty of the said payee with the said defendants that the said note should be surrendered by the said payees to the said defendants and the said horse taken back by the said payees if less than 60 per cent. of the breeding service of the said stallion during the breeding season next preceding the maturity of the said note should prove effectual impregnation, and the said payees, as part of the contract of sale and consideration of said note, then represented and guaranteed that the said stallion was vigorous, fit, and reliable and capable for breeding purposes in the said ratio of 60 per cent. of general service in breeding; and the said stallion, with full knowledge of the said payees that the said stallion was purchased by the defendants for such breeding purposes, was accepted and purchased by the said defendants from the said payees, upon said representations and guaranty, and the said defendants trusting in the said representations and guaranty, by the said payees of the said breeding capacity, fitness, and vigor for service of the said stallion, and the said stallion was immediately put into general service for such breeding purpose by the said defendants, but the said stallion was not vigorous, fit, and reliable or of the capacity and service for breeding purposes as represented and guaranteed by the said payees, and in the said service was unequal to the said representations and guaranty during the said season, and more unequal, incapable and unfit thereto since, in that 60 per cent. of the breeding service of the said stallion during the said breeding season next preceding the maturity of the said note did not prove effectual impregnation, and that since the said breeding season next preceding the said maturity of the said note a less percentage of impregnation has been effected by him, and that the said stallion was and is altogether useless to the defendants; and the defendants notified the said payees of the said unfitness and incapacity of the said stallion for the purpose of purchase and acceptance aforesaid—that is, for the purpose of breeding—and of the failure and breach of the said representations and guaranty as soon as the same was discovered by and known to the defendants and before maturity of the said note, to wit, the ——— day of June, 1907, with demand for surrender of the said note and offer thereon to return the said stallion to the said payees, for which the defendants are still willing and ready, but the said payees neglected and refused to comply with defendants' said demands, and defendants say that the consideration for the said note has wholly failed. And the plaintiff, conducting a banking business at Crawfordville,

in the state of Indiana, for the payees, with notice and knowledge of the said agreement, guaranty, sale, purchase, and acceptance, failure of considerations and notice thereof aforesaid, received and accepted the said note by indorsement of the said payees at Crawfordville aforesaid, before the maturity of the said note and during the period of guarantee aforesaid, and colluded with the said payees to avoid the effect of the said representations and guaranty of the said payees and pretended to be the indorsee in due course, well knowing the consideration of the said note aforesaid, and that the same had wholly failed as aforesaid, and intending to maintain this suit notwithstanding, and the said plaintiff had notice and knowledge of the said facts at the time of the commencement of this suit, and brought said suit with such knowledge and notice. The defendants therefore aver that the consideration for the said note has wholly failed, and plaintiff should not recover."

A previous plea of substantially the same import had been filed and a demurrer thereto sustained. A demurrer to the last-mentioned plea was also filed on the grounds that it was irrelevant and immaterial, indefinite, frivolous, uncertain, and constituted no defense to the suit. This demurrer was sustained, and this ruling is assigned as error.

A trial was had resulting in a verdict for the defendants. A new trial was granted, and on the second trial there was a verdict and judgment for the plaintiff. This judgment is here for review on writ of error.

[1] To sustain the ruling of the court below on the demurrer to the plea referred to, the defendant in error in its brief contends that the plea does not show knowledge on its part of the failure of consideration and breach of warranty at the time it purchased the note. It seems to us that the plea very clearly states that at the time the plaintiff took the note by indorsement it had notice and knowledge of the agreement, guaranty, sale, and purchase of the stallion referred to, and of the failure of the consideration for which the note was given.

It seems to us with the light before us the demurrer should not have been sustained. But, apart from this fact, it appears that during the progress of the trial objection was made to the introduction of the note in evidence because of an alleged variance between it and the declaration. Thereupon the plaintiff took a nonsuit as to two of the parties jointly sued, viz., S. E. Mickler and H. C. Mickler and dismissed the suit as to them. This was objected to by the defendants, and the contention there and here is that the effect of this action was to discontinue the whole case, as the plaintiff had elected to sue all the defendants jointly.

When the plaintiff discontinued the action as to the two Micklers, we think it clear that, under the practice prevailing in this

state, the circuit judge should have dismissed the whole case. The note was a joint and several one. The plaintiff had the right to sue them all jointly or any one or all of them severally; but an action against some of them only is subject to a plea in abatement. In the midst of the trial it elected to dismiss as to the Micklers, who had pleaded, not personal pleas, but jointly with the others and this made the action a joint one against a part of the makers. If the plaintiff had dismissed the action against all the makers except one, it would then have been changed into a several suit against that one, and that might have been permissible. But we can find no statutory authority in this state for the course that was pursued, and it is not supported by the common-law practice. 6 Ency. Pl. & Pr. 857; 15 Ency. Pl. & Pr. 553; Hale v. Crowell's Adm'x, 2 Fla. 534, 50 Am. Dec. 301; Somers v. Florida Pebble Phosphate Co., 50 Fla. 275, 39 South. 61; Rentz v. Live Oak Bank, 61 Fla. 403, 55 South. 856.

The judgment below is reversed, with direction that the case be dismissed.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, and COCKRELL, JJ., concur.

JOHNSON v. DU PONT.

(Supreme Court of Florida. Feb. 5, 1912.)

(Syllabus by the Court.)

1. EJECTMENT (§ 109*) — PROCEEDINGS — AFFIRMATIVE CHARGE.

Where a plaintiff in ejectment shows title and right of possession, and no title or right is shown on which the jury could lawfully find for the defendant, an affirmative charge for the plaintiff is proper.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 312; Dec. Dig. § 109.*]

2. TAXATION (§ 708*)—VESTED RIGHTS—TAX SALES.

The provision of the statute (Laws 1893, c. 4115, § 65) that "where any purchaser of any real estate, situated in this state prior to the passage of this act, has not entered into and taken actual possession of the same, he shall, within one year from the passage of this act, bring suit for the recovery of actual possession of the real estate described in such tax title, and in default thereof, said tax title shall become void and of no effect," cannot lawfully divest a title or put a material burden upon the title already vested in a purchaser of a tax deed under the law before the enactment of the quoted provision.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1291-1297; Dec. Dig. § 708.*]

3. TAXATION (§ 742*) — TAX TITLES — PURCHASE OF CERTIFICATES.

The provision of the statute (Laws 1887, c. 3681, § 56) that the purchaser of a tax sale certificate "shall purchase all the certificates held by the state" relates to the purchase of certificates from the state, and not

to the issue of a tax deed on a certificate issued at the sale to an individual.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1481-1484; Dec. Dig. § 742.*]

4. TAXATION (§ 785*)—TAX TITLES—PRIORITY.

Even where a tax deed is subject to an outstanding tax certificate, if the latter is void, the tax deed is not affected by a deed subsequently issued on the void certificate.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1553; Dec. Dig. § 785.*]

5. TAXATION (§ 750*)—TAX DEED — NOTICE OF APPLICATION.

Where the notice of an application for a tax deed required by the statute is not given, the deed is ineffectual as title.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1497; Dec. Dig. § 750.*]

Error to Circuit Court, Duval County; R. M. Call, Judge.

Action by Ada Du Pont against James E. Johnson. Judgment for plaintiff, and defendant brings error. Affirmed.

Young & Adams and F. T. Myers, for plaintiff in error. Cockrell & Cockrell and Geo. Couper Gibbs, for defendant in error.

WHITFIELD, C. J. Ada Du Pont recovered certain land in an action of ejectment and the defendant J. E. Johnson took writ of error. The court refused to direct a verdict for the defendant, and directed a verdict for the plaintiff.

[1] Section 1496 of the General Statutes provides that: "If * * * upon the conclusion of the argument of counsel in any civil case, after all the evidence shall have been submitted, it be apparent to the judge of the circuit court, or county court, that no evidence has been submitted upon which the jury could lawfully find a verdict for one party, the judge may direct the jury to find a verdict for the opposite party."

If the plaintiff showed title to the land which gave him a right to the possession, and the defendant showed no title or right on which the jury could lawfully find for the defendant, the giving of the affirmative charge for the plaintiff was proper under the statute.

[2] A tax deed dated September 7, 1889, based upon tax certificate issued in 1888 to an individual, was offered by the plaintiff as the basis of her title, and was admitted in evidence over the defendant's objection that no proof of possession under the deed was shown. It is contended that proof of possession was necessary because the revenue law of 1893 contains a provision that "where any purchaser of any real estate, situated in this state prior to the passage of this act, has not entered into and taken actual possession of the same, he shall, within one year from the passage of this act, bring suit for the recovery of actual possession of the real estate described in such tax title, and in default thereof, said tax title

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

shall become void and of no effect." Whatever may be the legal meaning and effect of this provision, it cannot divest a title or put a material additional burden upon a title already vested in a purchaser of a tax deed under the law before the enactment of the above-quoted provision. See *Hull v. State*, 29 Fla. 79, 11 South. 97, 16 L. R. A. 308, 30 Am. St. Rep. 95; *Starks v. Sawyer*, 56 Fla. 596, 47 South. 513.

When the statute of 1893 was enacted, the title of the plaintiff under her tax deed was not subject to the burden of a suit for the recovery of actual possession of land described in the tax deed, if the land was not in the adverse possession of another, and the statute cannot impose this burden or as an alternative render the vested title "void and of no effect." While the Legislature may, subject to constitutional provisions, prescribe a reasonable limitation within which existing rights of action may be enforced in the courts, it cannot under the Constitution impair or unlawfully burden title to property already vested in individuals.

[3, 4] It was not necessary to show possession under the tax deed before it could be introduced in evidence, as it was executed in the name of the state, and the subsequent quoted statute did not make the deed void, if it was valid when it was issued. The provision in the act of 1887, requiring that the purchaser of a tax sale certificate "shall purchase all the certificates held by the state," relates to the purchase of the certificates from the state, and not to the issue of a tax deed on a certificate issued at the sale to an individual. There was no provision that a tax certificate purchased from the state and a tax deed issued thereon would be affected by the failure to purchase all the certificates held by the state. The plaintiff's tax deed dated September 7, 1889, is a conveyance of the land by the state subsequent to the date of the certificate issued to the state in 1880 and transferred to the defendant on which his deed was issued in 1911. The statute did not then as now require the tax deed to be made subject to unpaid taxes, and, even if plaintiff's tax deed was subject to the tax certificate on which defendant's tax deed was issued, if the latter is void, the plaintiff's title under her tax deed is not affected by the defendant's tax deed.

[5] The tax deed offered by the defendant bearing date May 1, 1911, based upon a tax certificate issued in 1880 to the state and by it sold to an individual presumably in 1911, was admitted in evidence without objection, but, as there was evidence that the notice required by section 575, General Statutes, to be given of the application for the tax deed was not received by the owner of the land or by the person "last paying taxes on said property," the prima facie effect of the tax deed and its statutory recitations were de-

stroyed, and, as the giving of the notice as required by the statute was not shown by the party offering the deed, it is ineffectual as title. See *Clark-Ray Co. v. Williford*, 56 South. 938, and *Saunders v. Collins*, 57 South. 342, decided at the last term. Besides this, the assessment on which this deed is based is apparently fatally defective since it appears not to have been made in the name of the owner or occupant or as unknown as required by the statute then in force.

A quitclaim deed purporting to be from the heirs of the original owner of the land was introduced in evidence by the defendant, but it showed no title in the defendant as against the tax deed of the plaintiff.

The defendant showed no title by adverse possession, and the court did not err in directing a verdict for the plaintiff. *Bell v. Niles*, 61 Fla. 114, 55 South. 392.

The judgment is affirmed.

TAYLOR, SHACKLEFORD, COCKRELL,
and HOCKER, JJ., concur.

GARRETT v. FERNAULD.

(Supreme Court of Florida. Feb. 6, 1912.)

(Syllabus by the Court.)

1. MORTGAGES (§ 298*)—ASSIGNMENT—PAYMENTS TO ORIGINAL MORTGAGEE—FORECLOSURE.

Where B. executes to W. a note and a mortgage upon land to secure its payment, and W. assigns the note and mortgage before maturity to F., and B. thereafter conveys the land to G., who pays W. the balance he claims to be due on the note, but does not procure the surrender or cancellation of the note, G. cannot assert his payment to W. in defense of a foreclosure suit by F., who is the holder of the note and mortgage, there being no evidence that W. was authorized by F. to receive the payment made to him by G., or that W. was authorized to cancel the mortgage of record as he did after the conveyance from B. to G. In such a case the loss to G. results from his own failure to have the note surrendered or to ascertain its real owner.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 836-863; Dec. Dig. § 298.*]

(Additional Syllabus by Editorial Staff.)

2. MORTGAGES (§ 244*)—ASSIGNMENTS—"CONVEYANCE OF INTEREST IN LAND"—"TRANSFER OF INTEREST IN LAND"—"INTEREST IN LAND."

An assignment of a mortgage lien is not a "conveyance" or a "transfer" of "any interest" in land covered by the mortgage within the meaning of section 2480, Gen. St. 1906, relating to recording of conveyances and transfers of lands or interests therein.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 633-655; Dec. Dig. § 244.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1575-1584; vol. 8, p. 7619; vol. 4, pp. 3692-3709; vol. 8, pp. 7064-7070, 7691, 7819.]

Appeal from Circuit Court, Escambia County; J. Emmett Wolfe, Judge.

Bill by E. A. Fernauld against J. R. Garrett. Decree for complainant, and defendant appeals. Affirmed.

Jones & Pasco, for appellant. Reeves & Watson, for appellee.

WHITFIELD, C. J. This appeal is from a decree in a foreclosure proceeding. It appears that in June, 1907, L. C. Bannerman executed his note for \$1,000 payable two years after date to the order of D. Hale Wilson, with interest at the rate of 8 per cent. per annum from date until paid; that a mortgage on certain land was given to secure the payment of the note; that the mortgage was duly recorded June 17, 1907; that thereafter, during the year 1908, before the maturity of the note, the said D. Hale Wilson, for a valuable consideration, indorsed the note to E. A. Fernauld, and executed to her an assignment of the said mortgage; that on July 16, 1909, Bannerman and wife conveyed the land to Joseph R. Garrett; that the assignment of the mortgage by Wilson to Fernauld was never recorded; that, after the assignment of the note and mortgage by Wilson to Fernauld, the said Wilson, without the knowledge and consent of Fernauld and without authority from Fernauld, on October 2, 1909, canceled the mortgage of record; that, when Bannerman conveyed to Garrett, he then on July 16, 1909, paid to Wilson what he, Wilson, said was the balance due on the note, but the note was not surrendered, and Wilson thereupon promised to cancel the mortgage, which he did in fact do on October 2, 1909; that the interest on the note was paid to some time in 1910, and the principal of the note had not been paid to Fernauld, the assignee of the note and mortgage, when foreclosure proceedings were begun. Garrett, the purchaser of the land from Bannerman, resists the foreclosure decree upon the theory that he paid to Wilson, the original mortgage, the balance due on the past due note when he purchased the property, and, as he had no actual or constructive notice that the note and mortgage had been assigned, he took his title from Bannerman discharged of the mortgage lien. The complainant, appellee here, in whose favor the foreclosure decree was rendered, insists that the decree is proper because the assignment of the mortgage was not by statute required to be recorded and the purchaser of the land should have ascertained who was then the holder and owner of the note and mortgage and entitled to the payment of the same.

The statute provides that "no conveyance, transfer, or mortgage of real property, or of any interest therein, * * * shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law." Section 2480, Gen. Stats. of 1906. The stat-

ute also provides that the clerk of the circuit court shall keep "a mortgage and lien assignment book, in which shall be recorded all assignments of mortgages or statutory liens presented to him for record. No assignment shall be entered elsewhere than in such book, and any assignment shall, to entitle it to record, be in writing and duly acknowledged in the manner provided for the acknowledgment of deeds. He shall enter a note of assignment upon the margin of the record of the mortgage or lien."

[2] An assignment of a mortgage lien is not "a conveyance" or a "transfer" of "any interest" in land covered by the mortgage, but is only an assignment or transfer of the lien created by the mortgage; and the recording statute as first above quoted is not applicable. When the purchaser of the land undertook to pay off the mortgage indebtedness thereon without having the note surrendered to him, he thereby left the note outstanding with the mortgage as an incident thereto. The subsequent cancellation of the record of the mortgage by Wilson, the original mortgagee, was apparently unauthorized, and had no effect on the outstanding unpaid note or on the mortgage as a security for the note, since the note and mortgage, though past due, were unpaid in the hands of one who for a valuable consideration took them before the principal of the note was due. It appears that the interest on the note was paid after its assignment, and even after the purchase of the property by Garrett. While the statute provides for the record by the clerk of the circuit court of such assignments of mortgages as are "presented to him for record," it does not require such a record to be made, and does not subordinate such an assignment to the rights of a subsequent purchaser for value of the land who takes without notice of the assignment when it is not recorded. The assignee of the mortgage may reasonably have had the assignment recorded, but, as the purchaser has not used due diligence in protecting his rights, he cannot justly complain of the failure to record the assignment of the mortgage. In this case the purchaser did not when he paid the balance due on the note require the surrender to him or the cancellation of the note, or even ascertain the real owner of the note, or the authority of Wilson to act for the owner of the note, and it was his own fault that caused him injury. See *Scott v. Taylor*, 58 South. 30. This is not a case where one of two equally innocent parties must suffer by the act of a third person. It is a case where a purchaser of land suffers because he did not require the surrender or cancellation of, or proof of the satisfaction by or from, the real owner of the mortgage obligations of which he knew, thereby causing a loss to himself. The loss was caused, not by the failure to record the assignment of the mortgage, but

by the failure to have the note surrendered or to ascertain whether it had been assigned before its maturity.

The decree is affirmed.

TAYLOR, SHACKLEFORD, COCKRELL,
and HOOKER, JJ., concur.

STATE ex rel. RAILROAD COM'RS v.
LOUISVILLE & N. R. CO. et al.

(Supreme Court of Florida. Feb. 6, 1912.)

(Syllabus by the Court.)

1. COMMERCE (§ 62*)—CARRIERS—REGULATION.

The safety and comfort of passengers whether intrastate or interstate, or both, may be provided for by state authority when not in conflict with lawful regulations of Congress; and the safety and comfort of passengers may not be subordinated to freight traffic.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 81; Dec. Dig. § 62.*]

2. CARRIERS (§ 18*)—DEMURRER—ADMISSIONS.

Averments of railroad companies as to the adequacy of the public service being performed by them and the future effect of an order relative to such service made by state authority may be mere conclusions not admitted by a demurrer, or mere opinions that may not be sustained by experiments or experience.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 16-24; Dec. Dig. § 18.*]

3. CARRIERS (§ 18*)—REGULATION—RAILROAD COMMISSIONERS—REVIEW OF ORDERS.

The railroad commissioners are state officers charged specially with the governmental function of making just and reasonable regulations for the transportation of intrastate passengers and freight by railroads operating in the state, and their findings and orders should be accorded the force and weight due to such a tribunal under our system of government, when the invalidity of the action taken is not made to clearly appear in the authority exercised, or in mistaken application of law, or in regulations adopted or enforced arbitrarily and illegally, or without appropriate facts to support them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 16-24; Dec. Dig. § 18.*]

4. CONSTITUTIONAL LAW (§ 297*)—REGULATION—POWER TO REGULATE.

The burdens of lawful governmental regulations are assumed by common carriers in undertaking to render the public service, and such burdens are not invasions of property rights.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 832-834; Dec. Dig. § 297.*]

5. RAILROADS (§ 218*)—REGULATION—POWER TO REGULATE.

The franchises and privileges which the state permits railroad companies to use in rendering the public service carry with them the absolute, primary, and imperative duty to render an adequate service reasonably suited to the needs of the public to be served, as well as the obligation and duty to observe all lawful governmental regulations of the public service undertaken.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 715; Dec. Dig. § 218.*]

6. RAILROADS (§ 218*)—REGULATION—VALIDITY.

The law raises an implied duty of railroad common carriers to provide adequate facilities for the safe and comfortable transportation of passengers, that is, not subordinate to the duty of transporting freight.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 715; Dec. Dig. § 218.*]

7. CARRIERS (§ 11*)—REGULATION—COMPENSATION FOR SERVICE.

A reasonable compensation for service rendered the public is a property right of a common carrier, but this does not necessarily insure a full return for values used in rendering the service.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

8. CARRIERS (§ 11*)—REGULATION—COMPENSATION FOR SERVICE.

Whether a reasonable compensation produces a return for property, management, and labor used by a common carrier in rendering its public service depends upon circumstances; and the risks and burdens of the contingency are assumed by the carrier in voluntarily undertaking to render the public service.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

9. CARRIERS (§ 11*)—REGULATION—POWER TO REGULATE.

The prime duty of a common carrier to render a safe and reasonably adequate service is required by law to be effectually performed when possible whether such performance is profitable or not.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

10. RAILROADS (§ 227*)—REGULATION—TRAIN SERVICE.

Where the public duty of a common carrier of passengers and freight is assumed by a railroad company using public franchises, the state has ample authority under its reserved police powers to require the carrier to transport passengers in trains separate from freight trains.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.*]

11. RAILROADS (§ 227*)—REGULATION—TRAIN SERVICE.

Railroad companies may be required by lawful governmental regulations to transport passengers and freight in separate trains where it is necessary for the safety of passengers, without reference to the fact that the particular service may not be profitable, where the particular requirement is not of itself so unreasonable as to be an arbitrary burden put upon the carrier.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.*]

12. MANDAMUS (§ 180*)—PEREMPTORY WRIT—INSUFFICIENCY OF DEFENSE.

Where an amended return presents no sufficient defense to an alternative writ of mandamus, a peremptory writ may be awarded.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 401-405; Dec. Dig. § 180.*]

(Additional Syllabus by Editorial Staff.)

13. CARRIERS (§ 11*)—"OPERATING EXPENSES."

The "operating expenses" of a railroad include the value of the use of property that is used but not consumed in rendering the service, as well as the value of labor and manage-

ment used, and of property used and consumed, in rendering the service.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 11.*

For other definitions, see Words and Phrases, vol. 6, p. 4992.]

Mandamus by the State, on the relation of the Railroad Commissioners, to the Louisville & Nashville Railway Company and another. Demurrer to amended return to alternative writ overruled, and peremptory writ granted.

F. M. Hudson, for relators. W. A. Blount and W. J. Oven, for respondents.

WHITFIELD, C. J. Respondents, by leave of court, filed the following amendment to the return as set out in the statement to the former opinion herein (57 South. 175):

"The respondents, by leave of the court first had and obtained, amend their return heretofore filed as follows:

"Amend paragraph 8 so that it shall read as follows:

"(8) That the Louisville & Nashville Railroad Company has operated and managed its roads lying in the state of Florida, including the line between Pensacola and River Junction, with the utmost economy consistent with the safety and despatch of its passengers, and with the safe and prompt handling of its freights; that it has purchased supplies and equipments of the class and character required as cheaply as it could get them; that its employes are paid as low wages as they would be employed at, taking into consideration their efficiency and ability to handle the trains of the said Louisville & Nashville Railroad Company with despatch and safety; that all expenditures made in connection with and upon the said lines of railroad have been made as cheaply as possible; yet that by and from the operation of the said road conducted in the best manner known to the respondent, and, as it believes, in the most economical manner possible, the respondent has not been able, by the operation of its said lines in Florida, to receive from its business on said roads, and thereby to realize, a sum sufficient to pay its operating expenses, and interest exceeding 3 per cent., or any fair and reasonable return, upon the actual value of the property of the said Louisville & Nashville Railroad Company, devoted to and used in the public service as a common carrier in Florida of interstate and intrastate passengers and freight, or even upon the actual value of that proportion of said property devoted to and used in the public service as a common carrier in Florida of intrastate commerce, passengers, or freight; that money cannot be borrowed in the state of Florida for ordinary purposes for use in industrial enterprises at less than from 7 per cent. to 8 per cent. and for use in

large enterprises, like the construction and improvement of railroads, for less than 5 per cent. to 6 per cent., and that the profits ordinarily made by industrial enterprises in Florida usually exceed 8 per cent.; that the legal rate of interest in the state of Florida allowed upon judgments and decrees, and upon contracts where no rate is stipulated therein, is 8 per cent., and that if the said schedule directed by order No. 346 be put into operation, and the said freight cars eliminated from trains Nos. 1 and 4 of the said Louisville & Nashville Railroad Company, the cost of operating under such schedule, and the loss of the fast freight business, or the cost of operating a special fast freight train, would reduce the net receipts of the said respondent from the operations of its said lines, and would render it still more unable to realize from said operation sufficient to pay the cost of operation of said lines, and any interest exceeding 3 per cent., or any fair and reasonable return as hereinbefore in this paragraph set forth.

"And the said respondent says that the putting into effect of the said order 346, producing the said result, would be a deprivation by the state of Florida of the respondent of its property, without due process of law, and in violation of the provisions of the fourteenth amendment of the Constitution of the United States, and would deny to the said respondent the equal protection of the law, and thereby violate the provisions of the said constitutional amendment."

"Amend paragraph 10 so that it shall read as follows:

"(10) That the Seaboard Air Line Railway has operated and managed its roads lying in the state of Florida, including the line between Jacksonville and Pensacola, with the utmost economy, consistent with the safety and despatch of its passengers, and with the safe and prompt handling of its freights; that it has purchased supplies and equipment of the class and character required as cheaply as it could get them; that the employes are paid as low wages as they would be employed at, taking into consideration their efficiency and ability to handle the trains of the said railway with despatch and safety; that all expenditures made in connection with and upon the said lines of railroad have been made as cheaply as possible; yet that by and from the operation of the said road conducted in the best manner known to this respondent, and, as it believes, in the most economical manner possible, the said respondent has not been able, by the operation of its said lines in Florida, to receive from its business on said roads, and thereby to realize, a sum sufficient to pay its operating expenses, and any interest, or any fair and reasonable return, upon the actual value of the property of the said Sea-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

board Air Line Railway devoted to and used in the public service, as a common carrier in Florida, of interstate and intrastate passengers and freight, or even upon the actual value of that proportion of said property devoted to and used in the public service as a common carrier in Florida of intrastate commerce, passengers, or freight; and that if the said schedule directed by said order No. 346 were put into operation, and the said freight cars eliminated from trains Nos. 78 and 79 of the said Seaboard Air Line Railway, the cost of operating under said schedule, and the loss arising from the loss of the fast freight business, or the cost of operating a special fast freight train, would reduce the net receipts of the said respondent from the operation of its said lines, and would render it still more unable to realize from said operation sufficient to pay the cost of operation of said lines and any interest, or any fair and reasonable return, as hereinbefore in this paragraph set forth.

"And this respondent says that the putting into effect of the said order No. 346, producing the said result, would be a deprivation by the state of Florida of the said respondent of its property without due process of law, and in violation of the provisions of the fourteenth amendment of the Constitution of the United States, and would deny to the said respondent the equal protection of the law, and thereby violate the provisions of the said constitutional amendment."

"Amend paragraph 13, so that it shall read as follows:

"(13) That the number of passengers shown in paragraph 7 to have traveled on the line of said Louisville & Nashville Railroad Company between Pensacola and River Junction during the week mentioned in said paragraph was approximately the average number of passengers traveling per week over said line during the year next preceding said week. That the passenger travel over the lines of the respondents between Jacksonville and Pensacola is not large, and that the respondents now operate upon said lines between said points two fast trains, one each way, daily, of which trains No. 3 of the Louisville & Nashville Railroad Company leaves Pensacola at 6:45 a. m., and, becoming train No. 76 of the Seaboard Air Line Railway at River Junction, reaches Jacksonville at 7:30 p. m., and train No. 77 of the Seaboard Air Line Railway leaves Jacksonville at 8:05 a. m., and, becoming train No. 2 of the Louisville & Nashville Railroad Company at River Junction, reaches Pensacola at 9:45 p. m., which affords adequate facilities for fast travel for all passengers traveling over and through either of said points to the other, and for all passengers traveling on said lines requiring, or desiring, fast travel.

"That the inconvenience to the way passengers on the lines of the respondents and the injury to them and to the communities,

and to respondents, as hereinbefore set forth, will result from the change of schedule proposed by order No. 346, unless respondents put into operation local trains on the said lines with schedules the same, or substantially the same, as those now in force as to trains 1 and 4 on the Louisville & Nashville Railroad Company's line, and 78 and 79 on the Seaboard Air Line Railway's line. That the addition of said local trains would not add to the number of passengers traveling on said lines, but would transfer to said additional trains by far the largest part of the passenger travel now using trains 1 and 4 and 78 and 79. That the addition of said trains would double the large expense of the passenger service now rendered by the respondents to the public by the said trains 1 and 4 and 78 and 79, and thus still further lessen the income of the respondents, and render them still more unable to earn from the operation of their lines in Florida operating expenses and interest, as hereinbefore set forth."

The averments of the amended return do not constitute a defense to the present writ under the principles announced in the former opinion herein. See *State ex rel. v. Louisville & Nashville Ry. Co.*, 62 Fla. —, 57 South. 175. There is no statement that the enforcement of the order requiring the respondents to discontinue the hauling of freight cars on two designated regular trains that carry passengers will result in a denial to the respondents of a reasonable compensation for the entire intrastate service rendered severally by the respondents, and will thereby amount to an unlawful taking of respondents' property, even if that would be a defense to the writ requiring the performance of this particular public duty. Nor is it averred that the regulation will deny to the respondents a reasonable return for the real value of the property, management, and labor actually and properly used by them in their intrastate business taken as a whole.

With slightly varying terms, it is severally averred that "the respondent has not been able, by the operation of its lines in Florida, to receive from its business on said roads, and thereby to realize, a sum sufficient to pay its operating expenses, and any interest, or any fair and reasonable return, upon the actual value of the property * * * devoted to and used in the public service as a common carrier in Florida of interstate and intrastate passengers and freight, or even upon the actual value of that proportion of said property devoted to and used in the public service as a common carrier in Florida of intrastate commerce, passengers, and freight, and that, if the proposed schedule be enforced and the freight cars eliminated from the designated trains, the cost of operating under such schedule and the loss of the fast freight business, or the cost of operating a special fast freight train,

would reduce the net receipts of respondent from the operation of its said lines, and would render it still more unable to realize from said operation sufficient to pay the cost of operation of said lines, and any * * * fair and reasonable return upon the property used in the service." As to the Louisville & Nashville Railroad Company, it is averred that the enforcement of the order will deny to it "interest exceeding 3 per cent. or any fair and reasonable return upon the actual value of the property" used in rendering its intrastate service. These averments, even if sufficiently pleaded without statements of specific facts to support them, do not in terms or in effect justify the assertion that the enforcement of the order will unlawfully deprive the respondents of property rights.

[13] Although it is stated in general terms, without specific facts to support the averment, that the effect of the order will be to deprive the respondents of a fair return for the actual value of the proportion of the property used in the intrastate service, it is not stated that this will result if the operating expenses are also properly apportioned. Besides this, it is not stated what is included in "operating expenses," and they may include the value of the use of property that is used but not consumed in rendering the service, as well as the value of labor and management used, and of property used and consumed, in rendering the service. Some property such as fuel, stationery, lubricants, etc., are consumed in the use. Lands, rented property, and possibly other species of property are not consumed in the use, but the value of the use may be considered as operating expenses. Rolling stock and other property not permanent in its nature is gradually consumed in its use covering a greater or less period of time and the value of its use with reference to its gradual consumption in its use may be included in operating expenses. It does not appear that the value of the use of some of the property for which a "fair and reasonable return" is claimed is not included in "operating expenses."

The averment that the observance of the schedule ordered by the railroad commissioners and the elimination of freight cars from the two trains will produce the result stated is clearly insufficient as a defense, since this court in the former opinion herein expressly declined to enforce the schedule as made in the order of the railroad commissioners.

It is contended by the respondents that the real purpose of the writ is to obtain a more rapid schedule for the two trains for the convenience of passengers only, and that the discontinuance of freight cars as a part of the trains is a mere incident or means to attain the main object in view, viz., a more rapid schedule for passengers. This contention is not borne out by the pleadings. The first, and apparently the main, command of the writ is that the respondents discontinue

the hauling of freight cars on the two designated trains, the command, "and to shorten the schedule time of the operation of the said trains," being distinct and severable, and not necessarily connected with the main command, though it may be merely an incident thereto, the details of which schedule have been overruled by this court in its former opinion herein. The question of schedule has been eliminated from this case.

It is also contended that "the return shows that comparatively few interstate passengers are carried on these trains, while a large amount of fast freight and packages are carried, which by force of the order will cease to be transported," and that to discontinue the instrumentalities for carrying interstate freight on the particular trains, with no provision for carrying it otherwise, is not a reasonable regulating of interstate commerce or a regulation in aid of interstate commerce," and that consequently the enforcement of the order will be "an unreasonable and illegal assertion of state power over interstate commerce."

[1] This reasoning is plausible, but not conclusive. The apparent design of the order is the safety and comfort of passengers, most of whom are shown by the return to be carried between points in this state. The safety and comfort of passengers whether intrastate or interstate, or both, may be provided for by state authority when not in conflict with lawful regulations of Congress, and the safety and comfort of passengers may not be subordinated to freight traffic. There is apparently no order of the relators directly interfering with interstate freight, and the incidental effect imposed by requiring the freight cars to be separated from the particular trains that carry passengers does not necessarily impose an unlawful burden upon interstate commerce. So far as the pleadings show, the order is for the safety and comfort of interstate passengers as well as local passengers, and the incidental effect of the order upon interstate freight is apparently not unreasonable or arbitrary; and the order apparently does not conflict with regulations authorized by Congress. The duty of the respondents to transport interstate freight is not interfered with by the order to cease carrying freight cars on designated trains, carrying passengers.

[2, 3] The pleadings do not show that the trains affected by the order are "operated principally for interstate commerce, and incidentally for passengers," as suggested by the respondents. And, even if such were the case, the regulation here is for the safety and comfort of both interstate and intrastate passengers in this state, is not arbitrary or unreasonable, and does not conflict with regulations authorized by Congress. The averments of the amended return that the respondents now operate between the designated points two fast trains, one each way,

daily, "which afford adequate facilities for fast travel for passengers," and that the order here sought to be enforced will cause inconvenience to way passengers and communities and to respondents, unless respondents put in operation local trains which would have to be done at a loss to respondents, relate more to the schedule now out of the case; and are not a defense to the requirement that the two trains carrying passengers shall not carry freight cars. And, besides this, such averments are, as to the adequacy of the present service and the future effect of the order, mere conclusions that are not admitted by the demurrer in the absence of averments of specific facts to sustain the conclusions, or are mere opinions that may or may not be sustained by experiments or experience. See *Pensacola & A. R. Co. v. State*, 25 Fla. 310, 5 South. 833, 3 L. R. A. 661; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034. The statute makes the order of the railroad commissioners *prima facie* reasonable and just; and, as the commissioners are state officers charged specially with the governmental function of making just and reasonable regulations for the transportation of intrastate freight and passengers by railroads operating in this state, their findings and orders should be accorded the force and weight due to such a tribunal under our system of government, when the invalidity of the action taken is not made to clearly appear in the authority exercised, or in mistaken application of law, or in regulations adopted or enforced arbitrarily and illegally or without appropriate facts to support them. See *Int. Com. Comm. v. Union Pacific*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. —, decided by the Supreme Court of the United States on January 9, 1912. It is not stated that the order was made without a consideration of appropriate facts and circumstances necessary to support it in so far as it relates to the character of the trains. The two trains affected by the order are operated upon the only line of railroad in the state between cities of Jacksonville and Pensacola on opposite sides of the state. In every county between the termini there are one or more towns of considerable population including the capital of the state.

The only real question here is whether the duty required by this writ as it now stands imposes such an unreasonable and arbitrary burden upon the respondents as to unlawfully deprive them of property rights without due process of law.

[4] The burdens of lawful governmental regulations are assumed by common carriers in undertaking to render the public service, and such burdens are not invasions of property rights.

[5, 6] The respondents are permitted by the state to use franchises in rendering the public service voluntarily undertaken by them.

These privileges carry with them the absolute, primary, imperative duty to render an adequate service reasonably suitable to the needs of the public to be served, as well as the obligation and duty to observe all lawful governmental regulations of the public service undertaken. An implied duty is raised by law to provide adequate facilities for the safe and comfortable transportation of passengers, that is not subordinate to the carrying of freight.

[7, 11] A reasonable compensation for service rendered is a property right of the respondents; but this does not necessarily insure a full return for values used in the service. Whether such reasonable compensation produces a return for property, management, and labor used in rendering the service depends upon circumstances, and the risks and burdens of the contingency are assumed by the carriers in voluntarily undertaking the public service. The prime duty to render a safe and reasonably adequate service is required by the law to be effectually performed whether such performance is profitable or not. Where the public duty of a common carrier of passengers and freight is assumed by a railroad company using public franchises, the state has ample authority under its reserved police powers to require the carrier to transport passengers in trains separate from freight trains. This authority is essential to the safety and well-being of passengers; and it is the duty of the state to so supervise and regulate the service rendered by the carrier as to secure the safety and comfort of passengers. That it is more safe and comfortable for passengers to be transported on trains without freight cars attached thereto is obvious. Such separate trains may be required by the state in the exercise of reasonable supervision of the service, where it is necessary for the safety of passengers, without reference to the fact that the service may not be profitable, where the particular requirement is not of itself so unreasonable as to be an arbitrary burden put upon the carrier. The order of the railroad commissioners now sought to be enforced merely requires the respondents to discontinue the hauling of freight cars on two designated regular trains carrying passengers. Under the statute, this order is *prima facie* reasonable and just. Such a regulation is manifestly expedient if not essential to the safety and comfort of passengers, and this particular order appears to be reasonably necessary for the well-being of passengers, and not an unnecessary burden arbitrarily put upon the carrier. It does not appear that the order was made without a consideration of existing facts having relation to the action taken. The allegations admitted by the demurrer do not show unlawful or arbitrary action or abuse of discretion by the commissioners in ordering that the hauling of freight cars in the two designated trains that carry passen-

gers shall be discontinued. If the business of the respondents is already unprofitable as asserted, they cannot justly complain of a reasonable regulation requiring them to perform a primary duty for the safety and comfort of passengers that the respondents as common carriers have voluntarily undertaken to transport by virtue of public franchises, which the state permits the carriers to use primarily and essentially for the benefit of the public to be served. While the asserted losses to the carriers may be considered in determining the reasonableness of the order, yet as the duty required to be performed is primary and essential in its nature, and as the order is, even under the averments of the return, apparently not arbitrary or unreasonable, it may be enforced. See *Missouri Pacific Ry. Co. v. State of Kansas ex rel. Railroad Commissioners*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472; *People ex rel. Cantrell v. St. Louis A. & T. H. R. Co.*, 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656.

If a regulation requiring the running of separate passenger and freight trains is necessary, or even expedient for the safety and comfort of passengers, it may be enforced if it is authorized and valid and is not unreasonable in its substance and effect, even if the existing rate of compensation for the service will be unreasonable because of added burdens to the carriers; the remedy of the carriers being an application for the allowance of more remunerative rates if that be necessary to do justice to the carriers, since the furnishing of adequate facilities for the safety and comfort of passengers is a primary duty, and should have great weight in determining the reasonableness of rates.

[12] The amended return in the form or in the substance of its averments is, in view of the nature of the duty commanded to be performed by the respondents, not sufficient as a defense to the portion of the writ that has been sustained by the court. It is therefore ordered that the demurrer to the amended return be sustained. A peremptory writ will issue commanding the respondents jointly and severally to discontinue the hauling of freight cars on the train leaving Jacksonville at 5 p. m. and arriving at Pensacola at 11:15 a. m. and known on the Seaboard Air Line Railway as train No. 79, and on the Louisville & Nashville Railway as train No. 4, and to discontinue the hauling of freight cars on the train leaving Pensacola at 5 p. m. and arriving at Jacksonville at 10:50 a. m. and known on the Louisville & Nashville Railway as train No. 1, and on the Seaboard Air Line Railway as train No. 78.

TAYLOR, SHACKLEFORD, COCKRELL, and HOCKER, JJ., concur.

TAYLOR et al. v. AMERICAN NAT. BANK OF PENSACOLA.

(Supreme Court of Florida. Feb. 6, 1912.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 157*)—NEGOTIABILITY.—STATUTORY PROVISIONS.

Under the provisions of section 2936 of the General Statutes of 1906, which forms a part of what is known as "the negotiable instrument law," a promissory note for \$2,250, due and payable two years after date, with interest from date at the rate of 8 per cent. per annum, interest payable quarter-annually, is negotiable, though accompanied by an ordinary real estate mortgage, which contains a provision to the effect that, upon default in the payment of any installment of interest, which interest is payable quarter-annually, the whole amount of such note shall thereby become due and payable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 399, 400; Dec. Dig. § 157.*]

2. BILLS AND NOTES (§ 135*)—CONSTRUCTION—CONSTRUING INSTRUMENTS TOGETHER.

While it is true that, where a note evidencing a debt and a mortgage to secure its payment are executed at the same time in one transaction, and the mortgage refers to the note, they should be considered together in determining their meaning and effect, this does not mean or imply that the provisions of one of such instruments are to be imported bodily into the other. Considered together or construed together simply means that, if there be any provisions in one of such instruments limiting, explaining, or otherwise affecting the provisions of the other, they will be given effect as between the parties themselves and all persons charged with notice, so that the intention of the parties may be carried out, and the entire agreement actually made in the contemporaneous transaction may be effectuated.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 332; Dec. Dig. § 135.*]

3. MORTGAGES (§ 235*)—ASSIGNMENT—TRANSFER OF DEBT SECURED.

As a general rule, the indorsement of a note which is secured by a mortgage carries with it such mortgage. The note is the principal thing, the mortgage being regarded as an accessory, so that the transfer of the debt ipso facto carries with it the security.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 620, 621; Dec. § 235.*]

4. MORTGAGES (§ 218*)—RIGHTS OF PARTIES—ACTION ON INDEBTEDNESS SECURED.

As a general rule, the promise to pay, as evidenced by a promissory note, is one distinct agreement, and, if couched in proper terms, is negotiable, while the pledge of real estate to secure that promise, as evidenced by a mortgage, is another distinct agreement, which is not intended to affect in the least the promise to pay, but only to provide a remedy for the failure to carry out such promise. The holder of the note may, if he sees fit so to do, discard the mortgage entirely and bring an action on the note.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 568-585; Dec. Dig. § 218.*]

5. BILLS AND NOTES (§ 344*)—TRANSFER—BONA FIDE PURCHASERS—"HOLDER IN DUE COURSE"—"BAD FAITH."

Where a bill is filed for the foreclosure of a mortgage, which was given to secure the payment of a note, which note provides for the payment of the interest quarter-annually,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indices

and the mortgage contains a provision to the effect that, upon default in the payment of any installment of interest, the whole amount of such note shall thereby become due and payable, and there is a positive allegation in the bill that, at the time of the purchase of the note by the complainant bank, which was prior to the maturity of the principal of the note, it had no knowledge that there had been any default in the payment of interest, or that there was any defense on the part of the mortgagor against the note and mortgage, the fact that no payments of interest were indorsed on note or accompanying mortgage did not make the note dishonored, and the complainant must be deemed a holder in due course of such note, under the provisions of section 2985 of the General Statutes of 1906, and its action in taking such note under such circumstances did not amount to bad faith, which is required by section 2989 of such General Statutes, wherefore a demurrer interposed to the bill upon such grounds is properly overruled.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 866-868; Dec. Dig. § 344.*]

For other definitions, see Words and Phrases, vol. 1, p. 662; vol. 4, p. 3320.]

6. MORTGAGES (§ 261*)—RIGHTS OF PARTIES—BONA FIDE HOLDERS.

A bona fide purchaser of a mortgage, executed apparently on the same date between the same parties and upon the same property as was another mortgage, is not held to notice of latent equities in favor of the other mortgage by reason solely of the fact that the other mortgage was recorded after the purchased mortgage, but before the transfer.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 261.*]

Appeal from Circuit Court, Escambia County; J. Emmett Wolfe, Judge.

Bill in equity by the American National Bank of Pensacola against Clara B. Taylor and another. From a decree for plaintiff, defendants appeal. Affirmed.

On the 23d day of March, 1911, the appellee, as complainant, filed its bill in chancery against the appellants and others as defendants, which bill, omitting the formal parts thereof, is as follows:

"The bill of complaint of American National Bank of Pensacola, Fla., complaining of E. R. Caro, Clara B. Taylor, and J. Frank Taylor, her husband, and Bessie W. Wilson, a widow, and Elizabeth Hale Wilson, an infant under the age of 21 years, and W. V. Perry, a widow, respectfully shows to your honor:

"(1) That the complainant is a national bank incorporated under the laws of the United States, with its office at Pensacola, Fla. That each of the respondents is over the age of 21 years, except the respondent Elizabeth Hale Wilson, who is under said age, and all of them reside in Pensacola, Escambia county, Fla., except the said W. V. Perry, who resides at ———, in the state of Alabama.

"(2) That on the 8th day of December, 1908, the respondent E. R. Caro, being indebted to one D. Hale Wilson, made and delivered to him his promissory note for \$2,250,

payable two years after the date thereof, with interest at the rate of 8 per cent. per annum from its date until paid, said interest being payable quarter-annually, and on the same day, in order to secure the payment of the said promissory note, executed and delivered to the said D. Hale Wilson a mortgage on the following described property in the city of Pensacola, Escambia county, Fla., to wit:

"Lots 6, 7, and 8 of block 19 in East Pensacola, according to the map of East Pensacola, of record in the office of the clerk of the circuit court, Escambia county, Fla. That in and by the said mortgage, it was provided that it was intended to secure the payment of the promissory note above mentioned, and showed upon its face that the said promissory note was payable to the order of the said D. Hale Wilson, and it was especially agreed therein by the mortgagor that the indebtedness covered by the said mortgage should become immediately due and payable, and the mortgage should become immediately foreclosable for all sums secured thereby, if the said indebtedness or any part thereof, or the said interest or any installment thereof, should not be paid according to the terms of the said note, or if the mortgagor should omit the doing of anything therein required to be done to the protection of the mortgagee, and that all costs and expenses, including attorney's fees incurred in collecting said mortgage debt, should be a part thereof; and a lien upon the mortgaged property, and that if a foreclosure of the said mortgage was had, and a suit to foreclose the same was rightfully begun, he would pay all costs and expenses of the said suit, including an attorney's fee, to the attorney of the complainant foreclosing, of \$15 and 10 per cent. upon the amount decreed the complainant, which costs and fees should be included in the lien of the mortgage, and in the sum decreed upon foreclosure. That a copy of the said note is hereto attached, marked 'Exhibit A,' and a certified copy of the said mortgage is hereto attached, marked 'Exhibit B,' and each is made and prayed to be taken as a part hereof, as fully as though here specifically set forth. That on the 13th day of May, 1910, the respondent D. H. Wilson for a valuable consideration indorsed the said note and assigned the said mortgage to the complainant, delivering both of the said papers to it, since which time both of them have been in the possession of the complainant, who is a bona fide holder thereof in due course, for value, and by reason thereof the complainant avers that it is entitled to maintain this action to foreclose the said mortgage.

"(3) That since the negotiation of the said note and mortgage to the complainant, it has learned, but did not before know, that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

no installment of interest was ever paid on the said note.

"(4) That some time after the 8th day of December, 1908, and prior to the 10th day of February, 1909, and prior to any installment of interest becoming due on said \$2,250 note, the said E. R. Caro delivered to the said D. Hale Wilson another note for \$2,500 bearing date of December 8, 1908, with interest thereon at the rate of 8 per cent. per annum, payable quarter-annually, and, together with the said note, delivered to the said D. Hale Wilson another mortgage bearing date December 8, 1908, covering the same property as Exhibit B hereto attached to secure the payment thereof. That although the said note and mortgage on their faces were dated the 8th day of December, 1908, they were not in fact executed or delivered on that date, but were executed and delivered on some date subsequent thereto and prior to the 10th day of February, 1909, and subsequent to the date of the execution and delivery of the note and mortgage for \$2,250, copies whereof are hereto attached and are hereinabove referred to. That since the negotiation to the complainant of the \$2,250 note and mortgage above referred to, the complainant has learned that in truth and in fact as between the respondent E. R. Caro, and the said D. Hale Wilson, the \$2,500 note and mortgage were executed and delivered in substitution for the \$2,250 note and mortgage which had theretofore been executed and delivered by the said E. R. Caro, as above set forth, but the said Caro at the time of executing and delivering the said \$2,500 note and mortgage failed and neglected to demand the surrender of, or cause to be surrendered to him, the \$2,250 note and mortgage or to cause any cancellation thereof to be executed, but suffered the said note and mortgage for \$2,250 to remain in the hands of the said D. Hale Wilson, without any cancellation thereof, ever having been made, or entered, either upon the said papers or upon the records of Escambia county, Fla., and the said note and mortgage remained in the hands of the said D. Hale Wilson upon the records of Escambia county, Fla., to indicate that they were not valid and subsisting obligations, and the complainant in taking the said note and mortgage had no actual or constructive notice or knowledge of the attempted substitution of the \$2,500 note and mortgage therefor, and had no actual notice or knowledge of the existence of the \$2,500 note and mortgage.

"(5) That the said mortgage securing the said note for \$2,250 which the complainant holds was duly recorded on February 4, 1909, at page 307 of Book 44 of the mortgage records of Escambia county, Fla., and the said mortgage securing the said note for \$2,500 was duly recorded on February 10, 1909, at page 508 of Book 43 of mortgage records of Escambia county, Fla. That each of the

said notes secured by the said mortgages was negotiable in its form, bore interest at the rate of 8 per cent. per annum, payable quarter-annually, each was due two years after its date, and the mortgage securing each showed upon its face that the note secured was negotiable.

"(6) That in the latter part of the month of August or the early part of September, 1909, the said D. Hale Wilson, after negotiations with the respondent J. F. Taylor, executed and delivered to the said J. F. Taylor, who is the husband of the respondent Clara B. Taylor, a note bearing date September 9, 1909, for \$2,500, due two years after its date in favor of the respondent Clara B. Taylor, and deposited and delivered with the said note as collateral security therefor the note and mortgage of the said E. R. Caro, to the said D. Hale Wilson for \$2,500 hereinbefore referred to, and also at the same time delivered with the said note as collateral security therefor a negotiable note of one James T. Gerald for \$1,000 in favor of the said D. Hale Wilson, dated August 29, 1906, and due August 29, 1909, secured by a mortgage on lots 33 and 34 of block 127 and lot 13 in block 100, all in East King Tract; the said mortgage being executed by the said Gerald and his wife, and having been duly recorded on the 1st day of September, 1906, in Book 35, page 300, of the mortgage records of Escambia county, Fla. That each of the said notes so deposited and delivered as collateral security was duly indorsed by the said D. Hale Wilson, and he executed to the said Clara B. Taylor an assignment of each of the said mortgages at the time of the deposit thereof as above stated. That the said Clara B. Taylor and J. F. Taylor, her husband, did not record, or cause to be recorded, until long after the negotiation to the complainant of the \$2,250 note and mortgage above referred to, the assignment to the said Clara B. Taylor of the said \$2,500 note and mortgage, so that at the time the complainant became the holder of the said \$2,250 note and mortgage it had no notice from the records that any one other than the said D. Hale Wilson was the holder thereof, and, as before alleged, the complainant had no actual notice or knowledge of the existence of the said \$2,500 note and mortgage until after it had become the holder of the said \$2,250 note and mortgage.

"(7) That the complainant is informed and believes, and therefore avers, that about the 19th day of August, 1910, one Clyde E. Wilson, a brother of the said D. Hale Wilson, and associated with him in business, executed and delivered to the said Mrs. Clara B. Taylor, as additional security for her \$2,500 note, from D. Hale Wilson or in partial satisfaction thereof, a deed conveying to her lots 18-25, inclusive, in the Maxent Tract in Pensacola, Fla., and that she has other securities for her said \$2,500 note, the nature

and extent of which the complainant does not know.

"(8) That the complainant is informed and believes, and therefore avers, that the respondent W. V. Perry claims to be the owner of the \$2,500 note and mortgage above referred to by an assignment thereof from D. Hale Wilson claimed to have been made in or about the month of March, 1909, but avers that such assignment, if any was made, was not recorded until after the negotiation to the complainant of the \$2,500 note and mortgage above mentioned, and that the complainant had no actual knowledge or notice thereof, and that the said W. V. Perry after the alleged assignment, if any was made, suffered and permitted the said \$2,500 note and mortgage to be and remain in the hands of the said D. Hale Wilson, without anything to indicate that he was not the actual owner thereof.

"(9) The complainant avers that although the said note, of which Exhibit A is a copy, provided that interest thereon is payable quarter-annually, the respondent E. R. Caro has never paid any interest thereon and has never paid any part of the principal thereof save and except as hereinabove set forth, but the complainant had no knowledge at the time of the taking of the said note and mortgage that there had been any default in the payment of interest or that there was any defense whatever on the part of the said Caro against the said note and mortgage in the hands of the said D. Hale Wilson or any indorsee or assignee thereof. The complainant also further avers that the said Caro likewise never paid any interest or any part of the principal on his said \$2,500 note and mortgage which is now held by the said C. B. Taylor as above set forth.

"(10) That by reason of the premises the complainant avers that the \$2,250 note and mortgage held by it and sought to be foreclosed herein are valid and binding securities in its hands as against all of the respondents herein, and by reason of the complainants being a bona fide holder thereof in due course for value, the said mortgage is a lien upon the mortgaged property prior in dignity to that of the said mortgage held by the respondent Clara B. Taylor and claimed by the respondent W. V. Perry.

"(11) That in the month of December, 1910, the said D. Hale Wilson died intestate, and left surviving him, as his sole heirs, his widow, Bessie B. Wilson, and his child, Elizabeth Hale Wilson, a minor. That the said Bessie B. Wilson has duly qualified as administratrix of the estate of the said D. Hale Wilson, and she is made a party hereto that she may assert any defense, if any, she has in her capacity as administratrix, and she and her said child are made parties defendant that they may assert any rights, if any they have, in the mortgaged property, as well

as any defense they may be able to show as against the foreclosure of the said \$2,250 mortgage.

"The premises considered, the complainant prays that upon final hearing your honor will order, adjudge, and decree that the said mortgage, of which a copy is hereto attached marked 'Exhibit B,' is a lien upon the property therein described, to wit: Lots 6, 7, and 8 of block 19 in East Pensacola, according to the map of said East Pensacola of record in the office of the clerk of the circuit court of Escambia county, Fla., prior in dignity to the said note and mortgage for \$2,500 held by the respondent Clara B. Taylor, and that the respondent E. R. Caro be decreed to be indebted to the complainant by reason of the said note and mortgage, in the sum of \$2,250, with interest thereon from December 8, 1908, at 8 per cent. per annum, and that he be decreed to be further indebted in the sum of \$15 plus 10 per cent. of the principal and interest of the said note as fees for the attorneys of the complainant herein, and that he be required in a short day in the said decree to be named, to pay over to the complainant the said indebtedness, and that in default thereof the said mortgage be decreed to be foreclosed and the mortgaged property be decreed to be sold in the manner prescribed by law and equity practice, to satisfy the said several sums decreed to the complainant, and that the said mortgage may be decreed to be a lien prior in dignity upon the said property to that of the said \$2,500 mortgage held by the respondent Clara B. Taylor. The complainant further prays that if upon final hearing it should be adjudged that the lien of the said \$2,500 mortgage made by the said E. R. Caro, and now held by the said respondent Clara B. Taylor, and claimed by the respondent W. V. Perry, is equal or superior in dignity to the lien of the complainant's mortgage here sought to be foreclosed, that your honor, by appropriate decree, will require the respondent Clara B. Taylor and her husband, J. F. Taylor, if he be found to be interested to discover what securities they or either of them have for the indebtedness of D. H. Wilson evidenced by his note to the said Clara B. Taylor, and that they be required first to exhaust such other securities, if any they have, before undertaking to enforce the said note and mortgage of E. R. Caro for \$2,500 against the property described in Exhibit B.

"To the end, therefore, that the respondents Clara B. Taylor and J. F. Taylor, her husband, and E. R. Caro, Bessie B. Wilson, in her own right and as administratrix of the estate of D. Hale Wilson, deceased, and Elizabeth Hale Wilson and W. V. Perry, may, if they can show cause why the relief herein prayed for should not be granted, may it please the court to grant unto the complainant the state's most gracious writ of

subpcena in due form of law directed to the said Clara B. Taylor and J. F. Taylor, her husband, E. R. Caro, Bessie B. Wilson, in her own right and as administratrix of the estate of D. Hale Wilson, deceased, and Elizabeth Hale Wilson, and W. V. Perry, commanding them and each of them on a day therein to be named and under a penalty therein to be fixed to appear and answer this bill of complaint. May it also please your honor to grant unto your orator such other, further, and different relief as to your honor in the premises may seem just, equitable, and right.

"And as in duty bound your orator will ever pray."

The exhibits attached to the bill are as follows:

"\$2,250.00.

Pensacola, Fla.,

December 8, 1908.

"Two years after date I promise to pay to the order of D. Hale Wilson twenty-two hundred and fifty (\$2,250) dollars for value received with interest at the rate of eight per cent. per annum from date until paid. Interest payable quarter-annually.

"Payable at the office of D. Hale Wilson & Co., Pensacola, Fla.

"All persons now or hereafter becoming parties hereto, hereby waive demand and protest, and notice of demand, nonpayment and protest. After default in payment and this note shall have been placed in the hands of an attorney for collection, we (I) agree to pay attorney's fee of five per cent. if paid before suit, and ten per cent. if paid after suit, and all costs of collection.

"E. R. Caro."

Indorsed:

"D. Hale Wilson."

"Mortgage Deed.

"State of Florida, Escambia County. Know all men by these presents, that I, E. R. Caro (a single man), for and in consideration of the sum of twenty-two hundred and fifty (\$2,250.00) dollars, to me in hand paid by D. Hale Wilson, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, sell and convey unto the said D. Hale Wilson, his heirs and assigns, forever, the following described real estate, situate, lying and being in the city of Pensacola, county of Escambia, state of Florida, to wit:

"Lots six, seven and eight (6, 7, & 8) block nineteen (19) East Pensacola, according to map of East Pensacola of record in the office of the clerk of the circuit court, clerk of Escambia county, Fla.

"Together with the tenements, hereditaments and appurtenances thereunto belonging or appertaining, the whole free from all exemption and right of homestead.

"And I, the said mortgagor, for myself and my heirs, do covenant with the said mort-

gagee, his heirs and assigns, that I am well seised of said property, and have a good right to convey the same; that it is free from any lien or incumbrance in law or equity, and that said mortgagor shall and will warrant and by these presents forever defend, the said premises unto the said mortgagee, his heirs and assigns against the lawful claims of all and every person or persons whomsoever.

"The foregoing conveyance is intended to be, and is, a mortgage to secure payment of one promissory note of date — for the sum of twenty-two hundred and fifty (\$2,250.00) dollars, made by the said E. R. Caro, payable to the order of the said D. Hale Wilson, the mortgagee, two years after date, with interest from date until paid, at the rate of eight per cent. per annum, the said interest payable quarter annually at the office of D. Hale Wilson.

"The mortgagor covenant that he will keep perfect and unimpaired the security hereby given, that he will keep the improvements upon said mortgaged property insured for a sum not less than two thousand (\$2,000) dollars, in an insurance company or insurance companies, to be approved by the mortgagee, loss, if any, payable to the mortgagee as his interest may appear, until such note be fully paid; that he will pay all taxes, assessments and charges which may or might become liens superior to that hereby created, and that if such insurance be not procured or maintained, or such taxes, assessments and charges be not paid, the mortgagee may procure and maintain such insurance, and pay such taxes, assessments and charges, and the lien hereby created shall extend to all such sums expended, with interest at the rate of 10 per cent. per annum.

"The mortgagor agree that the indebtedness covered by this mortgage shall become immediately due and payable and this mortgage shall become immediately foreclosable, for all sums secured hereby, if the said indebtedness, or any part thereof, or the said interest, or any installment thereof, shall not be paid according to the terms of the said note, or if the mortgagor shall omit the doing of anything herein required to be done for the protection of the mortgagee, and all costs and expenses, including attorney's fees and commissions, incurred in collecting this mortgage debt, shall be a part of the mortgage debt and a lien upon the mortgaged property, and if a foreclosure of this mortgage be had, or a suit to foreclose the same be rightfully begun, he will pay all costs and expenses of the said suit, including an attorney's fee, to the attorney of the complainant foreclosing, of \$15.00, and 10 per cent. upon the amount decreed to the complainant, which costs and fees shall be included in the lien of this mortgage and in the sum decreed upon foreclosure.

"In witness whereof, I have hereunto set my hand and seal this ——— day of December, A. D. 1908.

"E. R. Caro. [Seal.]
 "..... [Seal.]
 "..... [Seal.]
 "..... [Seal.]

"Signed, sealed and delivered in the presence of

"Clyde E. Wilson,
 "C. V. Thompson.

"State of Florida, County of Escambia. Before the subscriber personally appear E. R. Caro (a single man), and known to me to be the individual described, and acknowledged that he executed the foregoing instrument for the uses and purposes therein set forth.

"Given under my hand and official seal this ——— day of December, 1908.

"[Notary Seal.] C. V. Thompson,

"Notary Public State of Fla. at Large.

"My commission expires March 20th, 1912.

"Assigned to Amer. Natl. Bank. Assignment recorded 8/9/10 in Mortgage Lien Assignment Book No. 3, page 187.

"Jas. Macgibbon, Clerk Circuit Court.

"State of Florida, Escambia County. I hereby certify that the above and foregoing is a true copy of the original as the same appears of record at page 307 of volume 44 of the Mortgage Records of Escambia Co., Fla., now remaining in my office, as recorded February 4, 1909.

"Witness my hand and official seal this 21st day of March, 1911.

"[Official Seal.] Jas. Macgibbon,
 "Clerk Circuit Court, Escambia County, Fla.,
 "By Thos. Johnson, D. C."

To the bill the appellants interposed the following demurrer:

"Now come the defendants Clara B. Taylor and her husband, J. Frank Taylor, and demur to so much of the bill of complaint herein as seeks to have the decree adjudging that the mortgage claimed by the complainant upon the property described in the bill is a lien prior in dignity to the mortgage for \$2,500 held by the defendant Clara B. Taylor, and for cause of demurrer shows:

"(1) That the complainant hath not in and by its said bill made or stated such a case as doth entitle complainant to the relief prayed for in said bill as above stated.

"(2) The bill of complaint shows that the complainant purchased the note and mortgage which it claims to own subsequent to the time when the principal of the said note was past due because of the failure of the mortgagor to pay the interest installments as provided by said mortgage, and that said mortgage was canceled and discharged by the giving of the mortgage which the bill shows is claimed by the defendant Clara B. Taylor.

"(3) Upon the allegations of the bill the mortgage lien of the defendant Clara B. Tay-

lor is superior to the mortgage lien of the complainant.

"(4) Upon the allegations of the bill the mortgage lien of the defendant Clara B. Taylor is not inferior to that of the complainant."

Upon this demurrer the following order was made:

"The above styled and entitled cause coming on for hearing on the demurrer of Clara B. Taylor and her husband, J. Frank Taylor, and the demurrer of E. R. Caro to the bill of complaint herein, and the same having been argued by counsel for the respective parties, the court being now advised of its opinion:

"It is ordered, adjudged, and decreed that the said demurrers be and they are hereby overruled, and the defendants interposing the said demurrers are allowed until the rule day in October, 1911, in which to plead or answer the said bill of complaint, and in default of their answering or pleading to the bill of complaint within such time, it is ordered that the said bill of complaint be taken as confessed against such of the said defendants as fail to plead or answer thereto.

"Done and ordered at chambers at Pensacola, Fla., this 7th day of September, A. D. 1911."

From this order it appears that the defendant E. R. Caro also interposed a demurrer to the bill, which was likewise overruled, but such demurrer is not incorporated in the transcript. Neither does any entry of appeal by Caro appear therein. As to what course may have been pursued by the other defendants we are not advised. Clara B. Taylor and J. Frank Taylor have appealed from the order overruling their demurrer, and question the correctness of such order.

Blount & Blount & Carter, for appellants.
 Reeves & Watson, for appellee.

SHACKLEFORD, J. (after stating the facts as above). The counsel for the appellants frankly state in their brief: "As the court will observe, the pleadings are carefully framed for the purpose of testing the validity of the bank's mortgage, and its priority over or equality with the mortgages of Mrs. Taylor without the expense and trouble of taking testimony. At the hearing no technical question relating to the sufficiency of the pleadings to present these questions was raised, but the judge was requested to and did decide the demurrer upon the merits. We shall therefore address ourselves directly to the questions mentioned above, as we have no doubt counsel for the bank will do, as all parties desire a decision upon the merits."

As we said in *Burton v. McMillan*, 52 Fla. 228, text 241, 42 South, 879, text 882, 11 L. R. A. (N. S.) 159: "We pause for a moment to express our approbation and appreciation of the skill and laudable spirit exhibited by the attorneys of the respective parties in so

shaping the record as to present to the court the naked questions of law involving the real merits of the case, without undue prolixity and without unnecessary complications." We would also pay a merited tribute to the full and able briefs with which the respective counsel have favored us. The counsel for E. R. Caro, one of the defendants in the court below, has also submitted a brief; but, as Caro entered no appeal from the order overruling his demurrer, he is not before us, we have never acquired jurisdiction of his person, and we are not in a position to adjudicate his rights. We are not even apprised as to the grounds of his demurrer, as the same is not copied in the transcript. We have copied the pleadings in the foregoing statement, without any attempt at condensation, in order to render this opinion the more readily intelligible.

[1] We would first call attention to section 2936 of the General Statutes of 1906, which is as follows:

"2936. Sum payable to be certain.—The sum payable is a sum certain within the meaning of this chapter, although it is to be paid:

- "(1) With interest; or
- "(2) By stated installments; or
- "(3) By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; or
- "(4) With exchange, whether at a fixed rate or at the current rate; or
- "(5) With costs of collection or an attorney's fee, in case payment shall not be made at maturity."

It will be observed that the note for \$2,250, purchased by the appellee, as alleged in the bill of complaint, is for a sum certain, and would be, under the provisions of such section, even if it contained a provision to the effect that, upon default in payment of any installment of interest, which interest is payable quarter annually, the whole amount of such note should thereby become due and payable. The note contains no such provision, but the accompanying mortgage, given to secure the payment of the indebtedness and which was assigned to the appellee at the same time that the note was indorsed to it, does contain such provision. It cannot be successfully contended, then, that such note was not negotiable, or that the accompanying mortgage was not assignable. The appellee states in its brief that the negotiable character of the note and mortgage was conceded by the appellants at the hearing in the court below, and that it understands from the brief of the appellants that such concession is likewise made here. That this is the law, see the well-reasoned case of *Thorp v. Mindeman*, 123 Wis. 149, 101 N. W. 417, 107 Am. St. Rep. 1003, construing the section of the negotiable instrument law which we have copied above. Also, see

the discussion in *Frost v. Fisher*, 13 Colo. App. 322, 58 Pac. 872, and *Carpenter v. Longan*, 16 Wall. 271, 21 L. Ed. 313. It should be borne in mind that the "negotiable instrument law," which has been adopted by a majority of the states, including Florida, is "primarily a codification of the rules of the law merchant." It has also been termed "in substance a codification of the principles of the common law governing negotiable instruments." See section 1 of *Selover's Negotiable Instrument Law* (2d Ed.).

[5] Having found that the note in question was negotiable, we must now determine whether or not, at the time it was purchased and taken by the appellee, it was overdue, as disclosed by the allegations in the bill. Here again we must have recourse to our statute upon the subject. Section 2985 of the General Statutes of 1906, which also forms part of the negotiable instrument law, is as follows:

"2985. Who is holder in due course.—A holder in due course is a holder who has taken the instrument under the following conditions:

- "(1) That it is complete and regular upon its face;
- "(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
- "(3) That he took it in good faith and for value;
- "(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

As we have already seen, the note in question itself contained no provision to the effect that, upon default in payment of any installment of interest, which interest was payable quarter annually, the whole sum of such note should thereby become due and payable; but the accompanying mortgage, given to secure the payment of the indebtedness, which was executed on the same day with the note and was assigned to the appellee at the same time that the note was indorsed to it, contains the following provision:

"The mortgagor agrees that the indebtedness covered by this mortgage shall become immediately due and payable and this mortgage shall become immediately foreclosable for all sums secured hereby, if the said indebtedness, or any part thereof, or the said interest, or any installment thereof, shall not be paid according to the terms of the said note, or if the mortgagor shall omit the doing of anything herein required to be done for the protection of the mortgagee."

It may be well also to call attention to the fact that the mortgage expressly states that it "is intended to be, and is, a mortgage to secure payment of" the note therein described.

[2] The appellants rely upon *Graham v. Fitts*, 53 Fla. 1046, 43 South. 512, 13 Ann. Cas. 149, which holds that, "where a note evidencing a debt and a mortgage to secure its payment are executed at the same time in one transaction, and the mortgage refers to the note, they should be considered together in determining their meaning and effect." Conceding the correctness of this holding, read, as it must be, in the light of the facts stated in the opinion, we fail to see wherein it helps the contention of the appellants. In that case the note itself contained a provision to the effect that, upon default in payment of the interest, the entire sum of principal and interest should become due and payable, at the option of the payee in the note or of the legal holder thereof. Moreover, in that case, as a reading of the opinion readily discloses, the questions now before us for consideration and determination were not then presented to the court. [3] As far back as *Stewart v. Preston*, 1 Fla. 10, 44 Am. Dec. 621, it was held that, "As a general rule, the indorsement of the notes secured by a mortgage carries with it the mortgage"; the court deeming the principle so well settled that it stated it was not "necessary to cite authorities in support of it." This being true, it necessarily follows, as is laid down in 1 *Jones on Mortgages* (6th Ed.) § 834, that "the debt being the principal thing imparts its character to the mortgage." In the same paragraph it is stated that "the mortgage rather is regarded as following the note, and as taking the same character; and it is the generally received doctrine that the assignee of a mortgage securing a negotiable note, taking it in good faith before maturity, takes it free from any equities existing between the original parties." See the numerous authorities cited in the note thereto, and in the note on pages 149 to 152 of 5 Ann. Cas. Also see, to the same effect, 1 *Daniel on Negotiable Instruments* (5th Ed.) § 834. As was said in *Frost v. Fisher*, 13 Colo. App. 322, 58 Pac. 872, "the general doctrine is that the note is the principal thing, and the mortgage an accessory, and that the transfer of the debt ipso facto carries with it the security." [4] This is quite an instructive case, as is also *Thorp v. Mindeman*, 123 Wis. 149, 101 N. W. 417, 107 Am. St. Rep. 1003, wherein it was held as follows: "The promise to pay is one distinct agreement, and, if couched in proper terms, is negotiable. The pledge of real estate to secure that promise is another distinct agreement, which ordinarily is not intended to affect in the least the promise to pay, but only to give a remedy for failure to carry out the promise to pay. The holder of the note may discard the mortgage entirely, and sue and recover on the note." Our own holding in *Scott v. Taylor*, 58 South. 30, filed this day, is squarely in line with the principle enun-

ciated in the authorities which we have cited. An instructive note upon the point will be found in 35 L. R. A. 536.

Even if it be true, as was held in *Hodge v. Wallace*, 129 Wis. 84, 108 N. W. 212, 116 Am. St. Rep. 938, that "a note providing expressly that delinquency in payment of any interest 'shall cause the whole note to immediately become due and collectible,' becomes due in such case absolutely, not merely at the option of the holder, and one thereafter taking the note from the payee takes it subject to the equities between the original parties," that would not prove decisive of the case at bar, for the reason that the note involved therein contains no such provision, as we have already had occasion to emphasize. As is also recognized and expressly stated in the cited case, "there are adjudications the other way, notably one particularly relied upon by counsel for the plaintiffs. *Chicago Ry. Co. v. Merchants' Bank*, 136 U. S. 268, 234, 286, 10 Sup. Ct. 999, 84 L. Ed. 849, affirming (C. C.) 25 Fed. 809." The decisions of the Wisconsin court itself upon this point are by no means in entire harmony, as a reading of the prior decisions cited in the opinion from which we have just quoted will show. See, also, *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697. The Missouri courts would also seem to have been on both sides of the question. See *Noell v. Gaines*, 68 Mo. 649, noting the vigorous dissenting opinion of Judge Hough. *Owings v. McKenzie*, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154; *Rumsey v. People's Ry. Co.*, 154 Mo. 215, 55 S. W. 615; *Board of Trustees of Westminster College v. Piersol*, 161 Mo. 270, 61 S. W. 811; *Merchants' Nat. Bank v. Brisch*, 154 Mo. App. 631, 136 S. W. 28. It must be admitted that the authorities upon this point are in irreconcilable conflict. We shall not attempt to cite all that we have examined. Neither do we feel called upon to go into any extended discussion of it, since the note with which we are dealing contains no provision to the effect that it shall be dishonored by reason of the failure to pay the installments of interest as therein stipulated. It would seem that the weight of authority supports the principle enunciated by Mr. Justice Harlan in *Chicago Ry. Co. v. Merchants' Bank*, supra. See *Rose's Notes* to such case; 7 Cyc. 953; U. S. National Bank of Portland v. Floss, 38 Or. 68, 62 Pac. 751, 84 Am. St. Rep. 752; *Gillette v. Hodge*, 170 Fed. 313, 95 C. C. A. 205; *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697; *Cooper v. Hocking Valley National Bank*, 21 Ind. App. 358, 50 N. E. 775, 69 Am. St. Rep. 365. We would also refer especially to Judge Freeman's able discussion in monographic note in 100 Am. Dec. 196.

It is not alleged in the bill that, at the time of the purchase of the note and mortgage by the appellee, it knew that there had been a default in the payment of inter-

est, but the contrary is alleged. Upon this point, see *First National Bank of Waverly v. Forsyth*, 67 Minn. 257, 69 N. W. 909, 64 Am. St. Rep. 415. We would also refer, with approval, to *National Bank of North America v. Kirby*, 108 Mass. 497, text 500, from which we take the following excerpt:

"This note was due at the end of 48 months, and the interest was made payable annually. It was taken by the plaintiffs before maturity; but, upon it appearing that no interest had been paid for two years or more, the court was asked to rule that this alone amounted to a dishonor, and would subject the note to all defenses. It is to be noticed that the fact relied on is only that the interest had not been paid, not that any knowledge of it was ever brought home to the plaintiffs beyond the fact that no payments were indorsed. The court declined to rule as requested, and we are of opinion that the mere fact that there appears to be no indorsement of one or more installments of interest will not justify the ruling asked for.

"If, as it is argued, it be true that the failure to pay interest ever as matter of law amounts to a dishonor of a note, it can only affect one who has knowledge of the fact. Payment of interest is not always indorsed, and other evidence is often relied on to prove it. Want of indorsement does not apprise the party, to whom such note is transferred, that there has been no payment; and when the note is only taken as collateral, and accuracy is not required in ascertaining the amount due for interest, the fact that overdue interest is not indorsed might have slight influence in putting the purchaser upon his inquiry."

It follows, from what we have said, that we have reached the conclusion that, upon the allegations in the bill in the instant case, which are admitted to be true by the demurrer, the appellee must be held to be a holder in due course of the promissory note, under the provisions of section 2985 of the General Statutes of 1906, which we have copied above. In other words, we are of the opinion that the allegations of the bill show that, at the time such note was negotiated to the appellee, it "had no notice of any infirmity in the instrument or defect in the title of the person negotiating it," and "that he became the holder of it before it was overdue." We are strengthened in this conclusion by the provisions of section 2989 of the General Statutes of 1906, which section is as follows:

"2989. Infirmity in instrument.—To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

We are clear that the allegations in the bill fail to show any "bad faith" in the action of the appellee in taking the note and mortgage. As is well said by Mr. Crawford, in his *Annotated Negotiable Instrument Law* (2d Ed.) p. 54, discussing this section of such law: "The holder is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted mala fide, his title, according to settled doctrine, will prevail." See the numerous authorities there collected. This language of Mr. Crawford was also quoted with approval by Mr. Chief Justice Rudkin, in *Gray v. Boyle*, 55 Wash. 580, 104 Pac. 829, 133 Am. St. Rep. 1042. Also, see Judge Freeman's note thereto and the authorities which he cites. From the many cases upon this point which we have examined, we select the following: *Mass. National Bank v. Snow*, 187 Mass. 159, 72 N. E. 959; *Detroit National Bank v. Union Trust Co.*, 145 Mich. 656, 108 N. W. 1092, 116 Am. St. Rep. 319; *Winter v. Nobs*, 19 Idaho, 18, 112 Pac. 525; *Union National Bank of Kansas City v. Neill*, 149 Fed. 711, 79 C. C. A. 417, 10 L. R. A. (N. S.) 426; *First State Bank of Pleasant Dale v. Borchers*, 83 Neb. 530, 120 N. W. 142; *Smith v. Livingston*, 111 Mass. 342; *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 101 Pac. 509, 132 Am. St. Rep. 1068. Also, see *Selover's Negotiable Instrument Law* (2d Ed.) p. 225.

As we have already seen, the fact that the interest was payable quarter-annually, and that no payments thereof were indorsed on the note or accompanying mortgage, did not make the note dishonored; it being positively alleged in the bill that, at the time of the purchase of the note, the appellee had no knowledge that there had been any default in the payment of interest, or that there was any defense on the part of Caro against the note and mortgage.

The writer hereof is of the opinion that what has already been said is sufficient for the disposition of this appeal. He does not consider it necessary to consider the contention of the appellants as to the effect of the constructive notice afforded to the appellee by the record of the \$2,500 mortgage. However, he is in full accord with the views of the Chief Justice upon this

point, who, at the request of the writer hereof, has briefly expressed them in writing, and the writer willingly makes such written statement, which here follows, a part of this opinion:

[8] The record of the \$2,500, bearing the same date as the \$2,250, mortgage, covering the same property, and being to the same original mortgagee, was constructive notice only that it was a lien not superior to, if of equal dignity with, the \$2,250 mortgage. The fact, alleged in the bill and admitted by the demurrer, that the \$2,500 mortgage was in reality executed some days after the execution of the \$2,250 mortgage, was, at the time of the assignment, actually or constructively admittedly not known to the assignee of the \$2,250 mortgage, and it is assumed that the record of the \$2,500 mortgage indicated only that it was executed on the same day as the \$2,250 mortgage, and to the same original mortgagee, and the assignee of the \$2,250 mortgage apparently had no knowledge or notice of the facts that the \$2,500 mortgage was in reality executed some days after the execution of the \$2,250 mortgage, and was in substitution of the \$2,250 mortgage.

The holder of the \$2,500 mortgage took it with notice of the record of the \$2,250 mortgage, which record apparently indicated that the \$2,250 mortgage was at least of equal dignity with the \$2,500 mortgage. If the holder of the \$2,500 mortgage claims superiority because the \$2,500 mortgage was executed in substitution for the \$2,250 mortgage, this fact was not of record and was not known to the bank who became the holder of the \$2,250 mortgage and note that had been by the maker and mortgagor left in its negotiable state in the hands of the original payee and mortgagee. The holder of the \$2,500 mortgage cannot have priority over the bona fide holder for value of the \$2,250 mortgage because of the latent equity of which the holder of the \$2,250 mortgage had on notice or knowledge. As to this latent equity the holder of the \$2,500 mortgage has no better right than the original mortgagee had, since the record of the \$2,250 had not been canceled, and the negotiable note had been left in the hands of the original payee and subsequently came into the hands of the bank as a bona fide holder for value and without notice of the latent equity growing out of the intended substitution. If the holder of the \$2,500 mortgage claims superiority over the \$2,250 mortgage by virtue of the intended substitution, she should at least show either that the note and mortgage for which hers was intended to be substituted were surrendered or canceled, or that the subsequent holder of the \$2,250 mortgage had knowledge or notice of the intended substitution, or took the assignment

under such circumstances as amount to a fraud or bad faith, or some other ground of equitable right to priority.

It follows that all of the contentions of the appellants must be decided adversely to them, and that the order overruling the demurrer must be affirmed.

WHITFIELD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

MALSBY v. GAMBLE.

(Supreme Court of Florida. Feb. 7, 1912.)

(Syllabus by the Court.)

1. ELECTION OF REMEDIES (§ 11*)—ACTS CONSTITUTING ELECTION—MISTAKE IN REMEDY.

The doctrine of election of remedies does not apply to a case where a party in his first action mistook his remedy.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 14; Dec. Dig. § 11.*]

2. JUDGMENT (§ 883*)—PLEADINGS—SUFFICIENCY.

An allegation in a bill that the defendant is insolvent, and has no property which can be found situated in the county where he lives subject to execution and sale, is sufficient to withstand a demurrer to the bill, based on the insufficiency of this allegation.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1669-1688; Dec. Dig. § 883.*]

3. JUDGMENT (§ 883*)—RELIEF AGAINST EXECUTION—SET-OFF OF JUDGMENT.

Where it appears from the allegations of a bill that G., the defendant in the bill, bought personal property from the A. B. F. Co.; that he gave notes for the purchase money which were assigned and indorsed to the complainant in the bill, upon which there is still a considerable sum due; that complainant by a mistake of remedy brought an action of replevin for the recovery of the personal property and was nonsuited, and that G. recovered a judgment against complainant in the replevin suit for \$1,400; that G. has sued out an execution on said judgment; that he is prima facie insolvent; and where it appears that complainant has brought an action at law on said notes and expects to recover a judgment thereon, and where complainant prays that the execution against him may be stayed or enjoined, and he may be allowed to set off such judgment as he may recover on the notes against the judgment and execution against him—the bill states a case for equitable relief.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1669-1688; Dec. Dig. § 883.*]

Appeal from Circuit Court, Alachua County; J. T. Wills, Judge.

Bill in equity by Marvin Malsby, doing business in Jacksonville, as the Malsby Machinery Company, against J. G. Gamble. From a ruling sustaining a demurrer to the bill, complainant appeals. Reversed.

See, also, 61 Fla. 310, 54 South. 763.

Hampton & Hampton and W. S. Broome, for appellant. A. H. King and F. Y. Smith, for appellee.

HOCKER, J. The appellant in March, 1911, filed his bill in the circuit court of

Alachua county against the appellee, stating therein substantially the same facts as are stated in his amended bill herein copied, but enlarging the prayer for process so as to name the defendant which, as is alleged, was simply a clerical error in the first bill. The amended bill is as follows:

"Humbly complaining, your orator, Marvin Malsby, doing business in the city of Jacksonville, Fla., as Malsby Machinery Company, brings this his amended bill of complaint against J. G. Gamble, of Alachua county, Fla., and thereupon your orator shows:

"That on or about the 4th day of October, A. D. 1907, your orator was engaged in the mercantile business in the city of Jacksonville, Fla., handling and selling machinery of various kinds, and that your orator in the conduct and operation of his said business purchased considerable machinery from the A. B. Farquhar Company, Limited, a corporation under the laws of Pennsylvania, and doing business in the city of York, Pa.

"Your orator would further show unto your honor that on or about the 4th day of October, A. D. 1907, the defendant, J. G. Gamble, desiring to purchase the machinery hereinafter described, that your orator caused the same to be sold to the said defendant upon what is known as a 'conditional sale,' which said conditional sale reserved the title to said property in the said A. B. Farquhar Company, Limited; said machinery being described as follows: One 9x11" cylinder Ajax C. Crank engine, mounted on one 20 H. power Cornish boiler, on 4 steel wheels; one number 2½ sawmill with 50 inch inst. tooth saw, 35 feet of carriage, 80 feet of ways, 3 headblocks with regular dogs, Ideal Reamy friction feet with belt tightener, lumber truck irons, two cant hooks, crowbar, monkey-wrench, saw wrench, and oil can; main belt 60 feet of 10-inch 4-ply rubber; one No. 8 circular saw steel mandrel, and one 36" solid tooth cut-off saw. And then and there received from the defendant four certain promissory notes, one for \$300, due November 1, 1907; one for \$366.67, due four months from the date thereof; one for \$366.67 due eight months from the date thereof; one for \$366.66, due 12 months from the date thereof, said notes being payable to the A. B. Farquhar Company, Limited, and bearing 8 per cent. interest per annum after maturity until paid. And then and there your orator received from the said J. G. Gamble a certain paper, being a lease, acknowledging that the said J. G. Gamble held the said property under a conditional sale, and that he acknowledged himself as the lessee of the said A. B. Farquhar Company, Limited, and agreed, among other things, that if default is made in the payment of any one or more of the aforesaid sums or installments of hire, when and as the same shall become due and payable as aforesaid,

it shall be lawful for the said lessors to re-enter into possession of said property described above, and lessors may repossess, remove, take away, and enjoy the said property as though this agreement to hire had not been made, as will appear by the said original lease attached to the original bill of complaint in this cause, marked 'Exhibit A,' and prayed to be referred to and made a part of this amended bill, as may be necessary or desired.

"And your orator further sheweth unto your honor that said instrument was duly recorded on the public records of Alachua county, Fla., on the 9th day of December, 1907, in Book of Mis. Records No. 3, at pages 315 to 317, as appears indorsed upon said instrument. And, further, that there was an assignment of the instrument indorsed upon the back thereof by A. B. Farquhar Company, Limited, to your orator on the 24th day of March, 1909, as appears indorsed upon said 'Exhibit A,' attached to the original bill of complaint in this cause.

"Your orator further sheweth unto your honor: That the said note of \$300 and the said note due on February 4, 1908, were thereafter paid, and the defendant given due credit for the same, but that the last two notes, to wit, one note dated November 4, 1907, due 8 months after date for \$366.66, and one note dated November 4, 1907, due 12 months after date for \$366.67, were not paid, but that each and both of said notes were duly assigned and indorsed by the said A. B. Farquhar Company, Limited, to your orator, and delivered to your orator by the said A. B. Farquhar Company, Limited, and thereby the title to the said notes and the indebtedness represented thereby became vested in your orator; and, further, that the said notes reserved the title to the said machinery hereinbefore described in A. B. Farquhar Company, Limited, same provide for interest at the rate of 8 per cent. per annum after maturity, and contains this further provision, 'And if the whole, or any part remains unpaid at maturity, ten per cent. (10%) attorney's fees and all necessary expenses incurred in collection shall be paid by the maker thereof,' and the further provision, to wit, 'And I do hereby empower and authorize the A. B. Farquhar Company, Limited, or agent, or any prothonotary, or attorney of any court of record, to appear for me, and in my name to confess judgment against me in favor of the said A. B. Farquhar Company, Limited, for the above-named sum, with cost of suit and release of all errors, without stay of execution after the maturity of this note,' etc., and, 'It is a part of the agreement that if the amount of this note with interest is not paid at maturity, or in case of removal of the said machinery from the county of Alachua, or if the machinery shall not be properly cared for, then the said A. B. Farquhar Company,

Limited, or their duly authorized agent, may declare all of our notes due and payable,' as will appear by copies of said notes attached to the original bill of complaint in this cause, marked 'Exhibits B and C', and which is prayed to be referred to and made a part of this amended bill of complaint as may be necessary or desired.

"That subsequently, to wit, on the 24th day of March, A. D. 1909, the said A. B. Farquhar Company, Limited, executed and delivered in due form at law and duly and legally acknowledged the same an assignment of the said indebtedness and notes of the said lease hereinbefore recited, and of all right, title, and interest in the property hereinbefore described in this amended bill of complaint to your orator, as will appear by the said original assignment and sale, which is attached to the original bill of complaint and marked 'Exhibit D,' which is prayed to be referred to and made a part of this amended bill of complaint, as may be necessary or required, and, further, that said instrument was duly recorded upon the public records of Alachua county, Fla., on the 14th day of June, A. D. 1910, in Mis. Records No. 4, Records of Alachua County, Fla., at page 108, as will appear indorsed thereon by the clerk of said court and under the seal of the said court.

"That there was a payment made on the note that was due June 4, 1908, to wit, on January 20, 1908, \$117.62. That the balance of the said note and of the said note that was due on the 4th day of October, A. D. 1908, is long since past due, and the same has not been paid, or any part thereof. That on the 24th day of March, A. D. 1911, the said J. G. Gamble was indebted to the said complainant, Malsby Machinery Company, in the full sum of \$804.17 upon the said notes for the purchase money of said property, as will appear by a statement attached to the original bill of complaint in this cause and marked 'Exhibit E,' and prayed to be made a part of this amended bill of complaint, and referred to as may be necessary or required.

"Your orator further sheweth unto your honor that after the maturity of the said notes, and after the indorsement thereof, and after the assignment of the lease and of the said property to your orator by the said A. B. Farquhar Company, Limited, your orator instituted a suit in replevin in the circuit court for Alachua county, Fla., to wit, on the 14th day of April, A. D. 1909, against the said J. G. Gamble, which resulted in a judgment of nonsuit in favor of the said defendant, J. G. Gamble, for the return of the said property replevied, or in the sum of \$1,400 principal, and \$8 costs, which said judgment was entered on the 14th day of June, A. D. 1910, as will appear by a certified copy of said judgment attached to the original bill of complaint in this cause, and marked 'Exhibit F,' and prayed to be made a part of this your orator's amended bill of

complaint, and to be referred to as may be necessary or required.

"Your orator further represents unto your honor that the lease herein referred to and attached to your orator's original bill of complaint and marked 'Exhibit A,' and prayed to be made a part of this your orator's amended bill of complaint, contained the following clause, to wit: 'It is further understood and agreed that the foregoing lease contains the only terms, conditions, and contract upon which the property described above is delivered to the lessee, and that the same cannot be varied, altered or controlled except by agreement in writing, signed by both parties hereto.' And your orator would show unto your honor: That said clause so contained in said lease reserved the title to the said property in the said A. B. Farquhar Company, Limited, without the right or power in the said A. B. Farquhar Company, Limited, to assign the same, and that although the said A. B. Farquhar Company, Limited, transferred, assigned, and conveyed the said property described in said lease to your orator, the said assignment and transfer was null and void, and conveyed no interest in said property to your orator, nor any right to the possession thereof, and therefore your orator was without any remedy by writ of replevin to recover the possession of said property. That, although your orator was without any title to said property by said transfer and assignment of said lease, as was held by your honor in the said replevin suit, the said indorsement and assignment of the said notes gave your orator a right to the indebtedness due by the said defendant, J. G. Gamble, to the said A. B. Farquhar Company, Limited, and gave your orator a right to receive and receipt for the said amount or amounts due on the said note or notes.

"That thereafter a writ of error was sued out in the Supreme Court of the state of Florida to the circuit court of Alachua county, Fla., and on the 6th day of February, A. D. 1911, the said judgment of the circuit court was affirmed, and the mandate of the Supreme Court was filed in the office of the clerk of the circuit court for Alachua county, Fla., on the ——— day of March, A. D. 1911. That in and by said judgment the said property was awarded to the said J. G. Gamble, and he has under the law the right of election to enforce the money judgment for \$1,400 and costs against your orator. That the said J. G. Gamble has elected to enforce the said money judgment against your orator, and has applied for, and sued out, an execution upon the said judgment, said execution having issued on the 16th day of June, A. D. 1910, and is now in the hands of the sheriff for the purpose of enforcement, and the same will be levied upon the property of your orator at once for the enforcement of the judgment and execution.

"Your orator further sheweth unto your

honor that he hath not an adequate remedy at law, and cannot set off the said notes against the said judgment, and cannot obtain judgment upon the said notes before his property shall have been seized and sold: that he is justly and legally entitled to collect the said notes from the said J. G. Gamble, the same having been indorsed and assigned by the said A. B. Farquhar Company to your orator, and being due for the purchase money of the said property, which is recited in the said lease, in the said notes, and being the same property that is awarded by the court to the said J. G. Gamble in the said judgment; that the said property was seized under and by virtue of the writ of replevin, and was delivered to your orator under and pursuant to the said writ of replevin, but was not replevied by the said defendant, and hence the defendant is entitled to his election to enforce the said money judgment for the price of the said property as against your orator.

"Your orator further alleges: That he is ready and willing to pay the balance of the said judgment in excess of the amount of the said notes held by him against the said J. G. Gamble, and herewith tenders the amount of said excess, being the sum of \$514.42, into the registry of the court, as per said tender made by your orator in his said original bill of complaint, to be applied upon the said judgment and in satisfaction thereof, after allowing the set-off of the said notes and attorney's fees provided for therein.

"And, further, that your orator has instituted a suit at law against the said J. G. Gamble upon the said notes, and expects to recover therein the sum of \$884.58 damages and attorney's fees, together with the interest that shall accrue thereon between now and the time when he shall obtain a judgment at law upon the said notes against the said J. G. Gamble.

"And your orator further alleges and charges that the said J. G. Gamble is insolvent, and has no property situated in Alachua county, Fla., that he has been able to find, after having made diligent search, that is subject to levy and sale under execution over and above his constitutional exemptions, and that if orator is not allowed to set off his said claims and demands, as represented by the said notes in this proceeding, he will be without any remedy, and the same will be a total loss to him.

"Your orator further alleges that it is necessary that an injunction issue to prevent the defendant, J. G. Gamble, and his attorneys, from levying upon your orator's property under the said execution, and to stay all proceedings in said suit until orator can reduce his said notes to judgment, and set off the same against the said judgment and execution in favor of the said J. G. Gamble and against your orator in the circuit court of Alachua county, Fla.

"Your orator therefore prays:

"First. That a temporary injunction do issue at once and without notice, restraining and enjoining the said defendant, J. G. Gamble, his agents and attorneys, from levying upon or seizing any of the property of your orator, Marvin Malsby, trading as Malsby Machinery Company, under the execution issued out of the circuit court of Alachua county, Fla., in favor of the said J. G. Gamble, and against the said Marvin Malsby, doing business under the firm name of Malsby Machinery Company, which said execution issued on the 16th day of June, A. D. 1910, and from proceeding or taking any steps in the enforcement of the judgment and execution in said cause until the further order of this court.

"Secondly. That an account may be had and taken by and under the direction and decree of this honorable court as to the truth of the allegations of this bill, and that a decree be rendered herein authorizing and permitting the complainant to set off whatever amount shall be found to be due to him by the said J. G. Gamble upon the notes recited in this bill, and in the original bill filed in this cause, and that, after allowing said set-off, the moneys tendered and paid into the registry of this court by this complainant may be decreed to be in full settlement, satisfaction, and payment of the judgment obtained by the said J. G. Gamble against the said Marvin Malsby, trading under the name of Malsby Machinery Company, on the 14th day of June, 1910, and the execution issued thereon on the 16th day of June, 1910.

"Third. That the injunction issued herein may be made perpetual.

"Fourth. That it may please your honor to grant unto your orator, Marvin Malsby, doing business in the city of Jacksonville, Fla., as Malsby Machinery Company, the state's most gracious writ of subpoena, directed to the said defendant, J. G. Gamble, therein and thereby requiring him at a certain time, and under a certain penalty, to be therein named and limited, to be and appear before this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide by such other and further order and decree herein as may seem agreeable to equity and good conscience, and as the circumstances of the case may justify and warrant.

"Fifth. And may it please your honor to grant unto your orator such other and further relief herein as may seem agreeable to equity and good conscience, and as the circumstances of the case may justify and warrant.

"And your orator will ever pray, etc.

"Marvin Malsby, Orator.

"W. S. Broome, Hampton & Hampton,

"Solicitors for Orator."

A temporary injunction was granted in accordance with the prayer of the original bill. A demurrer was filed to the original bill, which upon a hearing was sustained, and the injunction was dissolved.

When the amended bill was filed the circuit judge was applied to for a reinstatement of the injunction, which was denied. An appeal was taken from the order sustaining the demurrer to the original bill and dissolving the injunction, and from the order denying the application for a reinstatement of the injunction. These rulings afford the grounds for the assignments of error presented here.

The notes given by Gamble to the A. B. Farquhar Company and the so-called lease of the machinery executed by the latter to the former are made exhibits to and parts of the bill and amended bill, but we think it unnecessary to set them out here as they are in substance set forth in the case of Malsby v. Gamble, 61 Fla. 310, 54 South. 766. The demurrer to the original bill which was sustained by the court contains 13 grounds. The first ground is that there is no equity in the bill. The second ground is that there is a lack of necessary parties. The third ground is that the prayer for process fails to name the defendant. The seventh ground is that the allegation of the insolvency of Gamble is not alleged with so positive and direct a manner as to justify the relief sought, or any relief, and it may possibly be inferred the question was raised that Malsby by electing to bring the action of replevin dealt with in the cited case debarred himself from bringing this suit.

The other grounds of demurrer did not reach the equity of the case in so apparent a way as to require us to examine them specifically, particularly as the appellee has filed no brief in the case, and we are not informed particularly what ground or grounds the judge had in his mind in making his rulings. The appellee was permitted to present an oral argument, but discussed no question which is not covered by the grounds which we have specifically mentioned.

[1] We think it is clearly apparent from the decision in the cited case of Malsby v. Gamble, *supra*, that in bringing the action of replevin Malsby mistook his remedy, and in such a case the doctrine of election of remedies does not apply. *Hays v. Weeks*, 57 Fla. 73, 48 South. 997; *American Process Co. v. Florida White Pressed Brick Co.*, 56 Fla. 116, 47 South. 942, 16 Ann. Cas. 1054.

[2, 3] The allegation of the insolvency of Gamble in our opinion under the peculiar circumstances of this case at least states such a *prima facie* case as to withstand a demurrer. There is a positive allegation of insolvency, which, if denied, would have to be sustained by proof. As to the ground that

there was a lack of necessary parties, we can discover from the record no basis for it, and in the oral argument presented none was referred to. As to the main question that there is no equity in the bill, it seems to us that it abounds in equity. From its allegations it appears that Gamble bought the personal property mentioned from the A. B. Farquhar Company; that he still owes a considerable part of the purchase money, represented by notes which were assigned and indorsed to the complainant; that he has a judgment against the complainant for \$1,400 and costs obtained in the replevin suit which through a mistake in his remedy was brought by the complainant against Gamble; that Gamble has sued out an execution on this judgment; and that *prima facie* at least he is insolvent. Complainant has sued on the notes, and prays that he may be allowed to offset against this judgment and execution such an amount as he may recover in his suit on the notes representing the purchase money of the personal property which is described in the bill, and which he failed to recover on his action of replevin. These facts it seems to us appeal with great force to a court of equity, and justify the exercise of its functions as a court of conscience. If complainant is not afforded relief in equity, it is not apparent to us how he can obtain it. He can have no opportunity at law to offset his claim against that of Gamble. 1 Black on Judgments (2d Ed.) § 391; 1 High on Injunctions (4th Ed.) 243; *Linton v. Palmer*, 6 Fla. 533, text 542; *Baltzell v. Randolph*, 9 Fla. 366; *Dunham Lumber Co. v. Holt*, 124 Ala. 181, 27 South. 556; *Bettison v. Jennings*, 8 Ark. 287; *Tommy v. Ellis*, 41 Ga. 260; 23 Cyc. 1019.

We cannot say that the circuit judge erred in sustaining the demurrer to the original bill, as it is plain that the prayer was defective in not naming the defendant. But this defect was removed by the amended bill, and we think the circuit judge erred in not reinstating the injunction when requested so to do after the filing of the amended bill. His ruling on this point is reversed, and the cause remanded.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, and COCKRELL, JJ., concur.

KILBY FROG & SWITCH CO. v. JACKSON.

(Supreme Court of Alabama. Jan. 9, 1912.)

Rehearing Denied Feb. 17, 1912.)

MASTER AND SERVANT (§ 281*)—INJURIES TO SERVANT—DEFECTIVE MACHINE—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a servant, *held*, that plaintiff's failure to avoid the danger arising from defects in machinery was at least due to inattention, absent-mindedness, or thought-

lessness, and hence he was guilty of negligence which proximately contributed to his injury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 281.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Thomas S. Jackson against the Kilby Frog & Switch Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Weatherly & Stokely, for appellant. Ullman & Winkler and Harsh, Beddow & Fitts, for appellee.

SIMPSON, J. This is an action by the appellee, as an employé, for injuries received by having his leg caught between certain parts of a planing machine while he was operating the same. The case was tried on counts 4, 6, 7, 8, and 9.

The plaintiff's leg was caught between what is called the "knocker" or "dog" of the machine, and the shifting lever. Count 4 claims on account of the negligence of the defendant in not exercising "reasonable care and skill to furnish plaintiff with a reasonably safe machine or appliance with which to do his work." Count 6 alleges the failure of defendant to furnish a reasonably safe place to do the work. Count 7 rests upon the negligence of one Penrod, who had superintendence, etc., in that he knew the defective condition of the machine, and informed plaintiff that the machine had been "fixed," and instructed plaintiff to go to work on it. Count 8 rests upon the same negligence of said Penrod to whose orders plaintiff was bound to conform and did conform. Count 9 rests upon the negligence of said Penrod, as superintendent, in failing to instruct the plaintiff as to the dangers attendant upon the operation of the machine. The pleas are the general issue and contributory negligence.

The "frog," "switch," or "crossing" which is to be cut is laid on the table of the machine, above which is the "head," being a metal case, with a screw running down through it, holding the tool, which is a chisel, and this tool is adjusted up or down, according to the height which it is wished to cut. Such machines usually have a rod attached, by which the operator can stand two feet from the machine and work the head up and down, but in this machine there was no rod, nor had there been any, so far as the witnesses know, so that the only way to move the tool up or down was to stand nearer the machine, and reach above the operator's head and turn the wheel at the top of the screw. The bed of the planer runs along horizontally when the machine is in operation. The shifter protrudes from the bed of the machine about two feet, and on the same side and attached to the edge of the bed is the dog, which is a piece of metal protrud-

ing about six inches from the table, and, as the table moves back slowly towards the shifter, it strikes the shifter, and that automatically sets it in reverse motion. The plaintiff, while operating the machine and in the act of turning the wheel to lower the tool, placed his right leg forward so that it was caught between the dog and the shifter as they came together.

The bed of the machine is about 14 feet long, but the length of the stroke is regulated by the length of the cut which is to be made. The speed of the machine and stopping and starting it are within the control of the operator. Ordinarily the wheel can be turned with one hand, but, if the screw is tight, the operator has to raise both hands about six inches above his head and turn it.

The plaintiff testified that he was 26 years old; that he had been working for the defendant a month or 6 weeks, and at this particular machine about 2 weeks; that he had broken the machine about 10 days before the injury (he does not say in what particular), and that Penrod had told him it was "fixed," and to go to work; that the head worked hard, and he asked the master mechanic to come and start it, which he did, putting grease on it and loosening it up; that it was all he could do to move it with both hands; that he was working on a small frog about 3 or 3½ feet long; that, when Parsons showed him the machine, he told him to watch a certain mark, beyond which the screw was not to be turned, as it was too short; that no one had warned him of the danger of getting caught between the knocker and the shifter; that he worked on various machines for 12 or 13 years; that he had been adjusting the tool, by the use of the wheel, "during the six weeks he had worked on it every day that he worked," and did it by leaning over and catching hold of the wheel; that he watched the movement of the bed back and forth, knew the knocker was at the end and where the shifter was, knew when the knocker came back against the shifter it would hit the shifter and move the machine back the other way, knew that, if his leg was in there, it would get caught, "but, if he knew his leg was in there, he would have it out;" that he never thought of it, and it was never explained to him about the danger; that the knocker came up from the left side, did not strike his left leg, but caught his right one; that he had not worked the machine exactly like it was for 6 weeks, but laid off a week, worked three different machines, and worked this machine without intermission for 2 weeks, having previously worked another planer; that he had to step into the position he was in to get a purchase on the wheel, either that, or put both legs up.

It appears from the evidence that it was within the power of the operator to have

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

stopped the machine, screwed down the tool with the wheel, and then started it, or, if he wished to screw it down while in motion, if he had noticed when the dog or knocker struck the shifter, and reversed the motion, he would have had time to turn the wheel and return to his position before the knocker returned. He had evidently worked it without injury for at least two weeks, and, according to his own testimony, knew that if he placed his leg in that position, and kept it in there until the knocker came back, it would be caught.

We cannot escape the conclusion that his failure to avoid the danger was at least due to "inattention, indifference, absent-mindedness, forgetfulness," or "thoughtlessness," and consequently that "he was guilty of negligence which proximately contributed to his injury." *Wood v. Richmond & D. R. Co.*, 100 Ala. 660, 13 South. 552; *L. & N. R. R. Co. v. Hall*, 87 Ala. 708, 719, 720, 6 South. 277, 4 L. R. A. 710, 13 Am. St. Rep. 84. Consequently, the general affirmative charge should have been given in favor of defendant as requested.

It is unnecessary to consider other assignments of error.

The judgment of the court is reversed and the cause remanded.

Reversed and remanded. All the Justices concur, save DOWDELL, C. J., not sitting.

DAILEY v. ALABAMA CONSOL. COAL & IRON CO. et al.

(Supreme Court of Alabama. June 29, 1911.
Rehearing Denied Feb. 17, 1912.)

APPEAL AND ERROR (§ 639*)—RECORD—DEFECT IN NOTE OF EVIDENCE.

Where a deed in a suit to quiet title, received without objection in evidence, corresponded with the answer, the fact that the note of testimony incorrectly stated the date of the deed was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 639.*]

Somerville, J., dissenting in part.

Appeal from Chancery Court, Tuscaloosa County; A. H. Benners, Chancellor.

Suit by John R. Dailey against the Alabama Consolidated Coal & Iron Company and another. From a decree for defendants, complainant appeals. Reversed and rendered.

Richard B. Kelly and Maud McLure Kelly, for appellant. Van de Graaff & Sprott, for appellees.

SIMPSON, J. The bill in this case was filed by the appellant against the appellees, under the statute, to quiet title to certain lands described in the bill. Without regard to whether the deed from Matilda Norwood to John R. Dailey is genuine or not, yet tak-

ing into consideration the fact that said Dailey, according to his own testimony, purposely kept the deed off the record to prevent notice from reaching the owner of the title, and other evidence before the court, we hold that as to all of the land involved, except the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 3, township 21, range 7 W., the possessory acts were fictive, and not such as to establish adverse possession.

As to said S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, we hold that the complainant established adverse possession, without regard to the said deed. The acts of possession, referred to in the conflicting testimony, since the recording of the deed, are not sufficient to establish title in the complainant, as against the legal title shown by the respondents.

The fact that the note of testimony incorrectly states the date of one of the deeds introduced in evidence is not reversible error. The deed introduced corresponds with the allegation of the answer, and said deed was introduced in evidence without objection. *Odom, Ex'r, v. Moore*, 147 Ala. 568, 41 South. 162.

The decree of the court is reversed, and a decree will be here rendered, declaring that the respondents have no title to the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 3, township 21, range 7 W., in Tuscaloosa county, but that they have title to the remainder of said land. The appellant will pay one-half of the costs of the case, and the appellees will pay one-half of the same.

Reversed and rendered.

ANDERSON, McCLELLAN, and SAYRE, JJ., concur. DOWDELL, C. J., and MAXFIELD, J., not sitting. SOMERVILLE, J., dissents.

SOMERVILLE, J. (concurring and dissenting). I find no support in the record for the conclusion that the complainant is entitled to a decree awarding to him all of the 40-acre subdivision at one end of which he appears to have made his home for more than the period of limitations. The evidence shows that his residence was but a short distance across the line from his own land, and that his actual occupation of the 40 did not exceed an area of 5 or 6 acres at most. Conceding, as it seems to be the case, that complainant had by a *possessio pedis* acquired title to this much of the 40, there is still not a particle of evidence by which the small area in actual occupation can be defined or determined; and hence the chancellor was unable to ascertain its limits or location, and powerless to decree any relief with respect thereto. The proper solution of such a case is, in accordance with well-settled principles, not to award to the claimant a tract bounded by the purely imaginary lines of the sectional subdivision next surrounding the occupied tract, but to deny to him all of

it, in the absence of a valid color of title thus extending his possession.

For these reasons, I think the chancellor's decree should be affirmed in toto.

ALABAMA CHEMICAL CO. v. PHELPS.

(Supreme Court of Alabama. Nov. 23, 1911.

Rehearing Denied Feb. 15, 1912.)

1. MASTER AND SERVANT (§ 156*)—LIABILITY FOR INJURIES—WARNING.

Where a foreman directed an employé to work at a point upon the ground 40 or 50 feet below an overflow pipe from which he knew sulphuric acid occasionally dripped, and the employé was ignorant of this danger to his eyes, the failure of the foreman to warn the employé constituted negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 311; Dec. Dig. § 156.*]

2. MASTER AND SERVANT (§ 223*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

An employé in charge of men engaged in taking down an overhead bin 15 or 20 feet above the ground, and who had nothing to do with an overflow pipe, 40 or 50 feet above the ground, from which sulphuric acid was occasionally dripping, did not assume the risk of injury from the dripping of the acid into his eyes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 652; Dec. Dig. § 223.*]

3. TRIAL (§ 96*)—EVIDENCE—MOTION TO EXCLUDE—EVIDENCE ADMISSIBLE IN PART.

An exception to the overruling of a motion to exclude the testimony of a witness as to what a certain person had said, where part of such person's statement was clearly admissible, was insufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 248; Dec. Dig. § 96.*]

Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge.

Action by Julius D. Phelps against the Alabama Chemical Company. From judgment for plaintiff, defendant appeals. Affirmed.

Ray Rushton and W. M. Williams, for appellant. Hill, Hill & Whiting, for appellee.

DOWDELL, C. J. The cause was tried by the court below without the intervention of a jury, and a judgment was rendered in favor of the plaintiff. There are three assignments of error. The first two are in substance the same—one that the court erred in rendering judgment for the plaintiff, and the other that the court erred in not rendering judgment for the defendant. The third assignment relates to the action of the court in overruling the motion of the defendant to exclude certain evidence.

Under the issues in the case, we think the trial court on the whole evidence was fully justified in rendering a judgment in favor of the plaintiff. There can be no question that the plaintiff received the injury complained of, and that it was received while in the discharge of his duties under his said employment. That the injury was the result of sul-

phuric acid dropping in the eye of the plaintiff from the end of an unguarded overflow pipe 40 or 50 feet overhead where the plaintiff was required to be in the discharge of his duties was reasonably and satisfactorily shown by the evidence. That this was a dangerous place, and that the plaintiff was ignorant of the danger of the dropping of the acid, we think there can be no doubt.

[1] The plaintiff's superior, Austin, the foreman of the defendant, and who had superintendence of the plaintiff, and who ordered the plaintiff to perform the service at which he was engaged when injured, knew of the dropping of the acid from the overflow pipe, and hence that the place was dangerous, failed to inform or warn the plaintiff of such dangers, and was therefore guilty of negligence in the failure to notify and warn the plaintiff. The occasional dropping of the acid from the end of a pipe 40 or 50 feet overhead down upon the ground below was by no means an obvious danger, nor one that would have been discovered by ordinary care and prudence.

[2] The contention of the defendant that the plaintiff assumed the risk of the danger of the acid dropping upon him is without merit. The plaintiff was put in charge of a gang of men to take down an overhead bin for repairs, which was 15 or 20 feet above ground, and had nothing to do with the overflow pipe from which the acid dropped, and we are unable to see how it could be in reason said that in superintending this work he assumed the risk of danger from something disconnected from the work. We see no reason for disturbing the judgment of the trial court.

The plaintiff was examined as a witness in his own behalf, and in the course of his examination stated: "Immediately after my injury, they went, or sent, to see what it was. He came back and said, 'It is acid.' He says it is dropping a drop every two or three minutes." No objection was taken to this statement of the witness at the time, but after the conclusion of the examination of the witness, direct and cross, the bill of exceptions recites that the following motion was made by the defendant: "We move to exclude what Mr. Austin said because it was not a part of the *res gestæ*." The court overruled this motion, and the defendant excepted. It is not clearly shown from the bill that the statement quoted above was said by Austin. In the use of the pronoun "he," it may be that the witness was referring to Austin, but it cannot be positively asserted that he was referring to Austin.

[3] But, if it be conceded that the witness meant Austin, the record discloses that the statement quoted was not all that the witness testified that Austin said during the course of the examination, and some of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which was clearly relevant and competent. The exception reserved is in its nature too indefinite to put the trial court in error. Moreover, Austin was himself examined as a witness, and testified that there was occasional dropping of acid from the pipe, although he denied telling plaintiff that it was dropping a drop every two or three minutes. With the statement objected to eliminated, there was without dispute sufficient evidence left, as to this question, to warrant the judgment. We cannot say that the trial court committed reversible error, and the judgment will be affirmed.

Affirmed. All the Justices concur.

HAYS et al. v. DILLARD.

(Supreme Court of Alabama. Feb. 1, 1912.)

1. DEEDS (§ 11*)—EXECUTION—VALIDITY.

Where land was conveyed to a wife and her children jointly, a deed by the husband, executed after her death, purporting to be a deed of the children, but executed by him without authority in the names of the children, was void as to the children, and when not recorded it did not give the children constructive notice of its existence.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 11.*]

2. DEEDS (§ 211*) — VALIDITY — INSANITY — EVIDENCE.

Evidence held to justify a finding that a grantor was insane at the time of the execution of a deed, rendering the same invalid.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 639; Dec. Dig. § 211.*]

3. TENANCY IN COMMON (§ 15*) — ADVERSE POSSESSION.

Land was conveyed to a wife and her children jointly. After her death, her husband, without authority, conveyed the land and signed the children's names to the deed. Held, that a claimant under the deed was, during the husband's life, a tenant in common with the children, and his possession was prima facie that of the children, and to acquire title by adverse possession he had the burden of establishing possession adverse to the children.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

Appeal from Chancery Court, Tallapoosa County; W. W. Whiteside, Chancellor.

Suit by W. D. Dillard against H. F. Hays and others to quiet title to land. From a decree for complainant, defendants appeal. Reversed and rendered.

After setting out a description of the land, and alleging that orator and those under whom he holds said land have been in open, adverse, exclusive, and notorious possession of said land for more than 10 years, claiming title to same, it is alleged that H. F. Hays, Bertha Hays, and Willie Hays, who is alleged to be of unsound mind and incarcerated in the insane asylum at Tuscaloosa, purport to have some claim or title thereto, or lien or incumbrance thereon. Respondents propound their claim, setting up that

each owned a one-eighth interest in said land under and by virtue of a deed of conveyance executed by Day to themselves and their mother, and an additional one fifty-sixth interest by virtue of inheritance from their mother. The complainant claims through a deed purporting to have been made by H. R. Hays and his children to T. J. Simmons, who conveyed to T. O. Dillard, who conveyed to the present complainant. The other facts sufficiently appear in the opinion.

Bulger & Rylance, for appellants. Bridges & Oliver, for appellee.

MAYFIELD, J. This is a suit by appellee against appellants to quiet title and determine claims to land. The bill is filed under chapter 127, §§ 5443-5449, of the Code.

The respondents (appellants here) disclaimed title as to part of the land described in the bill, as is provided for by section 5448 of the Code, and as to this part of the land no question is raised on this appeal. As to the other lands, the respondents claimed to own an undivided one-eighth interest, acquired by conveyance from one W. J. Day and his wife in 1884, and in addition thereto an undivided one fifty-sixth interest, which they acquired by descent from their deceased mother, Theresa Hays.

The chancellor allowed the claim of two of the respondents as to the one fifty-sixth interest which they acquired by descent from their mother, but disallowed their claim as to the one-eighth interest acquired by purchase from Day. As to the third respondent, who is non compos mentis, the chancellor denied his entire claim on account of a conveyance by him of his interest.

After a careful examination of all the evidence, oral and documentary, together with the pleadings in this case, we are persuaded that the chancellor was in error in his findings and decrees as to the interest, claim, and title of each of these respondents; and that the evidence shows that they are entitled to the exact interests set up in their answers.

[1] It is conclusively shown, if not without dispute, that W. J. Day was the common source of title of the lands in dispute; that in 1884 he and his wife conveyed these lands to Theresa Hays and her seven children jointly, and that these respondents are three of these children and grantees; that the mother died in 1892, leaving surviving a husband, H. R. Hays, the father of the respondents and the other children. In 1899, the father, H. R. Hays, attempted to convey the absolute title to one Simmons. This deed was void, however, as to the children, including these respondents, for the reason that they were not parties thereto—the father, without any legal authority, signing their

names thereto, the children not even being present; and the certificate of acknowledgment reciting that the father did so sign their names. This deed was not recorded until November 7, 1910, after this suit was filed; nor was the complainant's deed from Simmons recorded until after the filing of this bill. So the respondents had not even constructive notice of this void deed, purporting to be signed by them. The complainant therefore shows no valid paper title to the interest of the two respondents who are *compos mentis*, although he claims through them.

[2] As to the interest of the respondent non *compos mentis*, the complainant shows title if his conveyance thereof is valid; that is, if it is not void because the grantor was non *compos mentis* at the time of the attempted conveyance. The evidence is in dispute as to this fact; but after careful examination thereof we are of the opinion that the grantor was incompetent to make the conveyance, and that the instrument attempted to be executed was therefore void. The chancellor expressed grave doubt as to the correctness of his own finding touching this fact; and it is not denied that this alleged grantor is now insane, and is now in the insane hospital at Tuscaloosa, where he has been confined for about eight years. Moreover, the majority of the disinterested witnesses qualified to testify upon this subject say that he is now insane, was so at the time of the attempted conveyance, and has been so all his life.

The evidence tending to show insanity was rather of a negative character, being to the effect that the witnesses did not *then know* this respondent was insane; and some of the witnesses as to sanity were interested. Those witnesses who knew him best testified that he had been idiotic all his life, and testified to conduct and acts on his part wholly inconsistent with those of a sane person, such as tearing up his clothes and chewing them, fighting with trees and other inanimate things, sleeping out in the woods, and going for days only partially clad, and without food.

[3] While the complainant claims title through these respondents, and the conveyances have been shown to be void and impotent to pass title, yet he contends that he has acquired title by adverse possession; that, though these conveyances be void, in so far as they attempt to pass title, yet they answered as color of title and enabled complainant to acquire possession. To this we cannot agree, for the reason that complainant was in fact and in law a tenant in common with these respondents during the life of the father; and hence, his possession, and that of those under whom he claims, was *prima facie* that of the respondents also. The deed from the respondents' father to

Simmons, of December 7, 1899, which must form the only basis for adverse possession, is shown conclusively to have been, in law, if not in fact, a forgery, so far as these respondents are concerned. It is conclusively shown that their names were signed to it without their presence, their authority, or their knowledge, and that they never appeared before the justice who took the acknowledgment. And while the certificate of acknowledgment is somewhat confusing in its recitals, it does not show that they executed the deed, or in person so acknowledged its execution; and there is no pretense of any power of attorney in any one to so execute the deed for them.

It is also shown that the grantee, Simmons, knew that as to these respondents the deed was a forgery; and, as stated, this deed was not filed for record until November 7, 1910, nearly 11 years after its execution, and several months after this bill was filed.

It appearing beyond question that the interests of these respondents in the land in question did not pass by this deed to Simmons, the question arises, Can or should the deed operate as a color of title to Simmons and his grantees, by virtue of which to build up an adverse possession and defeat the title of these respondents? We think not. Such would be a fraud in law, if not in fact. The law as to adverse possession, as between tenants in common, has been so often stated by this court that it would seem unnecessary to restate it here. It is sufficient to say that we are of the opinion that this doctrine applies to this case, and that the complainant has not discharged the burden resting upon him to show title, as against these respondents, by proof of adverse possession.

It therefore follows that the decree of the chancellor is erroneous, and it is reversed; and a decree will be here entered, adjudging that these respondents are each entitled to an undivided one-seventh interest in and to the land in question, as claimed in their answers.

Reversed and rendered. All the Justices concur.

CRICHTON v. HAYLES.

(Supreme Court of Alabama. Feb. 1, 1912.)

1. ACCOUNT (§ 6*)—EQUITABLE ACTIONS—BILL—REQUISITES.

A bill for an accounting, based on transactions between complainant and defendant's intestate, which alleges that the intestate platted three tracts and employed complainant, under separate agreements, to sell lots for a percentage, net on sales, after the intestate had received the amount of the price, together with the expenses incurred in preparing the property for market, that most of the lots were sold partly for cash and partly on deferred payments, that the cash payments were turned over to the intestate, that in several in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

stances complainant retained installments of payments with intestate's knowledge, that in some instances sales were canceled for defaults of purchasers and the lots resold by complainant to other purchasers, that the intestate expended sums, besides purchase money, in subdividing the tracts and in preparing the lots for market, and which prays for an accounting, states a cause of action for an accounting on the theory of a complicated account.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 17-19; Dec. Dig. § 6.*]

2. ACCOUNT (§ 14*)—EQUITABLE ACTIONS—REQUISITES—DEMAND.

Where an account is complicated, giving rise to an independent equity, a preliminary personal demand for an accounting before resorting to equity is not necessary.

[Ed. Note.—For other cases, see Account, Dec. Dig. § 14.*]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Suit by John F. Hayles against Hermeula Crichton, administratrix, for an accounting. From a decree overruling a demurrer to the bill, defendant appeals. Affirmed.

Henry Chamberlain, for appellant. D. B. Cobbs and Gregory L. & H. T. Smith, for appellee.

SOMERVILLE, J. [1] The bill is filed against appellant, as administratrix of the estate of her intestate, and seeks for an accounting, based upon certain business transactions between complainant and the said intestate, and also for discovery in aid thereof.

The facts and conditions shown by the bill are substantially as follows: Prior to May 27, 1907, the intestate owned two tracts of land known as the Millville and Toulminville tracts, which he laid off into lots and placed on the market for sale, and complainant had sold a large number of them for him from the Millville tract only. On the date mentioned, a written agreement was made between them, to wit:

"Mobile, Alabama, May 27, 1907.

"This memo of agreement between J. F. Hayles and myself. I agree to pay him 25 per cent. net on sales of lots in South Millville and Toulminville Heights after I receive the amount of the purchase price of property together with the expenses made necessary in preparing the same for market. Legal expenses, etc., as shown by ledger in which said accounts are kept. Said lots are to be sold at prices agreed to by me. This agreement to last two years from date. [Signed] H. R. Crichton. J. F. Hayles."

Under this agreement, complainant sold a large number of lots from the Toulminville tract. Subsequently the intestate purchased a third tract of land, known as the First Addition, which he has also laid off into lots and placed on the market; and complainant sold for him from this tract a large number of lots. The reasonable value of his

services in selling all the lots, not provided for by the written contract, was 25 per cent. of the selling price of the lots.

A few of the lots in each of the tracts named were sold for cash; but most of them were sold partly for cash and partly on deferred payments. Cash payments were turned over to the intestate, but in several instances complainant retained installment payments with the knowledge of the intestate, who also, from time to time, made payments to complainant on account of his commissions; all of these being charged to his general account, without reference to any particular sales. On the deferred payments referred to, various purchasers made payments from time to time, some to the intestate, and some later to the respondent; while, for defaults in some of them, the sales were canceled, and the lots resold by complainant to other parties.

The intestate expended considerable sums, besides the purchase money, in subdividing the tracts and preparing the lots for market, of which he kept an account.

Complainant does not know the amounts or dates of the various deferred payments; nor the amount of said expenses, of which he himself kept no account, and depends upon getting them from respondent. It is charged, however, that upon an adjustment of the several accounts a balance will remain due to him.

The bill alleges that intestate died in February, 1909, and that respondent "was thereafter appointed as the administratrix of his estate."

Paragraph 6 of the bill summarizes the conditions recited, as a predicate for discovery, as follows: "(6) By reason of the fact that there were a large number of small cash payments made upon the purchase price of the lots sold, and many similar payments made upon the notes given for deferred payments of the purchase money for lots sold on credit, and the further facts that a large number of these payments were not made promptly at the time that they became due, but at irregular periods, and the fact that the sales of some of the lots were rescinded, and such lots resold, and the fact that there is confusion and error in the account kept by H. R. Crichton and defendant of the expenses paid out by said H. R. Crichton and defendant, Hermeula Crichton, his wife, in preparing said lands for market, and the fact that complainant has no way of ascertaining when the said H. R. Crichton received payment of the amounts, all of the purchase money and expenses upon said property, rendering the ascertainment of the amount due complainant dependent upon a complicated account which has been kept only by said H. R. Crichton and defendant, complainant is unable to correctly state such account

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

without a discovery from the defendant, and is, for said several reasons, remediless, except in a court of equity."

The general principles declaratory of the equitable jurisdiction of accounting and discovery have often been stated and applied by this court, and it is not necessary to restate or discuss them. *Dickinson v. Lewis*, 34 Ala. 638; *Shackelford v. Bankhead*, 72 Ala. 476; *Virginia, etc., Co. v. Hale*, 93 Ala. 542, 9 South. 256; *Wood v. Hudson*, 96 Ala. 469, 11 South. 530; *Dargin v. Hewlitt*, 115 Ala. 510, 22 South. 128; *Pollak v. H. B. Claflin Co.*, 133 Ala. 644, 35 South. 645; *Hulsey v. Walker Co.*, 147 Ala. 501, 40 South. 811; *Hall v. McKeller*, 155 Ala. 508, 46 South. 460; *Friedman v. Fraser*, 157 Ala. 191, 47 South. 820.

It is evident that the bill does not exhibit a case of *mutual* accounts; and that in this respect the equity of the bill must depend upon the fact of confusion or complication; and this to such an extent as to render it fairly impracticable to present a clear and satisfactory statement of the account in the ordinary way in a court of law.

It must be noted that there were three series of sales, extending through several years, under separate agreements, upon which commissions have been paid indiscriminately. If this were all, however, there would be no apparent difficulty in computing the aggregate of the commissions, and placing upon respondent the duty, in a court of law, of showing the amount of the payments to be credited thereon. But the case is quite otherwise. It becomes necessary, under the written contract, in order to show that commissions, if any, are due to complainant, to first show that the purchase money actually collected on the sales made thereunder exceeds the first cost and preparatory expenses paid or incurred in respect to the two tracts concerned. And, to determine when the commissions became due and began to bear interest, it must first be shown at what date the aggregate of the payments, cash and deferred, equaled and balanced the amount of purchase money and expenses. To do this correctly under the conditions shown may well tax the skill of a trained accountant, and certainly cannot be presented in intelligible detail to the average jury.

Besides all this, another account must be stated to show the commissions earned under the other contracts; this must be added to the first sum, and from the aggregate must be subtracted the sum of all the partial payments, with due allowances for interest pro et con. Moreover, the bill shows that the greater part of the information necessary in the statement of the account is not with complainant, and is exclusively with respondent, as the representative of intestate and the custodian of his property and business books and documents, enhancing for him the diffi-

culties of a situation already difficult enough.

Upon a critical examination of the showings made by the bill we think they clearly indicate the necessity for an equitable accounting. In this view of the case, we need not consider whether the allegations of the bill show, also, an independent equity to have the discovery prayed for, since they are entirely sufficient for the incidental purpose of aiding the account.

[2] Where, as here, the account is complicated, giving rise to an independent equity, we are aware of no rule which requires a preliminary personal demand upon the other party before resorting to a court of equity. Other points made by the demurrers are without merit, and, not being argued by counsel, will not be considered.

The decree of the chancellor is affirmed.

Affirmed. All the Justices concur.

OSBORNE v. WADDELL.

(Supreme Court of Alabama. Feb. 6, 1912.)

1. EQUITY (§ 150*) — BILL — MULTIFARIOUSNESS.

Complainant filed a bill against her two minor children to sell real property for division, alleging a sale of the lands for taxes under a probate decree and the execution of a deed to R., who has paid all subsequent taxes, and who offers to release her interest for a certain amount. An amendment alleged that since the bill was filed defendant O. purchased the interest of R., with notice of R.'s offer to permit redemption, and prayed that he be made a party, and that the court decree that he only had a lien on the property for the purchase price paid at the tax sale, and that complainant and the infants be allowed to redeem. *Held*, that the bill, regarded as a bill to quiet title, was demurrable for multifariousness.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 371-379; Dec. Dig. § 150.*]

2. TAXATION (§ 722*) — TAX SALES — REDEMPTION — REMEDY.

A bill will not lie to enforce a right of redemption from a purchaser at a tax sale; the remedy at law provided by Code 1907. §§ 2313, 2314, being adequate, complete, and exclusive.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1449-1453; Dec. Dig. § 722.*]

3. CONTRACTS (§ 22*) — LIEN — RELEASE OF PROPERTY.

An offer of a purchaser at a tax sale to release the property from the lien on payment of \$80, or the amount of the purchase money, taxes, and interest, not shown to have been accepted, was unenforceable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 67-93, 104-108; Dec. Dig. § 22.*]

4. FRAUDS, STATUTE OF (§ 63*) — INTEREST IN LAND.

A parol agreement by the purchaser of land for taxes to release the lien on payment of a specified sum is within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 97-104; Dec. Dig. § 63.*]

Appeal from Montgomery City Court; William H. Thomas, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Bill by Camilla G. Waddell against W. J. Osborne. From an order overruling demurrers to the bill, defendant appeals. Reversed, rendered, and remanded.

J. Lee Holloway, for appellant. George Stowers, for appellee.

SOMERVILLE, J. [1] The complainant filed her original bill against her two minor children for the purpose of selling for division certain real estate alleged to be jointly owned by her and them.

The bill alleged that there had been a sale of the land for taxes in September, 1902, under a decree of the probate court; and that upon the expiration of the two years allowed for redemption a tax deed was executed to Leah Rice, who has paid all subsequent taxes, and who now offers to release her interest to complainant and respondents for the sum of \$80. This allegation was made with a view to the apportionment of this incumbrance to the several shares of the joint owners.

An amendment was filed, as follows: "Since the filing of said bill, one W. J. Osborne claims to have become the owner or purchaser of the interest in said real estate owned by the said Rice in a manner unknown to your oratrix. Complainant alleges that if said Osborne has purchased or otherwise become the owner of the interest of said Rice in said real estate he did so with notice of the agreement or offer of said Rice as to the redemption of said real estate as set forth in said bill, and is now bound by the same."

This Osborne is, by the amendment, made a party defendant to the bill, with the prayer that the court "adjudicate the interest of said Osborne in said property, and to decree that he only has a lien on said property for the purchase price paid at said tax sale, costs, and subsequent taxes and interest thereon, and complainant and said infants allowed to redeem said property." It is somewhat difficult to grasp the theory underlying this amendment; but, whatever the theory may be, the amended bill is subject to numerous and vital objections by Osborne. If it be regarded as a bill to quiet title, it is multifarious, as was held in the recent case of *Brown v. Feagin*, 57 South. 20, to say nothing of other deficiencies.

[2] On the other hand, if it is a bill to enforce the right of redemption from a purchaser at tax sale, it is wholly without equity, so far as Osborne is concerned; for the remedy at law, as provided by sections 2313 and 2314 of the Code, is not only adequate and complete, but also exclusive. The minor children may, of course, redeem under the statute at any time within one year after the removal of their disabilities. But they are not asking for redemption, and the bill

shows that complainant is not entitled to it.

[3, 4] And, finally, if, as seems most likely, the bill is intended as one to enforce the specific performance of an agreement to release the property upon the payment of \$80, or the amount of purchase money, taxes, interest, etc., it is fatally defective in not showing an enforceable contract. The mere unaccepted offer on the part of Osborne's grantor to complainant was in no sense an agreement; and, if it had become a contract by complainant's seasonable acceptance of its terms, it would still be unenforceable if not shown to be in writing, as required by the statute of frauds. In this aspect, also, the bill would be clearly multifarious, as above pointed out.

It is not necessary to pass upon other points raised by the demurrers, since it is clear that this bill cannot be prosecuted against appellant. The trial court erred in overruling the demurrers pointing out the defects above noted, and its decree will be reversed and one here rendered, sustaining them.

Reversed, rendered, and remanded. All the Justices concur.

SPIERS et al. v. ZEIGLER et al.

(Supreme Court of Alabama. Feb. 17, 1912.)

WILLS (§ 702*)—ACTION TO CONSTRU—ADMINISTRATION—PLEADING.

Where a bill to remove the administration of an estate from the probate to the chancery court, and to construe a will, set out a copy of the will, and alleged various matters with reference to which doubt and uncertainty had arisen, and sought the aid of equity to construe the instrument and to direct the executors in the premises, it was not demurrable for want of equity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1679; Dec. Dig. § 702.*]

Appeal from Circuit Court, Elmore County; W. W. Pearson, Judge.

Bill by T. J. Zeigler and another, as executors of the last will and testament of Nancy Zeigler, against Julia E. Spiers and others, to remove the administration of the estate from the probate to the chancery court, and to construe a will. From a decree overruling demurrers to the bill, respondents appeal. Affirmed.

The bill alleges that Nancy Zeigler died possessed of a large tract of real estate consisting of about 800 acres of land and certain personal property; that by her last will and testament she attempted to make disposition of said estate in lands and personalty, but that, after executing all the directions of the will that was possible of execution, complainants had a survey made of the real estate and the same platted, with purpose of defining the boundaries between the tracts of land devised to the devisees mentioned in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

said will and testament, and when the same was surveyed and platted it was ascertained that it was impossible to carry into execution certain devises set forth therein, since by the description in the will several devises overlapped and certain devises bequeathed land parts of which did not belong to said Nancy Zeigler. The bill then proceeds to set forth the devises, and to show wherein they overlapped, and wherein they convey land not the property of the testator. The will is attached to the bill, and shows 11 devises of land to as many different devisees.

The demurrers to the bill are: That there is no equity in the bill. That the bill shows on its face that it was filed by the executors, and there was no provision in the will directing or instructing them, as such executors, to take charge or control of the real estate alleged to be in possession of such respondents, or either of them. There is no authority in the will or provision of law which authorizes the executor to file any bill or obtain any decree from any court of equity affecting the right of possession or ownership of respondents, or either of them, to the lands which respondents, or either of them, are in possession of or claimed to own. The will shows on its face that there is no ambiguity which requires a construction of its intent by a court of equity.

Goodwyn & McIntyre, for appellants.
Frank W. Lull and Coleman, Dent & Well, for appellees.

McCLELLAN, J. The sole assignment of error is that the court erred in overruling the demurrers of Julia E. and Nancy J. Splers. The only objections, in substance, taken by these demurrers, go to the equity of the bill, which is filed by the executors of the last will and testament of Nancy Zeigler, deceased.

With the bill, the will, in copy, is exhibited. After most ample averments pointing out the bases of doubt and uncertainty in the provisions of the will with respect to property devised or undertaken to be devised thereby, the bill seeks the aid of equity to construe the instrument and to direct the executors in the premises. Upon the authority of *Ashurst v. Ashurst*, 57 South. 442, delivered at this term—which ruling was rested upon *Trotter v. Blocker*, 6 Port. 289; *Lakeview Co. v. Hannon*, 93 Ala. 88, 9 South. 539; *Tompkins v. Troy*, 130 Ala. 555, 30 South. 512; *Carroll v. Richardson*, 87 Ala. 605, 6 South. 342, and authorities in each cited—it must be ruled that the bill in hand possesses equity, for the removal of the administration from the probate court, and for the construction of the will of Nancy Zeigler, deceased. It is not necessary to rehearse the evidence of complication and uncertainty

which appears upon the face of the will, and to which the bill particularly refers.

The decree is affirmed.

Affirmed. All the Justices concur.

SHOWS v. STEINER, LOBMAN & FRANK.
(Supreme Court of Alabama. Nov. 30, 1911.
Rehearing Denied Feb. 15, 1912.)

1. GUARANTY (§ 7*)—VALIDITY—ACCEPTANCE.
While notice of the acceptance of a mere proposed guaranty is necessary, no further acceptance was required where a guaranty contract, completely executed by the parties, recited that sellers agreed to extend certain credit to the buyers and that the guarantor, in consideration of a certain sum in hand paid, guaranteed the payment of a certain part of the proposed indebtedness.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 9; Dec. Dig. § 7.*]

2. GUARANTY (§ 10*) — VALIDITY—ORDER OF SIGNING.

Where a guaranty of payment stated on its face that it was a continuing guaranty for 12 months, and showed that the proposal proceeded from the creditor to the guarantor, the order in which the parties signed it was not material to its validity.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 10; Dec. Dig. § 10.*]

3. GUARANTY (§ 14*)—VALIDITY—CONSIDERATION.

Where a guaranty contract for the payment of a proposed indebtedness of \$1,000 recited on its face that it was made in consideration of \$5 in hand paid, of which receipt was acknowledged, it was immaterial that the consideration was not actually paid.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 13; Dec. Dig. § 14.*]

4. ALTERATION OF INSTRUMENTS (§ 7*)—FILLING BLANKS—GUARANTY.

Where a guarantor signed a contract guaranteeing the payment of an indebtedness to be contracted by a certain firm, and a blank was left for the insertion of the name of such firm, which was not then exactly known, the subsequent insertion by the creditor of the firm name as intended was not a material alteration of the contract.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 34-39; Dec. Dig. § 7.*]

5. GUARANTY (§ 86*) — REMEDY OF CREDITORS—PLEADINGS—COMPROMISE OF INDEBTEDNESS.

Where the guaranty contract sued on provided that the creditor could compound the indebtedness with the principal debtors without in any way affecting the guaranty, it was not sufficient for the guarantor to plead a compromise, whereby the principal debtor was released, without specifically alleging that he himself was thereby released.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 100; Dec. Dig. § 86.*]

6. GUARANTY (§§ 64, 65*) — INSTRUCTION — STIPULATION AS TO COMPROMISE.

Under such provision of the contract, a compromise between the principal debtors and the guaranteees, without any agreement that it affect the guaranty, would not extinguish the guarantor's liability.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 75; Dec. Dig. §§ 64, 65.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. GUARANTY (§ 92*)—REMEDY OF CREDITORS—ISSUES FOR JURY.

Where the complaint upon a guaranty averred that the creditors extended credit to the accommodated parties as stipulated in the guaranty, and the defendant's evidence was that the creditors failed and refused to extend the credit to the full amount named, the issue raised was for the jury.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 92.*]

8. EVIDENCE (§ 213*)—ADMISSION—OFFER TO COMPROMISE—ADMISSIBILITY.

In a suit on a guaranty, a letter, written by the guarantor to secure a settlement without suit, was admissible to disprove his plea of non est factum, though not to show liability.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 745-753; Dec. Dig. § 213.*]

Appeal from Circuit Court, Crenshaw County; A. E. Gamble, Judge.

Action by Steiner, Lobman & Frank against T. W. Shows. From a judgment for plaintiffs on a directed verdict, defendant appeals. Reversed and remanded.

F. B. Bricken and Tyson, Wilson & Martin, for appellant. Powell & Hamilton, for appellees.

MAYFIELD, J. This is an action on a contract of guaranty, which contract was in writing, and was as follows:

"Agreement of Guaranty. The State of Alabama, Montgomery County:

"This agreement, made this the 17th day of October, 1907, by and between Steiner, Lobman & Frank, a partnership, engaged in the wholesale dry goods and notion business, at Montgomery, Alabama, of the one part, and T. W. Shows, of Luverne, Alabama, of the other part, witnesseth: That whereas, the said Steiner, Lobman & Frank have agreed to supply the firm of Beall & Fundaburk, from time to time, in the course of trade, with merchandise, on credit, to the extent of twenty-five hundred (\$2,500.00) dollars, for a period of twelve (12) months from this date, provided the said Shows will enter into this agreement of guaranty; and whereas, the said T. W. Shows is willing to become guarantor to the said Steiner, Lobman & Frank, upon a line of credit extended to the said Beall & Fundaburk, as hereinafter provided: Now, therefore, in consideration of the premises and the sum of five (\$5.00) dollars, by the said Steiner, Lobman & Frank to the said T. W. Shows in hand paid, the receipt whereof is hereby acknowledged by the said Shows, the said T. W. Shows does hereby guarantee unto the said Steiner, Lobman & Frank, the payment, to the extent of one thousand (\$1,000.00) dollars of any indebtedness which the said Beall & Fundaburk may, from time to time, owe the said Steiner, Lobman & Frank, during the continuance of this guaranty. It is agreed that the guaranty hereby given is a continuing guaranty for

twelve (12) months from the date of this instrument, and that the said Steiner, Lobman & Frank may grant time, or other indulgence, or compound with, or take additional security from the said Beall & Fundaburk, or extend credit to the said Beall & Fundaburk in excess of twenty-five hundred (\$2,500.00) dollars, without, in any way, affecting this guaranty. In witness whereof, the said parties to this contract have hereunto set their hands, the year and day first above written. [Signed] Steiner, Lobman, & Frank, [Signed] T. W. Shows."

The complaint as last amended contained three counts. The first and second declared upon the contract, which was set out in full, and the third on the common counts, which last count need not be considered. Demurrers to the complaint being overruled, the defendant filed a great number of special pleas, including one of non est factum. Demurrers were sustained to most of these pleas, and the trial was had upon pleas 1, 2, 13, 14, A, and C, and two special replications to pleas A and C, which replications it is unnecessary to notice. Assignments of error from 1 to 21, inclusive, go to the sustaining of demurrers to special pleas from 3 to 10, and to pleas B and 15.

The defenses attempted to be set up in the pleas, in varying forms, may be reduced to three, which were: First, that defendant had had no notice of the acceptance of the guaranty by the plaintiffs; second, that the contract, when signed by defendant, contained blanks which were afterwards filled in, such after filling in constituting an alteration of the contract; third, that there was no sufficient consideration to support the contract, in that the defendant did not actually receive the recited consideration of \$5, and had no notice of plaintiffs' acceptance of the guaranty, nor of their furnishing the credit, so as to make it a binding contract.

[1] None of these numerous pleas, to which demurrers were sustained, was good. The three defenses attempted to be set up in them were not availing in this action. It is very true that notice of acceptance by the guarantee of a mere proposed guaranty, such as a letter of credit, is necessary to make the undertaking binding upon the guarantor; but it is equally true and well settled that no formal or further acceptance is necessary where the guaranty, as in this case, is a bilateral contract, completely executed by both parties, reciting on its face that it is executed upon a recited, even though nominal, consideration.

These two rules are well settled by the Supreme Court of the United States, in the case of Davis v. Wells, 104 U. S. 159, 26 L. Ed. 686. It is there said: "In Adams v. Jones, 12 Pet. 207, 218 [9 L. Ed. 1058] Mr. Justice Story, delivering the opinion of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

court, said: 'And the question which, under this view, is presented is whether, upon a letter of guaranty, addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it. We are all of the opinion that it is necessary; and this is not now an open question in this court, after the decisions which have been made in *Russell v. Clark*, 7 Cranch, 69 [3 L. Ed. 271]; *Edmondston v. Drake*, 5 Pet. 624 [8 L. Ed. 251]; *Douglass v. Reynolds*, 7 Pet. 113 [8 L. Ed. 626]; *Lee v. Dick*, 10 Pet. 482 [9 L. Ed. 503], etc.'

But it is further on, in the same opinion, said: "If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows, as declared in *Wildes v. Savage*, supra [1 Story, 22, Fed. Cas. No. 17,653], where the agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis. It must be so wherever there is a valuable consideration, other than the expected advances to be made to the principal debtor, which, at the time the undertaking is given, passes from the guarantee to the guarantor, and equally so where the instrument is in the form of a bilateral contract, in which the guarantee binds himself to make the contemplated advances, or which otherwise creates, by its recitals, a privity between the guarantee and the guarantor; for in each of these cases the mutual assent of the parties to the obligation is either expressed or necessarily implied."

Such were the undisputed facts in this case, appearing on the face of the complaint. The guaranty, which was set out in the complaint, recited that the proposal came from the guarantees to the guarantor, and was accepted by him upon a recited consideration of \$5 paid, and of the proposed credit of \$2,500, to be extended to and for the benefit of a third party named therein.

[2] Moreover, this was a continuing contract of guaranty for the term of one year; such being expressly declared in the contract. It was therefore wholly immaterial who signed the contract first, or what was the order in which the parties signed it. Hence the pleas, setting up the fact that the contract was signed by defendant first, and that he did not know that plaintiffs had signed it, were immaterial; it being shown on the face of the contract that the proposal proceeded from the guarantees to the guarantor.

[3] It was likewise immaterial that the re-

cited consideration of \$5 was not actually paid, as recited. This same question was also disposed of in the cited case of *Davis v. Wells*, supra, 104 U. S. 167, 168, 26 L. Ed. 686, in which the court said: "It is not material that the expressed consideration is nominal. That point was made, as to a guarantee, substantially the same as this, in the case of *Lawrence v. McCalmont*, 2 How. 426, 452 [11 L. Ed. 326], and was overruled. Mr. Justice Story said: 'The guarantor acknowledged the receipt of the \$1, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guaranty as to other contracts. A stipulation in consideration of \$1 is just as effectual and valuable a consideration as a larger sum stipulated for or paid.'"

[4] There was nothing in the pleas which attempted to allege an alteration by the filling in of the blanks. If the facts set up in such pleas were true, they showed that the defendant was bound by the contract when the blanks were filled in. The blank to be filled in was wholly immaterial to the contract; the engagement would have been binding with the blank remaining, as it was, merely a blank for the name of the partnership to which the goods were to be furnished. The partners were known, but the exact name of the partnership had not been agreed upon; and when it was agreed upon it was inserted in the blank space. This was fully understood by all the parties. The defendant, by signing the contract in that condition, authorized the holder to fill in this blank when the facts were known; and hence it was as binding upon him, as a contract, as if the name had been inserted in the blank space when he affixed his signature.

"1. There are two general rules which apply to the law as to filling in blanks in written instruments: First, no one can found a title upon a forgery (7 C. B. Eng. 448; 30 L. J. C. P. 117); second, 'where a man has willfully made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden, as against them, to deny that assertion' (31 L. J. Ex. 436). It has been held that a deed or bond containing blanks delivered to the grantor's agent may subsequently be filled up and effectually delivered by him. [*Gibbs & Labuzan v. Frost & Dickinson*] 4 Ala. 720: [*Duncan v. Hodges*, 4 McCord (S. C.) 239] 17 Am. Dec. 734; [*Reed v. Morton*, 24 Neb. 760, 40 N. W. 282] 1 L. R. A. 736 [8 Am. St. Rep. 247]."

"3. It has been said by the Supreme Court of the United States: 'We agree that by signing and acknowledging the deed in blank, and delivering it to an agent with expressed

or implied authority to fill up the blank, perfects the conveyance, and its validity cannot well be doubted.' [Drury v. Foster] 2 Wall. 24 [17 L. Ed. 780]." 6 Mayf. Dig. 86.

[5] Pleas 11, 12, E, and F, which attempted to set up a compromise of the indebtedness due from Beall & Fundaburk to plaintiffs for which defendant was guarantor, were not sufficient, and demurrers thereto were properly sustained. Under this particular guaranty, it was necessary for such pleas to allege that the defendant was thereby released; it was not sufficient to allege that the principal debtor was released, because the guaranty expressly authorized plaintiffs to compound with the debtors, without affecting the guaranty.

[6] Construing the pleas most strongly against the pleader, defendant was not released by such general assignment by the debtor. We are of the opinion, however, that the court erred in giving the affirmative charge for the plaintiffs, under the evidence shown by this record, and upon the issues on which the trial was had.

[7] The contract of guaranty upon which this suit was brought was, as before stated, a bilateral undertaking, signed by both the guarantees and the guarantor. The undertaking on the part of the guarantees was, that they would extend a line of credit to Beall & Fundaburk, to the amount of \$2,500, during the next year, in consideration that defendant would guarantee the payment of the amount of \$1,000. The amended complaint alleged that they did so credit Beall & Fundaburk, to that amount, during the year, and that was therefore made a material averment. It is true that the plaintiffs' evidence proved this averment without dispute; but the defendant's evidence, that of both Beall & Fundaburk, denied that credit was extended to the amount named in the contract and alleged in the complaint, and declined to furnish the full amount, and showed that it was extended to an amount less than that named. It was therefore for the jury to say whether, as to this averment, they believed the evidence of the plaintiffs or the evidence of the defendant. The effect of the charge was to take this question from the jury, which, of course, rendered the charge erroneous. We do not now decide that it was necessary for the complaint to allege that credit was extended to the amount of \$2,500; but the complaint was amended by changing the amount of the credit alleged to have been extended from \$2,450 to \$2,500, thus emphasizing the importance of the averment. It was thus clearly made a material averment.

[8] The defendant utterly failed to prove his special plea of non est factum. His own testimony, as well as the other evidence, showed that he did execute the contract sued

upon. The letter written by him was properly admitted in evidence to disprove this plea. While it is a letter touching a settlement of the matter in dispute, and shows that it was written to avoid a suit, and was therefore not admissible to show liability under it, yet it was admissible to show that he did execute the contract.

As the case must be reversed, we will not pass upon those questions which may not arise on another trial; but we would suggest that the proof should be more certain that the copies of letters written by plaintiffs were true and correct transcripts of the originals, and that the originals were addressed and properly posted to the addressees, than it appears to have been upon this trial.

Reversed and remanded. All the Justices concur, save DOWDELL, C. J., not sitting.

BEARD v. DU BOSE.

(Supreme Court of Alabama. Feb. 8, 1912.)
APPEAL AND ERROR (§ 907*)—REVIEW—BILL OF EXCEPTIONS.

Giving the affirmative charge for defendant in ejectment is not shown error by a bill of exceptions not purporting to set out all or substantially all the evidence; it being presumable that defendant introduced evidence not in conflict with that of plaintiff, establishing a complete defense.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2916; Dec. Dig. § 907.*]

Dowdell, C. J., and Sayre, J., dissenting.

Appeal from Circuit Court, Pike County; H. A. Pearce, Judge.

Action by J. S. Beard against John Du Bose. Judgment for defendant. Plaintiff appeals. Affirmed.

Ball & Samford and Foster, Samford & Carroll, for appellant. Boykin Owens, for appellee.

MCCLELLAN, J. Statutory ejectment by appellant against appellee to recover a lot in the city of Troy, Ala. The court gave, at the request of the defendant, the general affirmative charge, with hypothesis, in his behalf.

The bill of exceptions does not purport to set out or to contain all, or even substantially all, of the evidence before the trial court. This being the condition of the bill before the court in the present appeal, the following language of Chief Justice Dowdell, to be found in Lewis Land & Lumber Co. v. Interstate L. Co., 163 Ala. 592, 593, 50 South. 1036, is apt, and its doctrine is decisive in the premises: "When, on appeal, the bill of exceptions fails to recite that it contains all of the evidence, this court will presume any state of the evidence which will sustain the giving of refusal of an instruction by the trial court." The quoted decision has been

accepted as authoritative on the point noted in these subsequent decisions: *Ventress v. Town of Clayton*, 165 Ala. 349, 352, 51 South. 763; *Lamar v. King*, 168 Ala. 285, 289, 53 South. 279. In the last-cited decision (168 Ala. 285, 289, 53 South. 279, 281), it was said: "But, while the bill of exceptions was drawn in a way which indicates with a degree of probability that it contains the evidence upon which the case was tried, there is no formal statement that such is the case nor the equivalent of any such statement. This court has in a great number of cases rigorously applied the rule that, where a bill of exceptions falls affirmatively to show that it contains all the evidence, any state of the evidence will be presumed to uphold the rulings of the trial court. A case especially in point is *Southern Mutual Ins. Co. v. Holcombe*, 35 Ala. 327, followed recently in *Lewis Land & Lumber Co. v. Interstate L. Co.*, 163 Ala. 592 [50 South. 1036]." The rule quoted ante is aptly supported by the following, among other, decisions delivered here: *Barnes v. Mobley*, 21 Ala. 232; *Bradley v. Andress*, 30 Ala. 80, 82; *Lovett v. Chisolm*, 30 Ala. 88, 90; *Stein v. Felthelmer*, 31 Ala. 57, 58; *Com'rs v. Godwin*, 30 Ala. 242, 244; *Wyatt v. Stewart*, 34 Ala. 716, 721, 722; *Taylor v. McElrath*, 35 Ala. 330, 333; *Alexander v. Alexander*, 71 Ala. 297; *M. & E. Ry. Co. v. Kolb*, 73 Ala. 405, 49 Am. Rep. 54; *Keep v. Kelly*, 29 Ala. 322, 324; *Postal Tel. Co. v. Hulsey*, 115 Ala. 193, 207, 22 South. 854; *Shafer v. Hausman*, 139 Ala. 240, 35 South. 691 (wherefrom the language in *Lewis Land & Lumber Co. v. Interstate L. Co.*, supra, was taken); *Sanders v. Stein*, 128 Ala. 633, 634, 29 South. 586.

Applying, as must be done, the quoted rule to this appeal, error in the giving of the affirmative charge stated—the only assignment of error made—is not shown to have been committed.

It is suggested that the holding in *Baker v. Patterson*, 55 South. 135, requires a different conclusion. The writer having dissented therefrom, expressing at length his views upon the matter therein discussed, Justice Anderson, who did concur therein, has kindly written for the court in response to the suggestion stated, and so, as follows: "The majority of the court concur in the opinion, but do not wish to be understood as expressly or indirectly overruling the recent case of *Baker v. Patterson*, 55 South. 135. They think that there is a broad distinction between said case and the case at bar. In the *Patterson* Case, supra, there was the demand and a general denial of same—no special defense whatever; the only issue being the existence vel non of plaintiff's claim as set out in the complaint. Therefore, under the issue as made by the pleading, and upon which the trial was had, it matters not what facts additional to those disclosed by the bill of exceptions either party may

have proved, there would necessarily be a conflict as to the real and only issue, and which would make the giving of the general charge improper. In other words, there was a conflict in the evidence upon the one material fact in the case, and whatever else may have been proven under said issue there would still remain a conflict, and thus make the decision of the case a question for the jury, and not for the court, by giving the general affirmative charge. Here we have a different case. The bill of exceptions does not disclose all of the evidence, and the defendant may have introduced evidence which might not have conflicted with the plaintiff's evidence, and yet it may have established a complete and undisputed defense to the plaintiff's action. The action was ejectment, and under the general issue the defendant had the right to defeat the plaintiff's recovery by showing that he did not have the title, and which could have been done without disputing or contradicting any of the plaintiff's evidence. The plaintiff proved certain facts to establish title, and these facts may have all been true; yet the defendant may have shown that he had acquired a title through a superior source to that of the decedent, *Betsie Du Bose*, and through whom the plaintiff claims title to the land, and there was nothing in the record to show that the defendant was claiming under a common source. He was the husband of *Betsie Du Bose*, it is true, but he did not, under the record, claim the land solely and only by the marital right to same; but, from aught that appears, he may have had a superior title to that of his wife's, and which may have been shown without disputing the plaintiff's evidence in the slightest, or he may have had a deed from her, made before her death."

In the writer's opinion, the statement of Justice Anderson that "there is a broad distinction between said case [*Baker v. Patterson*] and the case at bar" is obviously correct; for in that case a conflict in the evidence appeared; whereas in the case at bar no conflict appears.

Affirmed.

SIMPSON, ANDERSON, MAYFIELD, and SOMERVILLE, JJ., concur. DOWDELL, C. J., and SAYRE, J., dissent.

PALMER v. SIMS et al.

(Supreme Court of Alabama. Feb. 17, 1912.)

TENANCY IN COMMON (§ 15*)—ADVERSE POSSESSION—EVIDENCE.

In partition of the land of an intestate, one of the heirs claimed title by virtue of a parol gift from the intestate followed by 10 years adverse possession. After the death of the intestate, and until a few years before the action was commenced, the intestate's husband had been in possession, but it was alleg-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

ed as the agent of the claimant. There was no proof of actual knowledge by the other heirs that the husband was holding as agent, instead of in his own right as surviving husband. *Held*, that the claimant had not proved a disseisin of the other cotenants, and hence had not established adverse possession.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

Appeal from Chancery Court, Chambers County; W. W. Whiteside, Chancellor.

Action by James A. Sims and others against Mary Jo Erwin Palmer and others for partition of certain real estate. From a decree ordering partition, Mary Jo Erwin Palmer appeals. Affirmed.

Barnes & Denson, for appellant. Hines & Fuller, for appellees.

SAYRE, J. The parties to this bill for partition are the brothers and sisters, nephews and nieces, heirs at law of Susan Erwin, and claim under her. All parties, save the appellant, Mary Jo Erwin Palmer, are agreed that a decree for partition was proper. Mrs. Palmer claims the entire fee under a parol gift from her aunt Mrs. Erwin, and 10 years adverse possession continuously held subsequent to the gift. The evidence is meager, particularly so that offered by the contesting defendant in support of her alleged title. Her evidence takes the shape of a showing, admitted subject to legal exceptions, in which she and another witness state that Mrs. Erwin some time, a very short time it may be, before her death, which occurred some 15 or 16 years ago, gave the land to her, and that subsequently J. H. Erwin, husband of the former owner, remained in possession, both before and after his wife's death, holding adversely for Mrs. Palmer until his death, which occurred two or three years before the bill was filed. Prior to her death Mrs. Erwin lived on the place with her husband, and, since the death of the latter, it has been held and claimed by Mrs. Palmer. This alleged parol gift, unless followed by 10 years adverse possession, was ineffectual to pass title. The statement as to the nature of defendant's title and holding is made in these words: "The land in controversy was given to said Mary Jo Palmer by Mrs. Erwin in her lifetime, and J. H. Erwin, before the death of Mrs. Erwin, took charge of the land as the agent of Mary Jo, and not under his right under the statute as husband of Mrs. Erwin, after her death, and, since J. H. Erwin took possession as agent, said Mary Jo has been in the open, continuous, notorious, adverse possession of said land, claiming to own the same, and has been in such adverse possession for more than 10 years before the filing of this suit." There is, on the other hand, evidence going to show that J. H. Erwin after his wife's death was claiming to hold in virtue

of his statutory right as her surviving husband. It is plain that nothing done during the life of Mrs. Erwin sufficed to vest title in Mrs. Palmer. Nor does it appear that the possession held by J. H. Erwin, after Mrs. Erwin's death, amounted to a disseisin of her heirs other than the contesting defendant. Upon her death, owning the property, her heirs became tenants in common, and though defendant's evidence, stated as it is in the form of a mere conclusion of the witnesses, be given effect according to the utmost of its import, it falls short of that measure of proof necessary to show a disseisin of cotenants by a cotenant. In order to give effect as a disseisin to J. H. Erwin's holding under the particular circumstances here shown, it was further necessary to carry home to Mrs. Palmer's coheirs actual knowledge—not mere notice—that he was holding in repudiation of their rights and for Mrs. Palmer exclusively. *Ashford v. Ashford*, 136 Ala. 631, 34 South. 10, 96 Am. St. Rep. 82; *Oliver v. Williams*, 163 Ala. 376, 50 South. 937. The bare statement that he was holding for defendant and adversely did not suffice. So then, though it be conceded that the mere conclusions of defendant's witnesses should have consideration as competent evidence, and the evidence going to show that J. H. Erwin was holding in virtue of his statutory right as surviving husband be eliminated, defendant's claim of exclusive right and title has failed in the proof. *Hinton v. Farmer*, 148 Ala. 211, 42 South. 563, 121 Am. St. Rep. 63.

Let the decree be affirmed.

Affirmed. All the Justices concur.

LEWIS v. McBRIDE et al.

(Supreme Court of Alabama. Feb. 8, 1912.)

1. MORTGAGES (§ 594*)—REDEMPTION—RIGHT OF GRANTEE—"RIGHT OF REDEMPTION."

A sale by a mortgagor of his equity of redemption, made after a mortgage sale, is not an assignment of the "right of redemption" given by Code 1907, § 5746, and his grantee is not entitled to redeem.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1711; Dec. Dig. § 594.*]

For other definitions, see Words and Phrases, vol. 7, p. 6229.]

2. MORTGAGES (§ 591*)—"EQUITY OF REDEMPTION"—"RIGHT OF REDEMPTION."

The "equity of redemption" is the mortgagor's interest before foreclosure; while his "right of redemption" is a mere personal privilege given by statute to the mortgagor after a sale under the mortgage.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 591.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2447-2449; vol. 8, p. 7653; vol. 7, p. 6229.]

3. MORTGAGES (§ 605*)—REDEMPTION—CONDITIONS PRECEDENT.

One seeking to redeem from a mortgage sale must tender and deposit in court the pur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

chase money, with interest, on the refusal of the purchaser at the sale, or his grantee, on demand, to furnish a statement of the debt and lawful charges.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1788-1794; Dec. Dig. § 605.*]

Sayre, J., dissenting in part.

Appeal from Chancery Court, Butler County; L. D. Gardner, Chancellor.

Suit by Mae Lewis against J. J. McBride and another. From a decree for defendants, plaintiff appeals. Affirmed.

R. B. Smythe and John V. Smith, for appellant. Powell & Hamilton and Lane & Lane, for appellees.

SIMPSON, J. This is a bill by the appellant, seeking to redeem land that had been sold by virtue of a power of sale in a mortgage. The mortgage was made by George Lewis to Powell, Hamilton & Lane. The respondent J. J. McBride purchased at the mortgage sale and afterward sold the property to the other respondent T. B. Brown. After the sale under the mortgage, said George Lewis executed a paper in words as follows, to wit: "I * * * grant, bargain, sell, transfer, set over and assign, and do by these presents, grant, bargain, sell, convey, transfer, set over and assign to Mae Lewis all of my right, title and interest to my equity of redemption in and to a certain mortgage executed by George Lewis," etc.; going on to describe the land covered by the mortgage.

The original bill alleges that the sale by McBride to Brown was on credit, and that the legal title remained in McBride, and the amendment to the bill sets out the terms of the contract of sale, and reiterates the fact that the legal title remained in McBride. Brown, the purchaser, is in possession of the land. The original bill showed, by exhibit, a written demand on McBride, 10 days before the filing of the bill, for a statement of the debt and lawful charges. No tender of any money is alleged; nor is any money deposited in court.

After demurrer to the original bill had been sustained, the complainant filed an amendment, alleging that, after the decree sustaining the demurrer, the complainant had made a written demand on said Brown for a statement of the debt and lawful charges; that 10 days had elapsed since said demand; and that said Brown had failed to furnish the statement, and had refused to furnish the same, "saying that it was none of his business to do so, and that this was a matter for J. J. McBride to attend to." Still the complainant does not allege any tender of any money; nor does she deposit any money in court.

[1, 2] The first question which arises is whether the complainant is entitled to redeem at all. It is true that section 5746 of

the Code of 1907 authorizes the assignee of the "right of redemption," as well as the assignee of the *equity* of redemption, to redeem. According to numerous decisions of this court, the equity of redemption is that interest in the land which is held by the mortgagor, before foreclosure; while the right of redemption is not an interest in the land at all, but a mere personal privilege given by statute to the mortgagor after the land has been sold under the mortgage. It is true that, at the time of the execution of the instrument in question, said George Lewis did not have any equity of redemption in the land; but can we infer that, because a party making a quitclaim deed has no interest in the property named, he intended to convey something else, not named in the paper? We think this would be a dangerous principle to assert, and we therefore hold that the instrument in question was not an assignment of the statutory right of redemption.

[3] We hold also that the chancellor correctly held that, under the ruling of this court in the case of *Francis et al. v. White*, Adm'r, 142 Ala. 590, 39 South. 174, the amount of the purchase money, with interest, should have been tendered and deposited in court.

The judgment of the court is affirmed.

Affirmed. All the Justices concur, except SAYRE, J., who, while concurring in the result on other points, thinks that the conveyance carried the right of redemption.

CENTRAL OF GEORGIA RY. CO. v. ROUSE.
(Supreme Court of Alabama. Feb. 8, 1912.)

1. **QUIETING TITLE (§ 23*)—RIGHT TO SUB—"PEACEABLE POSSESSION,"**

One in peaceable possession under a claim of ownership, as distinguished from possession which is disputed, is within the statute authorizing one in "peaceable possession," actual or constructive, to sue to quiet title, and the fact that the right to the possession is disputed does not defeat the right to sue; but where the possession, as distinguished from the right to it, is disputed, the suit will not lie.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 55, 56; Dec. Dig. § 23.*]

For other definitions, see *Words and Phrases*, vol. 6, p. 5255; vol. 8, p. 7749.]

2. **QUIETING TITLE (§ 44*)—RIGHT TO SUE—"PEACEABLE POSSESSION."**

One suing to quiet title *held* not to show such peaceable possession as is essential under the statute to maintain the suit.

[Ed. Note.—For other cases, see *Quieting Title*, Dec. Dig. § 44.*]

Appeal from Chancery Court, Pike County; L. D. Gardner, Chancellor.

Suit by L. R. Rouse against the Central of Georgia Railway Company to quiet title to a strip of land. From a decree for complainant, defendant appeals. Reversed and rendered.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Steiner, Crum & Well and Foster, Samford & Carroll, for appellant. E. R. Braunen, for appellee.

ANDERSON, J. [1] Our statute authorizing a person in the peaceable possession of land, actual or constructive, to file a bill to quiet title to the same was construed in the case of *Adler v. Sullivan*, 115 Ala. 582, 22 South. 87. It was there said: "The act does not require the complainant to have title by possession; but if he has peaceable possession, under claim of ownership, as contradistinguished from possession which is disputed or contested, it is all, as to this, the statute requires." This case has been repeatedly cited and followed by cases, wherein the complainant's bill has been dismissed, because the proof showed that, whether he was in possession or not, it was a scrambling, disputed, or contested possession. *Lyon v. Arndt*, 142 Ala. 486, 38 South. 242; *Randle v. Daughdrill*, 142 Ala. 490, 39 South. 162; *Ladd v. Powell*, 144 Ala. 408, 39 South. 46; *Wood v. Lumber Co.*, 157 Ala. 73, 47 South. 202; *White v. Cotner*, 170 Ala. 324, 54 South. 114. This *Wood Case* is not opposed to the others, and is in conformity therewith, as there is a distinction between disputing the possession and the right to the possession. If the right to, and not the possession, is disputed, this fact should not defeat the right to maintain the bill; but if the possession itself, as distinguished from the right to same, is disputed, then the party whose possession is disputed cannot maintain the bill. Nor is the case of *Jordan v. McClure*, 170 Ala. 289, 54 South. 415, opposed to the present holding or the authorities, supra, as the opinion expressly states that the act of respondents in posting notices on the land was a mere adverse claim of title; and the opinion further on lays down the correct rule, as follows: "It requires actual possession or constructive possession; and, while it must be peaceable, it does not mean that the right or title thereto must not be disputed, for that is what the suit is intended to determine and quiet." This case does not hold that a possession is peaceable when it is disputed, or that the bill can be maintained when the possession itself, as distinguished from the right to same, is being disputed.

[2] The fourth headnote in this case is misleading. It is very questionable if the preponderance of the evidence in the case at bar does not place the possession of the strip in controversy in the respondent, instead of the complainant, when the bill was filed; but whether it does or not, and conceding, without deciding, that the complainant was in possession, it was not such a possession as the statute requires in order to maintain the bill. There was proof that the strip was surveyed and staked off as part of

the respondent's right of way soon after the conveyance from the elder Davis—Davis, Jr., the complainant's grantor, had his lots laid off and bounded to the front by this strip; he and the owners of other lots had their yard fences on the line between the lots and said strip. There was proof that Davis never claimed the strip, and told parties to whom he sold or was trying to sell lots that the respondent owned the strip, and they would never be bothered with houses in front of them. There was also proof that he declined to let a witness cut a certain tree from said strip, because it belonged to the respondent, and about the only acts of possession shown by Davis, Jr., was to have the strip cleaned off occasionally while he was occupying the house now owned by the complainant, Rouse. The only acts of possession shown by Rouse was cleaning off the strip occasionally, and at one time, just before or about the time of the filing of the bill, protesting against leaving logs on same, if the authority to do so was derived from the respondent. On the other hand, there was evidence showing that the respondent went into possession of the right of way under the deed from the elder Davis, kept the stakes at the corner, stopped the complainant's men from cutting down a tree on the land, and that it was used repeatedly as a dumping ground for logs brought for shipment, and which were deposited thereon with the consent of and under the authority of the respondent, and without protest or hindrance from Davis, Jr., or the complainant, except the one time mentioned. We hold that the complainant has not shown such a peaceable possession as will enable him to maintain the bill, and the decree of the chancery court is reversed, and one is here rendered, dismissing the bill of complaint.

Reversed and rendered. All the Justices concur.

WHALEY v. D. ROTHSCHILD & CO. et al. (Supreme Court of Alabama. Feb. 8, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§§ 473, 474*)—ADMINISTRATION SUIT.

A creditor of a testator, who had made his executrix the chief beneficiary, and who provided that she should not be required to give a bond or render an accounting of the administration of the estate, may sue in equity for his debt, though the probate court has issued letters testamentary and has assumed jurisdiction of the administration, and the right to sue is not affected by the statute postponing suits to fix liability against a decedent's estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2041; Dec. Dig. §§ 473, 474.*]

2. EXECUTORS AND ADMINISTRATORS (§§ 473, 474*)—JURISDICTION—ADMINISTRATION SUIT—DISCOVERY.

Where a creditor of a testator, who made his executrix chief beneficiary, and who pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

vided that she should not be required to give bond or to account, filed a bill to compel the payment of his debt, after the probate court had issued letters testamentary to the executrix and had assumed jurisdiction of the administration, a discovery sought by the bill from the executrix, who had made no inventory and who had disposed of assets, was necessary to an adequate administration of the estate in respect to the demand owned by the creditor.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. §§ 473, 474.*]

Appeal from Chancery Court, Houston County; L. D. Gardner, Chancellor.

Suit by D. Rothschild & Co. and others against Mamie C. Whaley, as executrix of W. H. Whaley, deceased. From a decree overruling demurrers to the bill, defendant appeals. Affirmed.

Espy & Farmer, for appellant. Pace & Chapman, for appellees.

MCCLELLAN, J. W. H. Whaley died May 31, 1911, leaving a last will and testament, which was regularly probated. Therein Mamie C. Whaley was named as executrix thereof, and to her letters testamentary were duly issued. By the terms of the instrument she is made the chief beneficiary. It is also provided therein that no bond should be required of her, nor shall an accounting be exacted of her, in the disposition or management of the estate. This bill is exhibited by creditors of the estate of W. H. Whaley, deceased, for debts created by him in his lifetime, and seeks the removal of the administration of the estate from the probate into the chancery court, the discovery of assets of the estate of their debtor, the injunction of Mamie C. Whaley and others from further disposing of or handling assets of the estate of the debtor, and other consistent relief. The appeal is from a decree overruling demurrers to the bill.

The probate of the will and the issuance of letters testamentary to Mrs. Whaley demonstrates, conclusively, that jurisdiction of the administration had been, before this bill was filed, regularly assumed by the probate court of Houston county. Of that there cannot be doubt.

[1] Creditors of the decedent are entitled to have their demands satisfied out of the estate of the debtor, and no restrictive provision incorporated by the debtor in his will can postpone or avoid the right of his creditors. That they may maintain a bill of the character before us was expressly held in *Rensford v. Magnus & Co.*, 150 Ala. 288, 43 South, 853. And such a bill is not affected by the statutory provision postponing suits whereby liability is sought to be fixed against the estate. *St. John v. St. John*, 150 Ala. 237, 240, 43 South, 580, among others.

[2] The discovery the bill seeks of the executrix is but an incident, though absolutely necessary, to the proper and adequate ad-

ministration of the estate in respect of the satisfaction thereby of the demands held by the complainants. No inventory had been made by the executrix, and the bill avers that assets of the estate had been disposed of or used by the executrix. The demurrer was properly overruled. The decree, so adjudging, is affirmed.

Affirmed. All the Justices concur.

WERTHEIMER et al. v. SIG. & SOL. FREIBERG.

(Supreme Court of Alabama. Feb. 1, 1912.)
FRAUDULENT CONVEYANCES (§ 96*) — BONA FIDE DEBT.

Where a debtor in failing circumstances owed his mother a bona fide debt, a conveyance of real property by the debtor to her in payment of the debt, reserving to the debtor no benefits, was not fraudulent as against his other creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 289-322; Dec. Dig. § 96.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by Sig. & Sol. Freiberg, partners, against Barbara and Victor Wertheimer, to set aside a conveyance to them as a fraud on creditors. From a decree granting relief, respondents appeal. Reversed and rendered.

The case made by the bill is that on the 14th day of October, 1907, Victor Wertheimer conveyed to his mother, Barbara Wertheimer, certain lots in the city of Birmingham, therein described; that Victor Wertheimer was indebted to plaintiff by account on the 1st day of January, 1907, in the sum of \$603.23; that complainants filed suit against him in the city court of Birmingham on the 9th day of March, 1910, and on the 13th day of June, 1910, recovered judgment against him in the sum of \$726; and that no part of said judgment has ever been paid. It is then alleged that the deed from Victor Wertheimer to his mother was without consideration, and that it was voluntary and executed for the purpose of hindering, delaying, and defrauding orators, his creditors. It is further alleged that Wertheimer was insolvent, and without property, save that disposed of, that he was largely in debt, and that these facts were known to his mother when she received his conveyance. Victor Wertheimer and Barbara Wertheimer answered the bill, denying his insolvency, setting up the fact that he was justly indebted to his mother in the sum of \$1,600, and that he was owing on said lots \$900 due in December, 1906, and \$900 due in December, 1907; that when the first payment became due he borrowed said \$900 to meet it from his mother, and that she assumed payment of the other \$900, which sums, taken together, were a fair and adequate price for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

the lands sold; and that said sums made up the purchase price of the lands. Barbara Wertheimer also filed answer, denying her knowledge of any insolvency, and setting up the same state of facts as to the consideration for the deed as that set up by her son. The only testimony on which the case was submitted was that of Barbara and Victor Wertheimer, each of whom testified in accordance with the facts set out above in their answer. Victor also testified as to the correctness of the account and the judgment.

F. L. Blackmon and Morris Loveman, for appellants. W. H. Smith, for appellees.

ANDERSON, J. While the grantor, Victor Wertheimer, may have been in failing circumstances, yet if he owed his mother a bona fide debt, and conveyed the lot to her in payment of said debt, it being an adequate consideration, and he reserved unto himself no benefits, the conveyance cannot be set aside at the instance of other creditors. Goetter v. Norman, 107 Ala. 585, 19 South. 56; Halsey v. Condon, 111 Ala. 221, 20 South. 445. The respondents' undisputed evidence brings this case directly under the protection of the rules as laid down in the authorities cited, and the decree of the chancellor must be reversed, and one is here rendered dismissing the bill of complaint.

Reversed and rendered. All the Justices concur, except DOWDELL, C. J., not sitting.

BRUCE et al. v. SIERRA.

(Supreme Court of Alabama. Feb. 8, 1912.)

1. WILLS (§ 186*)—REVOCATION—INSTRUMENT REVOKING WILL—EXECUTION—REQUISITES. Under Code 1907, § 6174, authorizing the revocation of a will by an instrument in writing, subscribed by testator and attested as prescribed by section 6172, an instrument revoking a will must be signed by testator or some one for him, attested by at least two witnesses, who must subscribe their names in the presence of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 447; Dec. Dig. § 186.*]

2. TRIAL (§ 140*)—EVIDENCE—WEIGHT.

The weight of the testimony of a witness who testifies to the due execution of a will, and who states that he gives his best recollection, is for the jury, and the court may not reject it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

3. TRIAL (§ 83*)—EVIDENCE—OBJECTIONS—NECESSITY.

Where, in a will contest, a witness who was a lawyer, but who did not qualify as an expert, testified that the will was properly executed, and no objection was made to the testimony on the ground that it was a mere conclusion, and the facts on which he based his opinion were not elicited, the testimony could not be excluded on a general motion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 193-210; Dec. Dig. § 83.*]

4. WILLS (§ 179*)—REVOCATION—INSTRUMENT REVOKING WILL.

Under Code 1907, § 6174, authorizing the revocation of a will by an instrument subscribed by testator and attested as prescribed for the execution of wills, a will legally executed revokes a prior will without any proof of the contents of the wills.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 456, 457; Dec. Dig. § 179.*]

5. STATUTES (§ 225%*)—CONSTRUCTION—RE-ENACTMENT OF STATUTES JUDICIALLY CONSTRUED.

Where a statute which has been judicially construed by the Supreme Court is re-enacted without modification, the re-enacted statute must receive the same construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 306; Dec. Dig. § 225%.*]

Mayfield, J., dissenting.

Appeal from Probate Court, Mobile County; Price Williams, Jr., Judge.

Petition by Jane Bruce Sierra for the probate of the will of Catherine L. Bruce deceased, and Catherine L. Bruce and others appeared to contest the probate. From a decree admitting the will to probate, contestants appeal. Reversed and remanded.

The basis of the contest was that, long after making said proposed will, Catherine L. Bruce made and executed, in the presence of witnesses as required by law, another will covering the same property, thereby revoking said former will.

Sullivan & Stallworth, for appellants. Elliott G. Rickarby and Norvelle R. Leigh, for appellee.

ANDERSON, J. [1] Section 6174 of the Code of 1907 provides that a will otherwise regular can be revoked only by the destruction of same, with the intention of revoking it, or "by some other will in writing, or some other writing subscribed by the testator, and attested as prescribed in the first section of this article," i. e., section 6172. It is therefore plain that the revoking must be executed with all due formality, and the compliance with every legal requirement must appear affirmatively as follows: (1) The will must be in writing; (2) it must be signed by the testator, or some one for him; (3) it must be attested by at least two witnesses; (4) the witnesses must subscribe their names in the presence of the testator.

[2] We think there was evidence from which the jury was authorized to find the existence of all of the essential facts tending to show the legal execution of a subsequent will by Mrs. Bruce and a revocation of the one undergoing contest. It is true the witness Inge was not absolutely positive in his testimony, but qualified it with to his belief and the best of his recollection; but this was not the mere expression of an opinion in the proper sense of the term. It was the assertion of the existence of facts, qual-

ified by the admission that the recollection of the witness was not clear and distinct, but that he may be mistaken. This qualification, though weakening the force of the testimony, and, in the opinion of the jury, may have deprived it of any value as evidence, did not authorize the rejection of same; it was for the jury alone to determine the weight of same. *Head v. Shaver & Adams*, 9 Ala. 791; 1 Greenl. on Ev. § 440; *A. G. S. R. R. Co. v. Hill*, 93 Ala. 520, 9 South. 722, 30 Am. St. Rep. 65; *Elliott v. Dyche*, 80 Ala. 378.

[3] It has been suggested in brief of appellee's counsel that Inge did not testify that the will was signed by the witnesses in the presence of the testatrix. This he did not do in exact words; but he stated that Mrs. Bruce executed the will, and that it was "properly attested." If it was "properly attested," then it was attested by two witnesses in the presence of the testatrix. Whether the opinion of Inge, who was a lawyer, was or was not competent as expert evidence matters not; for the conclusion or opinion of a layman or of a nonexpert was material proof of the proper execution of the will, and, if improperly proven, the opposing party should have objected thereto at the time, and not sit silently by and permit the contestant to prove material facts by conclusions and opinions, and then subsequently move to exclude all of the testimony which made a case for the jury, simply because some one link thereof had been proven by opinions or conclusions, and to which no objection was interposed at the time of deliverance. Had Inge not qualified as an expert, he may have done so upon objection to his opinion upon the proper ground; or, if his testimony was an opinion or conclusion, upon objection thereto, he may have stated the facts or details upon which he based said opinion or conclusion. At any rate, we think all established rules of evidence, as well as fairness, forbid the granting of a general motion to exclude all the evidence, which makes out a case for the jury, simply because some of it, though consisting of material facts, was, perhaps, subject to specific objection, owing to the manner of rendering same, but which said objection was never interposed. The probate court improperly excluded all of the contestants' evidence, and with this evidence before the jury the proponent was not entitled to the general charge.

[4] It is true there was no proof of the contents of the second or last will; but the jury could infer from the evidence that the testatrix executed a will subsequent to the one offered for probate, and if this was true this last will was a revocation, under the statute, of the one offered. Section 6174 of the Code of 1907. The court, in speaking of this statute as it existed in the Code of 1867, in the case of *Barker v. Bell*, 49 Ala. 284, said: "The point is made for the proponents

that, in order to revoke a will, it is not sufficient that the existence of a subsequent will should have been found by the jury; but it must be found different from the former, with the nature of the difference. The proposition is not correct. One of the ways of revoking a will is by making a subsequent one. Rev. Code, § 1932."

[5] Whether this was or was not the proper construction of the statute originally, we cannot now decide, as it was brought forward in the succeeding Codes as so construed, unchanged up to and included in the Code of 1907. It also received the same construction in the cases of *Wilson v. Bostick*, 151 Ala. 536, 44 South. 389, and *Allen v. Bromberg*, 147 Ala. 317, 41 South. 771. "It is an elementary rule of statutory construction that re-enacted statutes must receive the known, settled construction which they had received when previously of force; for it must be presumed the Legislature intended the adoption of that construction, or they would have varied the words, adapting them to a different intent. *Sutherland on Stat. Con.* § 256. The rule has been of frequent application to the Code; in its construction, uniformly the Legislature has been presumed to have known the settled construction of statutes, of which there was a substantial re-enactment, and to have intended the adoption of such construction. *Brickell's Dig.* 349, § 2. And to this rule the statute of wills has been subjected; and, in so far as it may be a substantial re-enactment of its predecessor, which was borrowed from the English statute of frauds, the known construction the English statute had received prior to its enactment here has been followed." *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831.

The case of *Knox v. Knox*, 95 Ala. 495, 11 South. 125, 36 Am. St. Rep. 235, is in apparent conflict with the authorities, *supra*, but a careful reading of the opinion will demonstrate that the holding was largely induced by a failure of the bill of exceptions to disclose all the evidence. Moreover, only so much of the will of 1883 as was sought to be established, and which was claimed to have not been revoked by the will of 1889, was that part which purported to be the execution of a power under certain deeds to the testatrix, Mrs. Knox. The court said: "Looking at the two instruments together, we cannot say the one executed in 1883 was not a testamentary exercise of the power authorized by the deeds of trust referred to; and there is certainly nothing in the evidence to show that the power thus exercised was subsequently revoked." For aught that appears, the will of 1883 was a mere devise under the power of the deeds of the trust property, and had no relation to her individual property, and was the mere execution of a power under sections 3426 and 3429 of the Code of 1907, and the last will and codicil may have related to her estate not

included in the trust estate, and may have specifically preserved the former will, in so far as it was an attempt to execute the power conferred by the deeds therein referred to in said will of 1883. On the other hand, if this case is in conflict with the other cases construing the statute, it should be overruled as being opposed to the statute as then construed, and which cannot be upheld upon the theory that the readoption of the statute in a subsequent Code was a ratification of the changed construction of same, as the statute was not construed or considered in said Knox Case, it was not referred to, and seems to have entirely escaped the attention of the court. Upon another trial, there will be no impropriety in permitting proof of the extent and value of the testatrix's estate.

The judgment of the probate court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, O. J., and SIMPSON, McCLELLAN, SAYRE, and SOMERVILLE, JJ., concur.

MAYFIELD, J. (dissenting). I cannot concur in the last part of the opinion nor in the decision in this case. I do not believe that it was ever intended by the lawmakers of this state to provide that the mere fact of executing one written instrument revokes or destroys all others of the same kind, executed by the same person, no matter what may be the contents or the provisions of either. I do not believe that section 6174 of the Code, as to the revocation of wills, so provides, or was ever intended by the lawmakers to so provide. The writer of this dissent, as code commissioner, wrote this section of the Code as it now appears, and he had no idea that it would or could be so construed as to have this effect. I am of the opinion that that clause of this section of the Code here construed is one of those provisions of the law that is too plain in meaning to admit of construction. There is nothing open for construction. It means what it says, and says what it means. The whole section is intended, as clearly appears upon its face, to limit the mode and means of revoking written wills. After mentioning some of the modes, as burning or tearing, canceling, etc., there follows the clause in question, which says, "by some other will in writing, or some other writing subscribed by the testator and attested as provided in the first section of this article." This clause merely mentions an agency or instrument by which the testator may revoke his will, another written will, or some other writing, executed with the same formalities as required in case of a will. This, I think, is for form, providing that, if he ever does execute another will or any other instrument required to be executed in the mode that a

will is executed, he thereby revokes all other wills, no matter what may be the contents of the last instrument so executed.

There is not a whit more reason for saying that the mere fact of executing a will revokes all former ones than there is for saying that executing any other written instrument requiring the formalities of a will, such as a deed or a mortgage, revokes them. The statute merely provides that the revocation must be evidenced by a writing executed in the manner provided for the execution of the will itself.

The law does now, and has always, provided, that if a man conveys by deed land theretofore devised the deed revokes the will pro tanto. Is it possible that, if a man executes a deed after making a will, conveying any land, he thereby revokes his will in toto, irrespective of the contents of the will or of the deed? A holding to that effect, I submit, would be no more unreasonable than the construction given to section 6174 of the Code.

It is but just and fair to my Brothers on the bench to say that they would not give the statute the construction here given it, if it were now up for construction for the first time. They are now acting upon the theory that the statute was so construed in the case of *Barker v. Bell*, 49 Ala. 234, and that the statute has since been readopted, with this construction placed upon it, and that the case has been subsequently followed, and thus has become a rule of property, and that the court is not now at liberty to depart from that construction, however erroneous it may be. To this reasoning I cannot agree. In the first place, I do not think the case of *Barker v. Bell* did or could so construe this statute as to bind all future legislators or courts in the re-enacting of the statute, or future courts in the construction thereof. The court in that case could bind the parties in that suit, and no one else, and bound them only in that particular suit, and not in any other; and under our law, if there had been a subsequent appeal in that particular suit, that decision would not have been binding upon the parties thereto, nor upon the court rendering it, much less upon other parties or other courts. Code, § 5965. I do not doubt nor dispute that the writer of the opinion in the case of *Barker v. Bell* had an erroneous conception of the purpose, effect, and meaning of the section of the Code under consideration, if we may judge his conception by what he said in the opinion. Nor do I deny that the opinion in that case is in accord with the decision in this case; but both are equally wrong. But the opinion in the former case upon this point was dictum, because not necessary to a decision of the cause then in hand. It is true that the writer in that case says: "The point is made for the proponents that, in order to revoke a will it is not sufficient

that the existence of a subsequent will should have been found by the jury; but it must be found different from the former, with the nature of the difference. The proposition is not correct."

But the allegation of contest in that case, and which the contestant was required to prove, was that the second will revoked the first, and was executed with the intent to revoke it. Some of the grounds were as follows: "After the execution of said written instrument propounded for probate, said decedent revoked the same by the execution of a subsequent will, to wit, in May or June, 1868. (3) After the execution of said paper propounded for probate, the said decedent revoked separately each bequest and devise therein mentioned by the execution of another will in writing, with the intention of revoking the same; (4) or by the execution of a paper signed by said testator, and attested by three witnesses, who subscribed their names thereto as witnesses in the presence of said decedent, and at his request, with the intention of revoking separately each devise and bequest as aforesaid."

It will be observed that the contestant in that case was required to prove that the last will *revoked* the first. While, as the judge said, he would not necessarily be required to prove the bequests or devises of the last, yet he would be required to prove that the second revoked the first. The second might have been intended only to revoke the first, and may not, therefore, have contained any disposition of the property; yet it would, under the law and the statute and the allegations of contest, have been just as effective to revoke as if it had disposed of the testator's property inconsistently with the provisions of the first will.

So it clearly appears that the case in 49 Alabama did not decide what the majority conclude that it decided, and if the opinion speaks otherwise it is a mere dictum, and binds nothing, not even the lips that uttered it. As was said by an old judge: "An obiter dictum is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none, not even the lips that utter it. Old Judge." Taken from the title page of a work on *Obiter Dicta*, published by John D. Allen, New York, 1885. Hart v. Stribling, 25 Fla. 433, 6 South. 455, 456.

If it can be said that the case of Barker v. Bell, *supra*, decided as the majority think it did, and that the statute has been re-adopted with that construction attached, then I answer that contention by saying that Barker v. Bell was overruled by Knox v. Knox, 95 Ala. 495, 11 South. 125, 36 Am. St. Rep. 235, and that the statute in question has been three times readopted by the Legislature since the latter decision, without change, and with the last and proper construction placed upon it—a construction by

the majority conceded to be correct but for the decision in Barker v. Bell.

It is true that the opinion of the court in the case of Knox v. Knox does not refer to the statute nor to the case of Barker v. Bell; but the court must be presumed to have known the law, as it was in force at that time—that is, the statute and the decision in question—and we should not assume that it overlooked same, merely because it did not mention said statute and decision in the opinion. No opinion ever attempts to specifically refer to and name all the statutes or all the decisions applicable to the case decided. It is a no more violent presumption to suppose that the Legislature had in mind the case of Knox v. Knox, when they on three several occasions readopted this statute, than it is to suppose that they had in mind the case of Barker v. Bell, which was written and published 20 years before the case of Knox v. Knox.

In the case of Knox v. Knox, *supra*, the statement of facts shows that the testatrix executed six separate and distinct testamentary papers, only one of which was denominated a "codicil"; and the trial court instructed the jury, as matter of law, that the testamentary papers offered for probate—three in number—were not revoked by the subsequent wills. One of the charges was as follows: "As a matter of law, that portion of the will of 1883 propounded for probate was not revoked by the wills said to have been executed by Anna O. Knox in the years 1887, 1889, 1890." And this court on appeal, affirmed the decrees of the circuit and probate courts, probating these three instruments, and held that there was no error in the charges.

It is to my mind made certain, beyond doubt, that the court and writer of the opinion in the case of Knox v. Knox construed the statute, no less than was done in the case of Barker v. Bell, and in effect overruled the last-mentioned case, if it decided what the court now holds it decided.

As before stated, I do not think the latter case decided what my Brothers hold it decided; but, if it did, it was in effect overruled by Knox v. Knox. This last case, as my Brothers concede, construes the statute as it reads; Barker v. Bell does not, but construes the statute, not as it reads (if it decides what my Brothers think it does), but it in effect writes a new statute, or a new provision in the statute, which the Legislature did not see fit to insert.

Our statute on the subject of revocation of wills is practically an adoption of the English statute (1 Vict. c. 26, § 20), which has been practically adopted in most all the states of the Union, and has been construed in most all the courts of England and of the United States, and in all, so far as I can ascertain, as construed by this court in Knox v. Knox.

The American cases are collected in the Century and Decennial Digests, under the subject "Wills," sections 456-641, and sections 179 et seq., respectively, most of which are in accord with the text-writers on the subject. The American & English Encyclopedia of Law states the rule as follows, as to revocation by another will (volume 30, p. 624): "A duly executed will may operate as a revocation of a prior testamentary instrument by reason either of an express clause of revocation, or of an inconsistent disposition of the previously devised property."

It is said by Mr. Williams (Executors), and quoted in a note in 80 Am. & Eng. Ency. Law, p. 626, as follows: "The principle applicable is well expressed in Mr. Justice Williams' book on Executors. He says: 'The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revokes the former, or the two be incapable of standing together; for, though it be a maxim, as Swinburne says above, that as no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary paper be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent.' This passage truly represents the result of the authorities."

Mr. Redfield (Law of Wills, vol. 1, *p. 351, p. 357) states the rule as follows: "The mere fact that one is shown to have made a subsequent will does not amount to a revocation of the former one, unless it appear that it contained an express clause of revocation, or that its contents were inconsistent with those of the former, or where the later one disposes of the testator's entire estate. And where the same estate is given to different persons, in two wills of different dates, the later bequest is an entire revocation of the former. But where the same property is given in the same will to different persons, such persons take as tenants in common; there being no sufficient ground to presume that the testator had changed his purpose while making his will."

That these statutes were in force when these texts were written and cases decided, is shown as follows: "To prevent the admission," says Chancellor Kent, "of loose and uncertain testimony, countervailing the operation of an instrument made with the formalities prescribed, it is provided that the revocation must be by another instrument, executed in the same manner, or else by burning, canceling, tearing, or obliterating the same by the testator himself, or in his presence, and by his direction. This is the lan-

guage of the English statute of frauds, and of the statute law of every part of the United States." 4 Kent, 520, 521.

This clearly shows the object and purpose of the statutes. The effect given our statute in this case is to inhibit a man from making two testamentary instruments, or even any written instrument executed with the formalities of a will, without revoking all prior testamentary instruments, unless he should denominate the last will a codicil to the former. This I do not think to be the law, and it will be destructive of thousands of wills if it is made the law. There are a great number of cases in this state in which two, three, and four separate testamentary instruments have all been probated as the last wills and testaments. In one case, an instrument which was in form a deed, but could not take effect as such, was given effect as a will, though executed after the will and after a codicil to the will. The three instruments, though separate, were all given effect to as wills.

In a note to the case of *Knox v. Knox*, as reported in 36 Am. St. Rep. 241, it is said: "All testamentary papers, no matter how numerous, should be proved together as one will. *Pepper's Estate*, 148 Pa. 5 [23 Atl. 1039]. A paper may be referred to and made a part of a will, if such paper is then in existence and can be identified. In re *Shillaber*, 74 Cal. 144 [15 Pac. 453]; 5 Am. St. Rep. 433, and note. Notes made by a testator, payable at his death, folded up in his will and referred to therein, and remaining in his possession at his death, are a part of the will. *Fickle v. Snepp*, 97 Ind. 289, 49 Am. Rep. 449, and extended note."

The evil of the rule announced will be clearly shown in this case, if contestant is able to prove the execution of a second will. It will, as thus far appears from the record in this case, be shown that the testatrix made two testamentary dispositions of her property, or a part thereof, without any evidence to show that she ever intended to revoke the first by the last, but, at most, only to provide for a person not provided for in the first; but, as the last will is lost and its contents are not proven, it cannot be probated, yet nevertheless it will revoke the first, and thus testatrix's will, whether expressed in one or two instruments, will be entirely defeated, and therefore, in law, she will have died intestate, and all the objects of her bounty will be entirely deprived of their property, or, at best, of the interest therein that testatrix clearly intended that they should take.

I am wholly unable to understand the reason or the logic in any such holding. Instead of being a rule to preserve the rights of property, its necessary effect is to destroy such rights.

PRINCE v. EDWARDS.

(Supreme Court of Alabama. Feb. 8, 1912.)

1. EVIDENCE (§ 67*)—MARRIAGE (§ 40*)—PRESUMPTIONS—CONTINUANCE OF MERETRICIOUS RELATIONS.

Illicit character of cohabitation is presumed to continue until there is evidence to the contrary; but, where the parties have manifested a desire to marry, the presumption will be rebutted, so as to make the question one of fact, by the slightest circumstance, and a marriage may be found from a mere cohabitation, without any apparent change, after the parties became able to contract a valid marriage, though, where they are shown to have preferred a meretricious relation, something more than continued cohabitation after the removal of the impediment to a legal marriage must be shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 87; Dec. Dig. § 67;* Marriage, Cent. Dig. §§ 58-69; Dec. Dig. § 40.*]

2. MARRIAGE (§ 50*)—COMMON-LAW MARRIAGE—EVIDENCE—SUFFICIENCY.

Evidence held to warrant a finding of cohabitation with matrimonial, and not with meretricious, intent, although unlawful in its inception, and that after the death of the woman's first husband the parties renewed their matrimonial pledges and entered into a common-law marriage, as affecting her right to letters of administration as a widow.

[Ed. Note.—For other cases, see Marriage, Dec. Dig. § 50.*]

Appeal from Probate Court, Jefferson County; J. P. Styles, Judge.

Sallie Prince and Lizzie Edwards filed rival petitions to be administratrix of John Edwards' estate. From an order issuing letters to Petitioner Edwards, Petitioner Prince appeals. Affirmed.

Jere C. King, for appellant. McNeal & Jones, for appellee.

SOMERVILLE, J. [1] Appellant and appellee each filed her petition to be appointed as administratrix of the estate of John Edwards within 40 days after his death; appellant claiming to be his mother, and appellee claiming to be his widow. On hearing the petitions, the probate court found, as a matter of fact, that appellee was the widow of John Edwards, and entitled to the preference claimed, and ordered that the letters of administration should issue to her as prayed. Appellant excepted to the finding of fact, and also to the decree granting administration to the alleged widow.

The evidence showed, without dispute, the following facts: Appellee, Lizzie Edwards, married one Jake Jemison in Birmingham about 1895. After living with him three or four years, he ran away, after first attacking and nearly killing her by cutting. Appellee never saw him again, but was told (at some unstated time) that he was in Selma. After Jemison's desertion of her, she cooked for a living until 1903, in which year she married John Edwards; this marriage, according to her testimony, was at the court-

house in Birmingham, and was solemnized by a person who was said to be Judge Porter (then probate judge); John Edwards having in his hand a paper represented to be a license. Appellee married Edwards under the name of Lizzie Ray; but the record of marriages "covering the period in which petitioner, Lizzie Edwards, claims to have been married to John Edwards" shows no license issued to John Edwards and Lizzie Ray. They then lived together as husband and wife, and while so living appellee was informed, in 1908, that Jake Jemison was dead, and this fact she communicated to John Edwards. After Jemison's death, she and Edwards continued to live together, treating each other as husband and wife, recognized as husband and wife by their neighbors, and looked upon in the community as such. They called each other husband and wife, and on one occasion (after Jemison's death) she introduced him to the witness Frank, on the streets of Birmingham, as her husband. This status continued until Edwards' death in May, 1911.

Appellant's contention is that, however satisfactorily these facts and conditions might ordinarily evidence a common-law marriage, their effect is here completely destroyed by the fact, as alleged, that appellee's connection with Edwards was originally meretricious and unlawful; that its original character is, as matter of law, presumed to continue until a change to a lawful status is shown; and that the burden is on appellee to distinctly show that a new marriage contract or agreement was made between her and Edwards subsequently to the death of Jemison. And it is insisted that there is nothing in the record to show such a consensus between them.

The general principle is thus stated: "While all reasonable presumptions are in favor of marriage, yet they are overcome by proof that the relations were in their origin illicit and unlawful. The illicit relation is presumed to continue until there is proof that the parties were married. This presumption, whether of fact or of law, may be overcome by satisfactory proof of cohabitation, acknowledgment, and reputation." 19 Am. & Eng. Ency. Law (2d Ed.) 1206, f.

Some authorities have very properly held that, where the relation was at first notoriously meretricious—that is, lustful and without matrimonial intent—as distinguished from unlawful merely, and especially where the parties willingly choose the meretricious state in defiance of law and social custom, there being no impediment to lawful matrimony, the evidence of a change to lawful matrimony ought to be clear and strong. Klipfel v. Klipfel, 41 Colo. 40, 92 Pac. 26, 124 Am. St. Rep. 96, 103, and note page 113. Mr. Browne, in his note to Appeal of Reading,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

etc., Co., 113 Pa. 204, 6 Atl. 60, 57 Am. Rep. 448, 461, says: "The presumption of the continuance of an illicit cohabitation is not so easily overcome where it appears that the parties have manifested a preference for a meretricious union. In such a case, the authorities seem to be uniform that, in the absence of some evidence of a change in the relation between the parties, they are presumed to continue in that relation"—citing *Collins v. Collins*, 80 N. Y. 9; *Badger v. Badger*, 88 N. Y. 553, 42 Am. Rep. 263; *State v. Worthingham*, 23 Minn. 528; *Yardley's Estate*, 75 Pa. 207, and other cases.

After a very full review of the authorities, both English and American, Mr. Browne states the following conclusions: (1) That an illicit connection is presumed to continue until there is evidence to the contrary. (2) That, where the parties have manifested a desire to form a matrimonial union, the presumption will be rebutted, so as to make the question one of fact, by the slightest circumstance; and that a mere cohabitation, without any apparent change, after the parties have the right to contract a valid marriage will suffice to justify a submission of the question of marriage to a jury, and in fact require it. (3) That, where the parties are shown to have preferred a meretricious connection, something more than continued cohabitation, after the impediment to a legal marriage has been removed, will be necessary to rebut the inference of the continuance of the original character of the cohabitation; there must be evidence to satisfy the mind of an actual change in the relation between the parties, or at least of a desire for a change. (4) That, where there is any evidence to rebut this inference of continuance of an illicit union, the question is one of fact.

Upon a survey of the authorities reviewed by Mr. Browne, and also of the many later ones, we approve the justice and propriety of his conclusions.

In *Badger v. Badger*, 88 N. Y. 554, 42 Am. Rep. 263, it is correctly declared that "a change may occur and be satisfactorily established, although the precise time or occasion cannot be clearly ascertained."

In *State v. Worthingham*, 23 Minn. 528, the following language is used: "An intercourse originally unlawful and lustful from choice undoubtedly raises the presumption that its character remains such during its continuance. But this is a presumption, not of law, but of fact, for the consideration of the jury in connection with the particular facts and circumstances of the case. In the case at bar, it appears that the cohabitation between the parties had its origin, in part at least, in a desire for marriage, and under the promise that such a relation should be assumed as soon as defendant could procure a divorce from his then wife. This indicates that the parties regarded the married state as one preferable to that of concubinage,

and weakens somewhat the force of the presumption ordinarily attaching to an original illicit cohabitation. The weight which is to be given to it, however, in this, as in every other, case rests exclusively with the jury, in the exercise of its best judgment, under proper instructions from the court."

In the well-considered case of *Adger v. Ackerman*, 115 Fed. 124, 129, 130, 52 C. C. A. 568, it was said, per Sanborn, J.: "But the true rule and the great weight of authority is that, inasmuch as the law itself and all its presumptions deprecate illegal, and favor lawful, relations, slight circumstances may be sufficient to establish a change from an illicit to a legal relation, and proof of its time or place is not indispensable. * * * The principle of law is that, where parties who are incompetent to marry enter an illicit relation, with a manifest desire and intention to live in a matrimonial union, rather than in a state of concubinage, and the obstacle to their marriage is subsequently removed, their continued cohabitation raises a presumption of an actual marriage immediately after the removal of the obstacle, and warrants a finding to that effect." In accord with this is the text of 19 Am. & Eng. Ency. Law, 1208, d.

Some courts have made the presumption just stated depend upon the fact of a *ceremonial* second marriage as being indispensable to show the matrimonial intent; others have required that at least one of the parties should have entered into the illicit relation in ignorance of the obstacle, and some require that the parties shall have been informed of the removal of the obstacle; while others hold such knowledge unnecessary. We apprehend, however, that, while all of these matters may be material aids in the solution of the question of marriage vel non, they are not ordinarily to be regarded as conclusive, and are to be considered, along with all the other evidence, simply for what they are worth. See *Moore v. Heineke*, 119 Ala. 627, 24 South. 374.

It is true that courts have no right to marry people who never wished nor intended to be married, and equally true that it is not their office or policy to place a premium on the defiance of law and social custom by lifting lust to the level of honorable matrimony. But these results cannot be reasonably feared from the practical application of the principles we have declared.

The cases, presenting all phases of this much-discussed subject, will be found fully reviewed in the case notes to Appeal of Reading, etc., Co., 113 Pa. 204, 6 Atl. 60, 57 Am. Rep. 448, 461; *Klipfel v. Klipfel*, 41 Colo. 40, 92 Pac. 28, 124 Am. St. Rep. 96, 113; and *Chamberlain v. Chamberlain*, 68 N. J. Eq. 736, 62 Atl. 680, 3 L. R. A. (N. S.) 244, 111 Am. St. Rep. 658, 6 Ann. Cas. 483, 484.

There are several cases from highly authoritative jurisdictions which are not in harmony with our views. Cartwright v.

McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105; Collins v. Voorhees, 47 N. J. Eq. 315, 20 Atl. 676, 14 L. R. A. 364, 24 Am. St. Rep. 412. But these are opposed to the great and increasing weight of authority.

[2] It only remains to apply the foregoing principles to the facts of this case, and we are clearly of the opinion that it was open to the trial court to find that the entire connection between John Edwards and appellee was with matrimonial, and not with meretricious, intent, notwithstanding it was unlawful in its inception; and to find, also, that, at some time between the date of Jemison's death (of which they were both informed) and the death of Edwards (a period of two or three years), these parties renewed their matrimonial pledges, and entered into a new understanding that they were thenceforth husband and wife in law, as well as in fact, without let or hindrance. Such a finding should not be disturbed, unless clearly erroneous, and we cannot so regard it.

Affirmed. All the Justices concur.

McLAUGHLIN v. BEYERS.

(Supreme Court of Alabama. Feb. 8, 1912.)

APPEAL AND ERROR (§ 87*)—REVIEW—DISCRETIONARY ORDERS—CONTINUANCE.

The imposition of costs as a condition to granting a continuance being within the unreviewable discretion of the trial court, since a party is not entitled to accept a continuance and reject the terms imposed by the court, the order and judgment imposing such condition is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 559-596; Dec. Dig. § 87.*]

Appeal from Circuit Court, Jefferson County; E. C. Crowe, Judge.

Action by Clara Beyers, pro am, against George H. McLaughlin. From an order imposing costs as a condition to granting a continuance on motion of defendant, he appeals. Dismissed.

Sterling A. Wood, for appellant. W. J. Whitaker and Frank S. White & Sons, for appellee.

SOMERVILLE, J. It was formerly held by this court that the granting or refusing of continuances was *entirely* within the discretion of the trial court, and that its exercise was "beyond the jurisdiction of the appellate court to control or revise." Humes v. O'Bryan, 74 Ala. 64, 78; Campbell v. White, 77 Ala. 397. Later it was said that "the continuance of a case is within the discretion of the trial court, and the exercise of this discretion will not be reviewed on appeal, except in a case where it is shown that the court has abused the discretion vested in it." Spann v. Torbert, 130 Ala. 541, 30 South. 389. Still later it has been declared that the action of the trial court will not be re-

vised on appeal unless a *gross abuse* of the discretion is shown. Kelly v. State, 160 Ala. 48, 49 South. 535. It seems, however, that in criminal cases the constitutional right of the defendant to have compulsory process for his witnesses may sometimes be so involved in the question as to nullify the general rule as to discretion. Rodgers v. State, 144 Ala. 32, 40 South. 572.

In the present case the suit was filed on March 22, 1909, and a demurrer was filed to the complaint on April 27, 1909. On October 20, 1909, and again on February 21, 1910, the cause was continued at the instance of defendant on account of his sickness. On June 2, 1910, defendant again moved for a continuance, showing to the court in support thereof, as recited by the docket entry, "that the cause of action as set forth in the complaint had arisen after the sickness of the plaintiff (?) had begun, and that the plaintiff (?) had been in danger of death since the said sickness had begun, and at times very much better." Substituting "defendant" for "plaintiff" in this entry—as was evidently intended—it does not appear that defendant was physically or mentally unable to appear in court for trial on the date mentioned. Thereupon the court entered an order continuing the cause on account of defendant's sickness, and upon his paying all accrued costs within 30 days, for which execution was to be issued. The bill of exceptions recites that defendant "then and there in open court excepted to the said action of the said court, and the said judgment of the said court, in taxing them with the cost of the said cause as set forth in said motion(?)." On June 24, 1910, defendant filed a motion to set aside "that part of the order of this court taxing him with the cost of said cause" on the ground, primarily, that he was sick and unable to attend court. Several other grounds are stated, but they do not merit mention or consideration. In support of this motion the testimony of defendant's attending physician was offered, and it seems to establish the fact of defendant's physical and mental unfitness to take part in the trial of his case—at least there was no testimony offered to the contrary. This motion was heard and overruled on June 29, 1910, to which defendant duly excepted. The transcript shows that this appeal is taken from the judgment for costs rendered June 2, 1910, and also from the judgment of June 30 (29?), 1910.

As has already been noted, the showing made for a continuance on June 2d was wholly insufficient; and, such being the case, no error could possibly have been predicated on an absolute denial of that motion. Exercising its lawful discretion, however, the motion was granted on condition that defendant should pay the costs already accrued.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Torrey v. Bishop, 104 Ala. 548, 16 South. 422. By a seasonable objection, defendant might have rejected the continuance on such terms, and complained of the refusal to grant a continuance, if he so desired. But the effect of his exception was to accept the continuance, with a rejection only of the terms imposed. This was held not permissible in **Humes v. O'Bryan**, 74 Ala. 64, 78, where it was said: "The enjoyment of the benefit of the order as made was an acceptance of the condition with which the court saw fit to burden it. The two should have been accepted or rejected as an entirety, and this course does not seem to have been followed."

The imposition of costs as a condition to granting the continuance being within the unrevisable discretion of the trial court, it follows that no appeal lies from the order and judgment of the court in that behalf, and the appeal must therefore be dismissed.

Appeal dismissed. All the Justices concur.

NORSWORTHY et al. v. WILLOUGHBY et al.

(Supreme Court of Alabama. Dec. 21, 1911.)

1. GIFTS (§ 47*)—INTER VIVOS—PAROL GIFT OF LAND—BURDEN OF PROOF.

A party claiming an interest in land under a parol gift has the burden of establishing the gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 81-86; Dec. Dig. § 47.*]

2. ADVERSE POSSESSION (§ 112*)—EVIDENCE—BURDEN OF PROOF.

One claiming land by adverse possession has the burden of proving that he has held the land adversely for the statutory period necessary to perfect his title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 651-668; Dec. Dig. § 112.*]

3. PARTITION (§ 63*)—PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

Evidence in an action for partition held sufficient to sustain a decree for plaintiffs.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 63.*]

4. EQUITY (§ 427*) — DECREE—CONFORMITY TO PLEADINGS.

The court cannot grant relief as to a matter or claim which was not made an issue of the bill, answer, or plea.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1001-1014; Dec. Dig. § 427.*]

Appeal from Chancery Court, Coffee County; L. D. Gardner, Chancellor.

Bill by J. L. Willoughby and others against W. S. Norsworthy and others for partition of land. Decree for complainants, and respondents appeal. Affirmed.

H. L. Martin, for appellants. J. F. Sanders, for appellees.

MAYFIELD, J. This is a bill to sell land for division among tenants in common. It was undisputed that T. W. Willoughby own-

ed the lands in question during his lifetime. He is the common source of title; the complainants claiming through him by inheritance, and the respondents by gift. Nearly all the parties to the suit are children or descendants of the said Willoughby, deceased.

The prime contention of respondents is that T. W. Willoughby, Sr., gave the land in question to T. W. Willoughby, Jr., prior to the year 1874, in consideration that the latter would take care of Mrs. Willoughby, wife of the donor and mother of the donee, during her natural life. The respondent T. W. Willoughby, Jr., also insists that soon after the gift he entered into possession of the land, and has ever since continued to hold it adversely to the complainants, the donor, and all the world, and that such gift and adverse possession had ripened into a legal title before the filing of the bill.

On the other hand, it is insisted by the complainants that there was never any gift of these lands by the common ancestor, but that they were allotted to the widow of the alleged donor, who was the mother of the complainants and of the respondent; that she remained in possession of them during her life; that the possession of T. W. Willoughby, Jr., after the death of their father, was really the possession of the widow under her dower and quarantine right; that such possession was never adverse to the rights of any of these complainants, but was permissive, and therefore would never ripen into title as against the true owners, who were the tenants in common with the party thus claiming possession. But for this alleged parol gift there would be no question that all the parties to this suit were tenants in common as to the land in question, after the death of T. W. Willoughby, Sr., who seems to have died intestate.

[1-3] The evidence relied on to substantiate this parol gift, and the fact of adverse possession under it by T. W. Willoughby, Jr., is very conflicting. The burden of proof is upon him, of course, to establish this gift, and also the fact that he has held the land adversely, and under and by virtue of such gift, for the statutory period necessary to perfect his title. He introduced a great deal of testimony to show such gift, and adverse possession thereunder. On the other hand, there was a great deal of testimony on the part of the complainants and their witnesses tending to show that there was never any gift, and that the possession was in recognition of their joint title and tenancy in common with the respondent. In other words, the complainants' testimony tended to show that this possession was that of the widow of the alleged donor, that she held it under her dower and quarantine rights, and that after that the respondent held it as a tenant in common with the complain-

ants; that his possession, therefore, was that of the complainants, having never amounted to an ouster of the complainants; and that, if he ever claimed to own and possess the land adversely to the complainants, no notice of such claim was ever brought to their knowledge. These were all much disputed questions.

The whole of the evidence has been carefully considered, and we are not able to say that the chancellor erred in his conclusions or findings as to the facts in the case, but are inclined to the conclusions, reached by him, that the complainants have made good their claim as set forth in the bill, and that the land belongs to the parties as tenants in common, and as set forth in the bill, that the respondent has failed to make good his claim as to the parol gift and adverse possession under it for the statutory period of 10 years, which would be required to perfect his title.

It is proper to say, in this connection, that there is in the transcript a great deal of testimony that cannot be considered on this appeal, for the reason that it relates to the conversations and transactions of a deceased person, whose estate is interested in the result of this suit, that such testimony was offered by witnesses who had a pecuniary interest in the result of the suit, and was directed against the party to whom their interests were opposed—all in clear violation of section 4007 of the Code. It was finally agreed between counsel of record that all legal objections as to evidence of the questions or answers would be assigned and considered on the hearing of the cause, as if the objections and exceptions had been taken at the time such evidence was introduced, and that either party should have the right to object to any evidence offered upon any grounds of illegality or incompetence.

On this ground we are unable to consider a great deal of the evidence offered by the respondent to prove the parol gift under which he claims. It is also insisted by the respondent that it was agreed between him and the other heirs of his father that he should retain possession of the land during his life, and that the complainants could not have this sale during the continuancy of his life estate, for that it would be in violation of such agreement. This agreement, however, is disputed by the complainants, and does not comport well with the other claim, made by him, that he had held the land for 30 years or more under a parol gift from his father.

A court of equity is not inclined to give ear to the contention of a party who asserts two claims to land, which are absolutely conflicting and inconsistent. One or the other must be false. But if any such agreement was ever made between the parties, respondent's testimony and that of his witnesses conclusively shows that he did not live up to it, that he had lulled complainants into inaction while obtaining their consent for him to hold possession during his life, on account of his physical and financial condition, and then had taken advantage of a seeming opportunity to deprive them of their interest in the lands, by claiming to hold the same adversely and under a parol gift from his father. To give effect to this agreement under the respondent's claim and theory would be to perpetrate a fraud upon the complainants, which, of course, a court of equity should not do.

[4] It is also true, as found by the chancellor, that this last claim of the respondent was not set up in his answer, nor by any plea, and was therefore not made an issue, and that the court could not grant relief—or decline to grant it, for that matter—which was not made an issue by the bill, answer, or plea.

Finding in the record no error of which the appellants can complain, the decree of the chancellor must be affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

GASSENHEIMER v. WESTERN RY. OF ALABAMA.

(Supreme Court of Alabama. Feb. 8, 1912.)

1. MASTER AND SERVANT (§ 302*)—ASSAULT BY EMPLOYE—LIABILITY.

Plaintiff went to the station of defendant railway company to learn the reason for delay in delivering his freight, and, after finding his drayman at the freight house, the freight bills were taken by defendant's delivery clerk, and plaintiff then complained of the delay to the clerk's superiors, who went with plaintiff to investigate, and when they reached that clerk, who was then engaged in delivering freight, he abused and struck plaintiff without provocation. Held, that defendant could not avoid liability for the assault on the ground that it was not within the scope of the clerk's authority, because committed as a result of plaintiff's complaint about his delay.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1229; Dec. Dig. § 302.*]

2. CORPORATIONS (§ 423*)—LIABILITY—TORTS OF EMPLOYEES.

A corporation is liable for the wrongful acts of its employes, done in the course of their employment or line of their duties.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1692-1695; Dec. Dig. § 423.*]

Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge.

Action by Leo. Gassenheimer against the Western Railway of Alabama. From a judgment overruling plaintiff's motion for a new trial after judgment for defendant, plaintiff appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Letcher, McCord & Harold, for appellant.
Steiner, Crum & Well, for appellee.

SAYRE, J. Plaintiff sent a drayman from his place of business to the freight house of the defendant railway company to fetch some freight. Considerable delay ensuing, plaintiff went to see what was the matter. He found the drayman waiting at the freight house. Then Mabson, one of defendant's delivery clerks, came up saying: "I will deliver the freight." The freight bills were then handed to Mabson, and plaintiff went to the office in another part of the building, where he complained of the delay to Mabson's superiors. He does not seem to have mentioned Mabson's name. Mr. Lutz, commercial agent for the railway, and Mr. Stanley, chief clerk, then walked down the freight house in company with the plaintiff, inquiring of several of the delivery clerks what they knew about plaintiff's dray having to wait for freight. When they reached Mabson, who was then and there engaged in defendant's business of delivering freight, he, without a word, or, so far as the evidence shows, a demonstration of any sort from plaintiff, applied to plaintiff a most offensive epithet, and struck and kicked him. The assault left behind it no physical injury. Plaintiff sued the railway company for the assault and battery committed by its agent, and, the jury having acquitted the defendant, made a motion for a new trial on the ground that the verdict was contrary to the law and the evidence. From a judgment overruling the motion, plaintiff appeals.

[1, 2] The court below makes it clear that the motion was overruled on the theory that the jury might have inferred that Mabson assaulted plaintiff because plaintiff had made complaint to his superior officers, and that an assault committed for such reason was not within the scope of Mabson's employment. In this the court erred. It is well settled in the decisions of this court that corporations are liable for the wrongful acts of their agents or employes, done in the course of their employment, or in the line of their assigned duties. The difficulty in particular cases arises in the proper application of this principle of law to the facts. The case of *Case v. Hulsebush*, 122 Ala. 212, 26 South. 155, is strikingly like the case at bar in all essential respects. In that case the tax collector of Mobile county was held personally liable for an assault and battery committed by his deputy upon a taxpayer who had gone to the collector's office to pay taxes. The assault grew out of a dispute about a fee the deputy sought to collect. In the case at hand there is nothing to indicate, however remotely, that the assault grew out of anything but the delay in the delivery of plaintiff's freight. The trial court referred the assault, or held that the jury might have

referred it, to the fact that plaintiff had complained to Mabson's superior officers. But the complaint was about the delay, and we have no difficulty in taking all that occurred between plaintiff and Mabson and Mabson's superiors as part and parcel of one transaction. In this state of the evidence the plaintiff was entitled to have the verdict set aside. "There is no more sacred duty resting on the presiding judge than to set aside a verdict which is rendered in palpable disregard of the evidence." *A. G. S. Rwy. Co. v. Powers*, 73 Ala. 248. And since the passage of the act permitting the review of rulings on such motions this court has frequently reversed judgments where the preponderance of the evidence against the conclusions reached in the trial courts was so decided as to involve the conviction that they were wrong and unjust. *Birmingham National Bank v. Bradley*, 116 Ala. 142, 23 South. 53; *Southern Rwy. Co. v. Lollar*, 135 Ala. 375, 33 South. 32, and cases cited. No doubt the court below, but for the theory entertained in respect to the origin to which the jury might have referred the difficulty as sufficient to take the assault upon plaintiff without the scope or course of Mabson's assigned duties, would have granted a new trial. But that theory of fact and law, under the authority of our rulings heretofore, was misconceived. *Case v. Hulsebush*, 122 Ala. 212, 26 South. 155, and cases there cited. It results that the judgment must be reversed, and the cause remanded for another trial on the facts as they may then appear.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

HUTCHISON et al. v. FLOWERS.

(Supreme Court of Alabama. Feb. 6, 1912.)

1. MORTGAGES (§ 542*) — FORECLOSURE — REDEMPTION — DEMAND — SERVICE — "WRITTEN DEMAND."

Code 1907, § 5747, provides that, on foreclosure, possession of the land must be delivered to the purchaser, within 10 days after sale, by the debtor, if in his possession, or by any one holding under him by privity of title, if in his possession, on written demand of the purchaser or his vendee. *Held*, that a written demand required by such section must be served on the debtor to bar his right to redeem, and that a mere reading to him of an alleged written demand was insufficient.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1561; Dec. Dig. § 542.*]

2. MORTGAGES (§ 542*) — FORECLOSURE — POSSESSION — WRITTEN DEMAND — WAIVER.

Under Code 1907, § 5747, requiring a written demand for possession by the purchaser at foreclosure sale, or his vendee, in order to cut off a debtor's right to redeem, the debtor's refusal to deliver possession on the purchaser's oral demand did not constitute a waiver of a demand in writing.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 542.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Chancery Court, Coffee County; L. D. Gardner, Chancellor.

Bill by Eula Flowers against D. C. Hutchison and others to redeem land from a mortgage foreclosure sale. From a decree ordering redemption, respondents appeal. Affirmed.

The bill was filed within the statutory period, and offers to do equity by paying the amount found due, with interest, that request had been made to ascertain the amount necessary to redeem, and the refusal to furnish it, and her inability otherwise to ascertain the amount necessary for a tender; but it is alleged that the mortgage contained usury, and that the same should be deducted from the principal. The defense was that after the sale under the mortgage written demand was made upon complainant for possession of the land, and that respondent declined within a reasonable time thereafter to deliver possession to the purchasers at such sale. The evidence as to this matter sufficiently appears in the opinion.

J. F. Sanders, for appellants. El. R. Bran-
nen, for appellee.

DOWDELL, C. J. The bill as amended, under the agreement of the parties, is confessedly one for statutory redemption of land sold under a mortgage. The real, and practically the only, question is whether or not the purchaser at the mortgage sale made a written demand for possession of the land on the mortgagor, the party in possession.

[1] After a careful consideration of the evidence, we concur in the finding of the fact by the chancellor that the writing, which was read by one Talbot, as the agent of the purchaser, to the complainant, purporting to be a demand for possession, was not delivered to the complainant, nor a copy thereof delivered. And the question of law is: Did the reading merely of the writing, purporting to be a demand, to the party in possession, constitute a "written demand" under the statute? The present statute, section 5747 of the Code of 1907, reads as follows: "The possession of the land must be delivered to the purchaser within ten days after the sale thereof, by the debtor, if in his possession, or of any one holding under him by privity of title, if in his possession, on written demand of the purchaser or his vendee." Prior to this statute an oral or verbal demand for possession was sufficient. When we review the legislative history of the statutory right of redemption of land, the legislative intention of the importance of a written demand, as incorporated in the present statute, is not to be overlooked. The right to redeem after foreclosure was first conferred on the mortgagor by the Code of 1852, and in respect to the demand to be

made by the purchaser for possession section 2117 of the Code of 1852 reads as follows: "The possession of the land must be delivered to the purchaser within ten days after the sale thereof, by the debtor, if in his possession, on demand of the purchaser or his vendee." The precise language of this section was carried forward in the Codes of 1867, 1876, and 1886. In the Code of 1896 the same language is used, with the following clause added: "Or of any one holding under him by privity of title, if in his possession." Section 3506. So it is to be seen, from the history of the legislation, that the requirement of the demand to be in writing was first inserted in the Code of 1907—after its having been the law for so many years that any demand, verbal or written, was sufficient to cut off this important right of redemption. The change in the law, therefore, is significant in meaning, and was intended for the benefit of the debtor, and to prevent, as far as possible, the fact of a demand from being a controverted question.

We are also of the opinion that in complying with this requirement of the statute—that is, in making a written demand—the writing should be served upon the debtor, or the person in possession, by the delivery of the writing to such person, and that a mere reading of the writing, purporting to be a demand, by the purchaser to the debtor, is not sufficient. So far as the debtor is concerned, the reading by the purchaser of what purports to be a written demand for possession of the land is nothing more than the purchaser's oral demand.

[2] We think, however, that the demand in writing might be waived; but in such a case the waiver should be clear and unequivocal, since it involves the forfeiture of so important a right by the debtor. And, since the debtor is not bound on a verbal or oral demand of possession to deliver, in order to prevent a forfeiture of his statutory right to redeem, a refusal to deliver possession on oral demand should not be construed into a waiver of a demand in writing. We concur in the views of the chancellor, both as to his conclusions of the law and as to the facts in the case. It results, therefore, that the decree appealed from must be affirmed.

Affirmed. All the Justices concur.

RICHARDSON et al. v. MERTINS.

(Supreme Court of Alabama. Feb. 17, 1912.)

1. APPEAL AND ERROR (§ 1078*)—REVIEW—
WAIVER OF ERROR.

The failure to argue assignments of error to the overruling of demurrer further than to assert that the demurrer was improperly overruled is a waiver of the assignments.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. APPEAL AND ERROR (§ 917*)—REVIEW—PRESUMPTIONS—PLEADING.

Where demurrers sustained by the trial court are not set out in the record, the Supreme Court will presume that they properly stated a valid objection to the pleading, if any there be.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3706-3709; Dec. Dig. § 917.*]

3. PLEADING (§ 204*)—DEMURRER TO PLEADING GOOD IN PART—DETERMINATION.

Where a replication offers as an answer to all the pleas, collectively, the single fact that plaintiffs were minors at the time of the filing of the suit, if that fact is not a good defense to each and all of the special pleas, the trial court did not err in sustaining a demurrer to the replication.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 488-490; Dec. Dig. § 204.*]

4. LIMITATION OF ACTIONS (§ 72*)—COMPUTATION OF PERIOD—PERSONAL DISABILITIES—INFANCY.

Code 1907, § 4846, allowing three years additional to infants within which to sue after coming of age, if they were minors when the right of action accrued, and section 4860, providing that a disability which did not exist when the cause of action accrued does not suspend the operation of the limitation, unless the contrary is expressly provided, are in pari materia, and the saving statute operates in favor only of the person to whom the cause of action first accrued, and not of those who succeed to his rights, unless, at the time of their succession, the statute had never begun to run against their predecessor; and a plaintiff claiming the benefit of the exception in favor of infants must show either that the cause of action accrued to him originally, or that he has succeeded to the rights of one against whom limitations had never begun to run.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 390-398; Dec. Dig. § 72.*]

Appeal from City Court of Montgomery; William H. Thomas, Judge.

Action by Minnie Reese Richardson and another, by next friend, against J. A. L. W. Mertins. From a judgment for defendant, plaintiffs appeal. Affirmed.

Ball & Samford, for appellants. G. F. Mertins and Steiner, Crum & Well, for appellee.

SOMERVILLE, J. The plaintiffs sued the defendant in trover for the conversion by her on or about November 25, 1908, of certain chattels, the property (as alleged) of plaintiffs. The summons describes the plaintiffs as "minors who sue by M. R. R., as next friend." In the caption to the complaint they are described as "M. R. R. and C. R. by M. R. R., as next friend." The defendant's pleas were as follows: "(1) The general issue. (2) The defendant for answer to the complaint saith: That the plaintiffs' cause of action, if any they had, is barred by the statute of limitations of six years. (3) The cause of action of the plaintiffs, or of those under whom they claim, accrued more than six years prior to the bringing of

this suit. (4) The property for the conversion of which this suit was brought came into the possession of the defendant if at all under claim of right more than six years prior to the institution of this suit. Wherefore," etc. A demurrer was interposed to these pleas collectively on the grounds that the complaint showed that the plaintiffs were minors when the suit was instituted, and that the statute of limitations would not begin to run against them until they were of age. This demurrer was overruled, and error is separately assigned for overruling the demurrer to plea 2, to plea 3, and to plea 4.

[1] However, counsel do not argue these assignments of error other than by asserting that the demurrer was improperly overruled. This, under the practice and rulings of this court, must be treated as a waiver of the assignments.

The plaintiffs filed four replications to these pleas, collectively, as follows: "(1) That they had no knowledge of the conversion by the defendant of the property sued for until on or about the date named in the complaint. (2) That, even if the allegations of said pleas are true, they were minors at the time of the filing of this suit. (3) That they had no knowledge of the whereabouts of the property sued for until November, 1908, although they made diligent efforts to ascertain the location of said property which was fraudulently withheld from them by one Wm. Pullium from whom defendant obtained them directly or indirectly. (4) That the defendant came into the possession of the property sued for by and through one William Pullium, who had no authority to sell or dispose of said property, and that in the disposition of said property by said Pullium he was guilty of embezzlement by which a fraud was practiced on them, of which they had no knowledge until about the time named in the complaint and suit was filed in less than a year from said time."

[2] The judgment entry shows that the court sustained defendant's demurrers to these replications, but the demurrers are not set out in the record. In such a case this court always presumes in support of the judgment that the demurrer properly stated a valid objection to the pleading, if any there be.

The only question argued by appellants' counsel is the sufficiency of the second replication, and so we shall not consider the several assignments of error relating to the first, third, and fourth replications.

[3] The second replication offers as an answer to all the pleas, collectively, the single fact that plaintiffs "were minors at the time of the filing of this suit." If this fact is not a good defense to each and all of defendant's special pleas, then, of course,

the trial court cannot be held in error for its elimination by demurrer.

[4] Section 4846 of the Code allows in general three years additional to infants within which to bring suit after coming of age, if they were minors "at the time such right accrued." It is the saving effect of this statute that is invoked by the replication. Section 4860 of the Code provides that "a disability which did not exist when the cause of action accrued does not suspend the operation of the limitation, unless the contrary is expressly provided." These statutes are construed in *pari materia*, and it is thoroughly well settled that the saving statute operates in favor only of the person to whom the cause of action first accrued, and not of those who succeed to his rights, unless at the time of their succession the statute had never begun to run against their predecessor. *Doe v. Thorp*, 8 Ala. 253; *Underhill v. Mobile, etc., Ins. Co.*, 67 Ala. 45; *Black v. Pratt, C. & C. Co.*, 85 Ala. 504, 5 South. 89; *Oliver v. Williams*, 163 Ala. 376, 50 South. 937. In *Doe v. Thorp*, where the question was first given full consideration, this court, construing the act of 1843, said: "The saving expends itself upon the person first entitled to an action, if he is in the predicament to require the benefit of it; and, if the disability be once removed, the time must continue to run, notwithstanding any subsequent disability, either voluntary or involuntary." And, referring to the English statute on the same subject, it is observed that "the courts of England have, therefore, properly extended it only to the persons to whom the right then accrued, and not to those to whom it should afterwards come; so that, on the death of a person in whose life the statute first began to run, his heir must enter within the residue of the period allowed for making the entry, although he labored under a disability at the death of his ancestor." Although, as subsequently codified, the phraseology of the act of 1843 was changed, this principle of construction has always been adhered to, and it was declared in *Black v. Pratt, C. & C. Co.*, 85 Ala. 508, 5 South. 92, that "a party claiming the benefit of an exception or proviso in the statute of limitations can only avail himself of the disability which existed when the right of action first accrued." It is apparent at a glance that the accrual of the right of action to the plaintiff, as referred to in the saving statute, is a matter wholly distinct from the accrual of the cause of action as referred to in section 4860, above quoted; and this distinction is vital, we think, to the decision of the question presented.

A plaintiff claiming the benefit of this exception in favor of infants must bring himself not only within the terms of the saving statute, but must also exclude the qualifying influence of section 4860. It is

not enough that he is an infant when he sues, and must, therefore, have been an infant when the right of action accrued to him. He must also show either that the cause of action accrued to him originally, or else that he has succeeded to the rights of one against whom the limitation had never begun to run. The replication was therefore subject to demurrer in this respect, in so far as it attempted to answer the second and third pleas, and the trial court did not err in so holding.

Affirmed. All the Justices concur.

MILLER-BRENT LUMBER CO. et al. v. LUNDAY.

(Supreme Court of Alabama. Feb. 17, 1912.)

TRESPASS (§ 40*)—TRESPASS TO PERSONAL PROPERTY—COMPLAINT—REQUISITES.

A complaint alleging that plaintiff claims of defendant a specified sum as damages for wrongfully taking "the following goods and chattels, the property of plaintiff, to wit, 3,000 pine rails and 3,000 pine boards," states a cause of action for trespass to personal property, in conformity to Code 1907, form 23, p. 1199, and is not demurrable for failing to allege the time of the trespass.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 80-88; Dec. Dig. § 40.*]

Appeal from City Court of Andalusia; A. L. Rankin, Special Judge.

Action by Henry Lunday against the Miller-Brent Lumber Company and others for trespass to land and personal property. From a judgment for plaintiff, defendants appeal. Affirmed.

The first, second, and fourth counts are in trespass to realty. The third count is as follows: "The plaintiff aforesaid claims of the defendant aforesaid the other and further sum of \$1,000 damages for wrongfully taking the following goods and chattels, the property of the plaintiff, to wit, 3,000 pine rails and 3,000 pine boards."

Henry Opp and Coleman, Dent & Well, for appellants. Reid & Prestwood, for appellee.

SIMPSON, J. The only assignment of error insisted on in this case is that the court erred in overruling the demurrer to count 3 of the complaint, and the only insistence is that said count was subject to the demurrer, in that it failed to allege the time when said trespass was committed, citing, in support of said contention, *Snedecor v. Pope*, 143 Ala. 275, 286, 39 South. 818. That was a case of trespass to realty, and the form of complaint on page 1199 of volume 2 of the Code of 1907 (form 26) so requires. But, in the case of trespass for taking personal property, no such requirement is made; and the said count 3 is in exact conformity to form 23, on the same page of the Code.

Said count 3 is for "wrongfully taking the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

following goods and chattels, the property of the plaintiff, viz., 8,000 pine rails and 8,000 pine boards." The count shows on its face that it is not for trespass to realty, but for taking personal property. *Thornton v. Cochran*, 51 Ala. 415.

There was no error in the ruling of the court, and the judgment of the court is affirmed.

Affirmed. All the Justices concur.

HARTON v. ENSLEN et al.

(Supreme Court of Alabama. Jan. 18, 1912.
Rehearing Denied Feb. 15, 1912.)

1. EXECUTION (§ 256*)—SALE—INADEQUACY OF PRICE.

Even if inadequacy of price were grounds for relief in equity against an execution sale, the fact that the land was worth \$10,000, and the sale was for \$50, does not show such inadequacy; the bill showing complainant's claim to the land was without merit, in that he had no title.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 723-733; Dec. Dig. § 256.*]

2. EXECUTION (§ 256*)—SALE—SUIT TO SET ASIDE—BILL—TITLE OF COMPLAINANT.

Construing most strongly against complainant the allegations of his bill for relief against execution sale, that he purchased the land from M. "during the year 1887," and paid her certain cash, and on November 29, 1887, M. executed a warranty deed to S., who afterwards conveyed to complainant's wife, one of the defendants, no deed from M. to plaintiff being exhibited, no acquisition of title by complainant from M. before she deeded to S. is shown.

[Ed. Note.—For other cases, see *Execution*, Dec. Dig. § 256.*]

3. EXECUTION (§ 256*)—SALE—SUIT TO SET ASIDE—BILL—TITLE OF COMPLAINANT.

As against the claim of the bill for relief against execution sale that complainant acquired title to the land by quitclaim from M. "on or about, to wit, the 20th day of March, 1903," the bill, alleging that "on the 17th day of March, 1903," M. executed a quitclaim of the land to one of the defendants, a copy of which, with the notary's certificate of its acknowledgment on March 17, 1903, is made an exhibit, shows complainant acquired nothing by his quitclaim.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 723-733; Dec. Dig. § 256.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by H. M. Harton against E. F. Enslen and others. From a decree for respondents, complainant appeals. Affirmed.

S. C. M. Amason, for appellant. Harsh, Beddow & Fitts and Campbell & Johnston, for appellees.

SOMERVILLE, J. The bill of complaint was filed by appellant for the purpose of vacating and setting aside an execution sale of certain lands which he claims to own; to cancel certain deeds made to or by certain of the respondents as clouds on his title; to vacate and set aside a certain judgment in

ejectment recovered by one of the respondents against complainant's wife; and to have issued a writ of possession to put complainant in possession of the land.

[1] 1. The only reason assigned for invoking the jurisdiction of equity for the vacation of the sheriff's sale is that the land, which was worth \$10,000, was sold at this sale for only \$50, an inadequacy of price so gross as to amount per se to a fraud on complainant. If this were all that the bill showed with respect to the subject-matter of the sale in question, and it were conceded that such a presumption of fraud would arise as to justify a resort to equity for relief, which, however, is not the case, nevertheless, in our opinion, the bill so distinctly shows that complainant's claim to the land is without any merit, that it cannot be said to show any inadequacy of price at all, if, indeed, the \$50 paid was not a serious overvaluation. And on the showing made by the bill in this regard it is without equity, and the demurrer on that ground was properly sustained.

[2] 2. Complainant's connection with the title is shown by the bill as follows: He "purchased" from one Mrs. Mills (who is now Mrs. M. E. Finegan, and one of these respondents) "during the year 1887," and paid her \$1,200 in cash, but no deed is exhibited. On November 29, 1887, said Mrs. Finegan executed a warranty deed to one Smithson, who afterwards conveyed to Lula B. Harton (who is complainant's wife and also one of these respondents). Construing the allegations as to these two transactions most strongly against complainant, as we are bound to do, the bill does not show that he acquired any title from his alleged grantor before she had deeded the land to Smithson.

3. But, waiving this defect, whatever his interest may have been, the bill shows that he joined with said Lula B. Harton in a deed to one C. H. Baker, through whom, by foreclosure of Baker's mortgage to Lula B. Harton, the title regularly passed to R. D. Johnston, one of these respondents.

[3] 4. It is claimed, however, that complainant subsequently acquired the title to this land by a deed from one W. E. Martin, "on or about, to wit, the 20th day of March, 1903"; Martin's title having been acquired through a valid tax sale against said C. H. Baker.

But the bill of complaint shows "that on the 17th day of March, 1903, said W. E. Martin and his wife, Annie M. Martin, executed a quitclaim deed to E. F. Enslen (one of these respondents) to all of said land." A copy of this deed is made an exhibit, and the certificate of the notary public shows that the grantors acknowledged the deed before him on March 17, 1903.

On the face of the bill, therefore, it ap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pears that complainant's quitclaim deed from Martin was wholly worthless as a muniment of title, and that the title is actually in Enslin, or his assigns.

Numerous grounds of demurrer attack the bill for this patent defect, and were, of course, properly sustained.

Some other grounds of demurrer were also well taken, but it is useless to discuss them.

For the reasons above stated, the decree of the chancery court must be affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

PENDREY v. GODWIN et al.

(Supreme Court of Alabama. Feb. 8, 1912.)

DEEDS (§ 118*)—PROPERTY CONVEYED—ADMISSION OF EVIDENCE.

Where the deed relied on by plaintiff in ejectment conveyed to him property described by government subdivisions and "known as the M. place," and recited that it was the grantor's purpose to convey the M. place, whether the description by metes and bounds was correct or not, and authorized grantor's executor to ascertain the proper subdivisions, should the description be incorrect, evidence was admissible to identify the land sued for as the M. place; the deed being admissible in connection with such evidence, notwithstanding the incorrectness of the government subdivisions.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 118.*]

Appeal from Circuit Court, Crenshaw County; J. C. Richardson, Judge.

Ejectment by S. J. Pendrey against Daniel Godwin and another. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded.

Plaintiff offered to introduce in evidence a deed from James P. Pendrey, conveying to him certain property sued for, described by government subdivision and known as the "Jess Myers place." The deed further asserts that it is the purpose of the vendor to convey the Jess Myers place, whether the above description is correct or not; and, should the description prove incorrect, authority is given to vendor's executors or administrators to ascertain the proper subdivisions and execute deed in accordance therewith. In connection with this deed, plaintiff offered testimony to identify the land known as the Jess Myers place; but the court declined to permit such evidence, and on motion of the defendant excluded the deed, whereupon the plaintiff took a nonsuit, and afterwards filed a motion to set aside the nonsuit, based on the erroneous action of the court as above set out.

M. W. Rushton, for appellant. Powell & Hamilton, for appellees.

DOWDELL, C. J. Without evidence of identification of the land sued for as being a

part of the place "known as the Jess Myers place," the deed offered in evidence was inadmissible; but with this evidence supplied, and it was permissible to do so by parol testimony, the deed was in connection with such evidence of identification admissible. The deed on its face expresses the intention of the grantor to convey the "Jess Myers place," and such intention should not fail because the government numbers given in the deed do not correspond with the true government numbers of the "Jess Myers place." In the face of the expressed intention in the deed to convey the land "known as the Jess Myers place," the government numbers given, failing to correspond, will be regarded as a misdescription.

The trial court committed error in not allowing plaintiff's evidence of identification of the land sued for as being the "Jess Myers place." As we have said above, with this evidence in, then the deed offered in evidence is rendered competent. Seymour et al. v. Williams, 139 Ala. 416, 36 South. 187. The question considered appears from the record to be the controlling question in the case, and other assignments of error need not therefore be considered.

For the error indicated, the judgment of the lower court is reversed, and the cause remanded.

Reversed and remanded. All the Justices concur.

DUY v. ALABAMA WESTERN R. CO.

(Supreme Court of Alabama. Dec. 24, 1911.

On Rehearing, Feb. 17, 1912.)

1. EVIDENCE (§ 29*)—JUDICIAL NOTICE—PUBLIC ACTS.

The courts will take judicial notice of public acts of the Legislature, though local in application.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 89; Dec. Dig. § 29.*]

2. STATUTES (§ 263*)—RETROACTIVE OPERATION—CONSTRUCTION.

Courts will not construe a statute so as to control or affect past transactions or matters, unless the Legislature expresses a clear intention to give the enactment a retroactive operation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 344; Dec. Dig. § 263.*]

3. MUNICIPAL CORPORATIONS (§ 657*)—STREETS—VACATION—STATUTES—RETROACTIVE OPERATION.

Loc. Acts 1907, pp. 644, 645, vacating certain streets and alleys in Birmingham on which defendant railroad company had erected a freight depot, did not evince a legislative intent to confirm or ratify from its inception the obstruction of the streets described before the vacation accomplished by the local act took effect, and therefore did not affect the rights of property owners to recover damages for a nuisance arising out of such obstruction.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 657.*]

4. MUNICIPAL CORPORATIONS (§ 657*) — STREETS—VACATION—LEGISLATIVE POWER.

Except as restricted by the Constitution, the state's power is plenary in respect to the vacation of streets and highways within its borders, so that Loc. Acts 1907, pp. 644, 645, vacating certain streets and alleys in Birmingham, was constitutional.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1429; Dec. Dig. § 657.*]

5. MUNICIPAL CORPORATIONS (§ 657*) — STREETS—VACATION—CONSTITUTIONAL LIMITATIONS.

The sole restraint on the state's power to vacate streets and highways within its borders is Const. 1901, § 23, providing that private property shall not be taken for public use unless just compensation is first made therefor, since section 235 is addressed and applies only to municipal and other corporations and individuals invested with the privilege of taking property for public use.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 657.*]

6. NUISANCE (§ 72*)—PUBLIC NUISANCE—OBSTRUCTION OF STREET—SPECIAL INJURY.

One who suffers, in person or property, special peculiar injury different in kind from that suffered by the public generally, from a public nuisance may recover damages therefor against the creator of the nuisance.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*]

7. MUNICIPAL CORPORATIONS (§ 671*)—OBSTRUCTION OF STREETS—RIGHTS OF ADJUTING OWNERS.

Where an adjoining property owner sued to recover damages for obstruction of a highway by defendant's construction of a freight depot, and alleged that by reason of the obstruction, his property was rendered less accessible, its prominence minimized, and the public use of the street on which it abutted deflected lessening its value, he thereby alleged a special injury, different in kind from that suffered by the general public, for which he was entitled to recover damages.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.*]

Mayfield, J., dissenting.

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by G. B. Duy against the Alabama Western Railroad Company for damages for obstructing street. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The complaint is as follows: Count 1: "Plaintiff claims of defendant the sum of \$4,000 damages by reason of the following facts, to wit: Plaintiff avers that on and before, to wit, the 15th day of August, 1906, he was owner of the following described lots or parcels of ground in Birmingham, Alabama, described as follows, to wit: Lots twelve (12) and thirteen (13) in block ninety (90) according to the present plan and survey of said city. Said lots form a rectangle 100 feet square on the northeast corner of Fifteenth street and Second Avenue North, in said city. Plaintiff further avers that on and for more than twenty (20) years prior

thereto, to wit, the 15th day of August, 1906, the said Fifteenth street was a public street, and had been used by the public as such; and said street extended northwardly from First avenue, and in front of plaintiff's said lot on one of its sides, and to the limits of the said city on the north, and that the said street between First and Third avenues was much traveled by the public in going to and from First avenue, and other parts of said city, and many people passed in front of plaintiff's said lot in going to and from First avenue and other parts of said city. Plaintiff further avers that the part of said Fifteenth street, between First and Second avenues was much used by the public in passing to and from First avenue and other parts of said city, and to that part of Fifteenth street in front of plaintiff's said lot, and to that part of Second avenue in front of plaintiff's said lot. Plaintiff further avers that the value of plaintiff's said lot is dependent on its accessibility to the public, and on the number of people and travel which pass in front of said lot. Plaintiff further avers that on or about the 15th day of August, 1906, defendant built across Fifteenth street, between First and Second Avenues North, in the city of Birmingham, Alabama, a freight house, or depot, thereby permanently obstructing said street, and that the defendant since said date has used the said part of said street for its freight depot terminal, and by reason of said obstruction the said part of said street has been closed to public travel. Plaintiff further avers that the said part of said Fifteenth street so obstructed is about, to wit, 80 feet from plaintiff's said lot, above described, and diagonally across Second avenue from plaintiff's said lot. Plaintiff further avers that by reason of said obstruction in said street as aforesaid the public travel to and from First avenue and other parts of said city, as set out above, has been largely diverted from that part of Fifteenth street and Second avenue on which plaintiff's property as above described abuts, and by reason thereof plaintiff's property made less valuable, to the great damage of plaintiff as aforesaid. Plaintiff further avers that there are one or more lines of electric cars run on said First avenue, and that by reason of said obstruction in the said street said car lines are rendered less convenient and less accessible to the occupants of plaintiff's said property, thereby rendering plaintiff's said property less valuable, and greatly damaging plaintiff as aforesaid. Wherefore plaintiff sues."

The demurrers were as follows: "It appears from the complaint that the obstruction of the street complained of is a public nuisance, and the plaintiff does not show such special injury as entitles him to maintain an action for damages. It does not ap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pear that plaintiff's lot abuts on that portion of Fifteenth street which it is alleged it obstructed by defendant's freight house and depot. The complaint shows no such special injuries or damage done plaintiff as entitle him to maintain this suit. For aught that appears, plaintiff is not deprived of reasonably free access to and from said lot. It affirmatively appears that said Fifteenth street and said alleys alleged to have been so obstructed have been duly, properly, and legally vacated as public streets and public thoroughfares. No facts are set forth which give this plaintiff the right under the act of the Legislature referred to to maintain this action on account of any special injuries done to him."

Count 2 is as follows: "Plaintiff claims of the defendant the further sum of \$4,000, because heretofore, to wit, on July 5, 1877, the Elyton Land Company conveyed to the mayor and aldermen of the city of Birmingham, Alabama, certain streets, avenues, and alleys in said city for the use and benefit of the general public, and for no other purpose, and among other streets so dedicated Fifteenth street, between First avenue on the south and Fifth avenue on the north. That on and since the 15th day of August, 1906, the plaintiff has been the owner of lots 12 and 13, in block 90, according to the Elyton Land Company's survey, in said city, and has used the said property and improvements thereon for a storehouse. That the said defendant on, to wit, the 15th day of June, 1907, erected and still maintains a brick freight house, a permanent structure, on said Fifteenth street, between First and Second avenues, in said city. That on July 31, 1907, the Legislature of the state of Alabama enacted an act entitled 'An act to vacate the dedication of the following alleys and part of the street in the Elyton Land Company's survey in the city of Birmingham—the alley bisecting block 94 and the alley bisecting block 95 and that part of Fifteenth street lying between the north line of First avenue and the south line of Second avenue, and to provide compensation for any property owner injured thereby.' Such act appears on pages 644 and 645 of the Local Acts of said state of 1907. That said act provides that any property owner who may sustain any special injury by virtue of any structure erected in or across the portion of said street or alleys vacated hereby may bring one suit against the person or corporation maintaining such structure and recover all such damages, including future damages, which he may sustain in an action at law. That said plaintiff has suffered and will suffer in the future all the damages mentioned in the first count of this complaint, which first count is hereby adopted and made a part of this count, and has also been deprived by said structures on said streets and alleys of access to and ingress

from said First avenue by way of said Fifteenth street. That the approach to his said property has been thereby rendered less accessible to customers and intending customers, and that the trade of the general public has been thereby deflected or diminished, and that all access to said Fifteenth street, between First and Second avenues, has been thereby entirely cut off. That a map of said blocks 90, 94, and 95, and surrounding territory, is hereto attached, marked 'Exhibit A,' and made part of this complaint. That the red cross marked on said map indicates the freight house of said defendants on said Fifteenth street, between First and Second avenues."

The same demurrers were filed to the second as to the first count.

Brown & Murphy and Richard H. Fries, for appellant. Percy, Benners & Burr, for appellee.

McCLELLAN, J. There are two counts in the amended complaint. They will be set out in the report of the appeal.

The questions to which attention is given here arise out of the action of the trial court in sustaining demurrers to these counts.

The first count seeks the recovery of damages to plaintiff's property, abutting on Fifteenth street, in the city of Birmingham, by reason of the permanent obstruction by defendant of that part of Fifteenth street between First and Second avenues and beyond, across Second avenue from the lots of plaintiff. The theory of this count is that a public nuisance, wrought by the obstruction of a public highway, inflicted special, particular damage to plaintiff's property. In this count the allegation is that the obstruction was made "on or about the 15th day of August, 1906." On July 31, 1907 (Local Acts 1907, pp. 644, 645), a local act was approved, whereby the mentioned section of Fifteenth street and two related alleys were vacated. This act, omitting the title, will be set out in the report of the appeal. Our construction of its second section will be later stated.

[1] Independent of averment, the courts of this state take judicial notice of public acts of the Legislature, though local in application. *Badgett v. State*, 157 Ala. 20, 48 South. 54; *McCarver v. Herzberg*, 120 Ala. 523, 25 South. 3; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65.

[2] In cases where the Legislature may enact with a retroactive effect; the courts will not construe the enactment to control or affect past transactions or matters, unless the Legislature expresses a clear intention to give the enactment a retroactive operation. *Gould v. Hayes*, 19 Ala. 438, 451; *Barnes v. Mobile*, 19 Ala. 707, 709; *Smith v. Kolb*, 58 Ala. 645; *New Eng. Mort. Co. v. Board of Revenue*, 81 Ala. 110, 1 South. 30; *Wetzler v. Kelly*, 83 Ala. 440, 3 South. 747; 4 May. Dig. p. 859.

[3] There is nothing in the mentioned local act evincing any legislative intent to confirm or ratify from its inception the obstruction described before the vacation accomplished by the local act, as was the express purpose of the enactment considered in *State ex rel., etc., v. L. & N. R. R. Co.*, 158 Ala. 208, 48 South. 391.

So the first count must, if its sufficiency upon demurrer is vindicated here, be treated as claiming damages, suffered in consequence of the public nuisance charged, between the origination thereof and the approval of the vacating act.

The second count takes express account of the vacating act, and restates the provision of the second section thereof in respect of compensation "to any property owner who may sustain any special injury by virtue of any structure erected in or across the portion of said street or alleys vacated thereby." This (second) count then enters upon an enumeration of the damages suffered and to be (in future) suffered, and includes, by adoption, the damages alleged in the first count, and adds thereto that said structures deprive the property of access to and egress from First avenue by way of Fifteenth street, that approach to his property has been thereby rendered less accessible to customers and intending customers, and that trade of the general public has been thereby deflected or diminished, and that all access to First avenue over Fifteenth street has been thereby entirely cut off. The damages alleged in the first count are diminution in value of the property because of deflected public travel by it, thereby to a large degree minimizing its prominence, and the impaired convenience and accessibility of the property to street car lines along First avenue.

In the second count the erection of the permanent structure, in the described area between First and Second avenues, is alleged to have been made by defendant "on, to wit, the 15th day of June, 1907," a date, if taken particularly, antedating the approval of the vacating act on July 31, 1907. The second section of the vacating act, particularly mentioned in the second count, did not confer, or provide for, or attempt so to do, compensation or remedy for injury to property resulting from or attending the vacation of the section of Fifteenth street and the alleys described in the act. The second section of the local act contemplated only the preservation (a work of supererogation) of the right, and but echoed therefore the legal remedy already existent, a property owner, specially injured by the nuisable characteristics or consequences of the structures erected in or across the area vacated, had to enforce recompense therefor. The public right, subject to the legitimate power of the Legislature to lift, was consistent with the dedication mentioned in the act, but an easement upon a servient estate. When that was legally extin-

guished by legislative declaration, the legislative power attained the limit of its rightful force and effect; and any legislative effort to deal with or to affect the use or enjoyment of the area so relieved of the burden of the public easement was a vain assumption. *Jackson v. Birmingham F. & M. Co.*, 154 Ala. 464, 470, 45 South. 660. The second count neither charges nor relies upon any right of action arising out of the unwholesome or deleterious character or consequences of the structures erected in the area vacated as a public way by the local act. It is its quality as an obstruction or hindrance of which complaint is made. Under this interpretation of the second section of the vacating act, its inclusion by averment in the second count avails nothing in the assertion of a right of action by this plaintiff against this defendant.

[4] The constitutionality of the vacating act as regards the plaintiff's property is not to be doubted. Except as restricted by the Constitution, the state's power is plenary in respect of the vacation of streets and highways within its borders. *Jackson v. Birmingham F. & M. Co.*, 154 Ala. 464, 45 South. 660.

[5] As to the state itself, the sole restraint in the particular now important is Const. § 23, wherein it is provided that "private property shall not be taken for, or applied to, public use, unless just compensation be first made therefor." Section 235 is addressed to the restraint of "municipal and other corporations and individuals invested with the privilege of taking property for public use." This latter section does not apply to the state itself in the exercise of its sovereign power in restraint of which, in so far as we are now concerned, Const. § 23, alone operates. It was ruled in *Jackson v. Birmingham F. & M. Co.*, supra, that a property owner whose lot abutted on a street had a special, private property right in the street, which could not be taken, by a vacation of the street, without compensation, if such vacation, by the state, operated to deprive the property of a reasonably convenient means of access thereto. In the *Jackson Appeal*, as appears, consideration was alone given the validity vel non of the legislative act as affected by Const. 1875, art. 1, § 24; Const. 1901, § 23. No account was or could be taken of section 235, or of its predecessor in the Constitution of 1875, for, as stated, that section of the Constitution did not restrict the state itself in the exercise of its power in the premises. The doctrine of the *Jackson Appeal* was restated in *Hall v. A. B. & A. R. R. Co.*, 158 Ala. 271, 277, 48 South. 365, though the ruling was inadvertently referred to section 235 of the Constitution. And this decision (*Jackson v. Birmingham F. & M. Co.*) was again referred to in *Meighan v. Birmingham Terminal Co.*, 165 Ala. 591, 599, 600, 51 South. 775, where, in treatment of charge

2, it was said that the "language was taken from the opinion" in Jackson's Appeal, and the use of the word "aesthetic" was said to be "open to verbal criticism." The word ("aesthetic"), as employed in the mentioned charge, was subject to the criticism put upon it; but in the grammatical connection, materially different, in which it was used in the opinion mentioned (Jackson's Appeal), it was not open to that criticism, for it there qualified the noun "taste" which was the subject of the verb "allowed." As employed in the opinion in Jackson's Appeal, "aesthetic" did not refer to "convenience of way." The expression, in the opinion in Jackson's Appeal, was aptly incorporated in limitation of the generally stated private right of access, therein before considered, succinctly reiterated in *Hall v. A. B. & A. R. R. Co.*, supra. It affirmatively appears from the map exhibited with the second count that the legislative vacation of the described section of Fifteenth street and of the related alleys did not infringe upon the private right of access stated in the opinion in Jackson's Appeal, supra. So, the second count must be treated as claiming compensation for a like wrong to that asserted in the first count, viz., for the obstruction of the public way between the creation of the obstruction, as alleged in the second count, and the date of approval of the vacating act.

[6] One who suffers, in person or property, special peculiar injury in consequence of a public nuisance, has his action in damages therefor against the creator thereof; but, if his injury be only that common to the public, he has no right of action, for he has suffered no injury of his private right. Elliott on Roads & Streets, § 669, and citations, notes thereto; *Birmingham R. L. & P. Co. v. Moran*, 151 Ala. 187, 44 South. 152; *Dennis v. M. & M. Ry. Co.*, 137 Ala. 649, 658, 35 South. 30, 97 Am. St. Rep. 69; *Sloss-Sheffield S. & I. Co. v. Johnson*, 147 Ala. 384, 41 South. 907, 8 L. R. A. (N. S.) 226, 119 Am. St. Rep. 89, 11 Ann. Cas. 285; *Jones v. Bright*, 140 Ala. 268, 37 South. 79; full note to *Stetson v. Faxon*, 31 Am. Dec. 123, 132, 135; and notes to 5 Am. Dec. 18-21. Judge Freeman's conclusion in the pertinent particular in the note to *Stetson v. Faxon*, 19 Pick. (Mass.) 147, 31 Am. Dec. 123, is approvingly referred to in *S.-S. S. & I. Co. v. Johnson*, supra. Whether the individual property owner seeks equity's power to abate a public nuisance created by the obstruction of a highway, or impleads the obstructor of the highway in a court of law to respond in damages suffered in consequence of the obstruction, the fundamental principle inheres in the right he would in each instance assert and vindicate, namely, that the obstruction has inflicted special, peculiar damage upon him, different from that inflicted upon the public. If the wrong to him is only that common to the public, he is without individual right to assert or vindicate;

and his cause, in either tribunal, must fail, for the public wrong suffered cannot be redressed or its cause removed by an individual who has not been specially, peculiarly damaged thereby. Author, supra. Reference to many of the decisions of eminent courts dealing with the question in concrete cases, whether the property owner has suffered special, peculiar damage in consequence of the obstruction of a highway, whereby ingress and egress to the property has not been entirely cut off, but the traversing of a circuitous route is thereby compelled, discovers a marked inharmony even where the status was, in substance, the same. In *Williams' Case*, 3 Coke's Rep. 73, it was pertinently said: "A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance, and then it is not reasonable that a particular person should have the action; for by the same reason that one person might have an action for it, by the same reason every one might have an action, and then he would be punished 100 times for one and the same cause. But, if any particular person afterwards by the nuisance done has more particular damage than any other there for that particular injury, he shall have a particular action on the case. * * *"

[7] This statement is quoted and strongly approved for its directness, simplicity, and readiness of application in the note to *Stetson v. Faxon*, supra; and this court has approved the conclusion there drawn by the learned editor in *Jones v. Bright* and *S.-S. S. & I. Co. v. Johnson*, supra, and in the latter decision it was ruled that an enforced circuit of route from the property owner's location to the outside world wrought a special, peculiar injury to him. To like effect was the ruling on *Jones v. Bright*, supra. No distinction in principle can in our opinion be taken in respect of the specialty of the injury to the property owner between cases where circuit of route to the outside world and consequent diminution of value of his property is the result of the obstruction of the highway, and cases where, as is here alleged, the obstruction minimizes the prominence of a property by deflecting the popular use of the way on which it abuts, and thereby, it may reasonably be as alleged, lessening its value. Such a state of injury must be special, peculiar to the owner of the property. It is a particular injury within the quoted doctrine of the *Williams Case*, supra; and accords with the therewith consistent ruling in our cases of *Jones v. Bright* and *S.-S. S. & I. Co. v. Johnson*, supra, and the authorities therein cited, and with the express ruling made in *Sloss-Sheffield Steel & Iron Co. v. McLaughlin*, 55 South. 522, delivered since the foregoing opinion was prepared. The rulings made on the several appeals in *Southern Railway Co. v. Ables*, 153 Ala. 523, 45 South. 234, and *Albes v. South-*

ern Ry. Co., 164 Ala. 356, 51 South. 327, Id., 55 South. 816, are not, the court holds, opposed to the conclusion now expressed. That other properties are thereby likewise injuriously affected does not render the injury any the less special or particular. 29 Cyc. p. 1213.

In the light of these considerations, the counts of the amended complaint were not subject to the demurrer interposed thereto, since each sufficiently set forth a cause of action for damages in consequence of the obstruction of the street before the vacating act was approved July 31, 1907. *Melghan v. Birmingham Terminal Co.*, 165 Ala. 591, 51 South. 775; *Sloss-Sheffield Steel & Iron Co. v. McLaughlin*, 55 South. 522.

The judgment is therefore reversed and the cause is remanded.

Reversed and remanded.

SIMPSON, ANDERSON, SAYRE, and SOMERVILLE, JJ., concur. DOWDELL, C. J., not sitting. MAYFIELD, J., dissents.

On Rehearing.

PER CURIAM. Upon full consideration of the argument submitted in support of the application for rehearing, the court feels constrained to overrule it, and the rehearing must, therefore, be denied.

No ruling of the trial court touching the measure of damages is presented on this appeal for review. The court cannot hence consider at this time the matter of measure of damages. It is proper, however, that it be stated, though necessarily a reiteration, that permanent injury or damage to the plaintiff's property is not recoverable, since the street and alleys were vacated by the vacating act, thus and then relieving the freight house of its character as an obstruction in a public street.

MAYFIELD, J. (dissenting). I cannot concur in the conclusion or decision in this case. There are many propositions of law well stated in the opinion, but of these none in my judgment will warrant the conclusion reached, that both counts of the complaint state a cause of action, and are not subject to the demurrer.

Counsel for appellant and for appellee state and concede in their briefs that the trial court sustained the demurrer to the complaint under the authority of the *Albes Case*, which has been twice considered by this court. In my judgment the counts were properly held bad by the trial court under the decisions in that case, as well as under the great weight of authorities, both English and American. There are some cases which support the conclusion reached in this case, but in my opinion those cited do not support it, as I shall attempt to point out.

It will be observed that the only damages or relief sought in this case was for depreciation in value of two lots, each 50x100

feet, on account of an obstruction in a street some distance from these lots. The rule, as I understand it, and as I think the majority opinion concedes it to be, is this: "In order that an individual may maintain an action for a public nuisance, he must show that he thereby suffers a particular, direct, and substantial injury, different in kind from that suffered by the public. It must be beyond the general injury suffered by the public, and his damage must be direct and substantial, and not merely consequential. *Benjamin v. Storr*, L. R. 9 O. P. 401, 409; 43 L. J. C. P. 162; 19 Eng. Rul. Cas. 263." The only damages sought to be recovered in this case are purely and solely consequential. They are not claimed to be direct or different in kind from those suffered by the public. The obstruction does not touch plaintiff's property. The ingress and egress to and from his property are not obstructed or impeded. It is the ingress and egress as to other property or other parts of the city that are obstructed; yet consequent damage to the property in question is claimed. The complaint shows that there are two streets, open and unobstructed, in front of this property; and that the obstruction while in one of these streets is in a block different from that in which plaintiff's property is situate. There is no attempt in this case to recover as for damages to a trade or to an occupation, but merely as for damages sustained in the diminished value of the lots. The first count does not allege that the lots are occupied. It is true that the counts allege that, by reason of the obstruction, the travel of the public is diverted from the streets in front of plaintiff's lots, and that, in consequence thereof, the value of these lots has been greatly decreased; yet for this very reason the damages sought to be recovered are consequential—not direct—and are therefore not recoverable.

As shown by all the authorities, the rules are different in actions brought to recover compensation for lands taken or injured by reason of the nuisance from those in actions brought to recover damages purely personal, such as damages to trade, personal injuries, cost and expense of removing, avoiding, etc. The rule is well and fully stated in the leading English case, above referred to, as follows: "The cases referred to upon this subject show that there are three things which the plaintiff must substantiate, beyond the existence of the mere public nuisance, before he can be entitled to recover. In the first place, he must show a particular injury to himself beyond that which is suffered by the rest of the public. It is not enough for him to show that he suffers the same inconvenience in the use of the highway as other people do, if the alleged nuisance be the obstruction of a highway. The case of *Hubert v. Groves*, 1 Esp. 148, seems to me to prove that proposition. There the plaintiff's business was injured by the obstruction of

a highway, but no greater injury resulted to him therefrom than to any one else, and therefore it was held that the action would not lie. *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316, was decided upon the same ground. The plaintiff failed because he was unable to show that he had sustained any injury other and different from that which was common to all the rest of the public. Other cases show that the injury to the individual must be direct, and not a mere consequential injury, as where one way is obstructed, but another (though possibly a less convenient one) is left open. In such a case the private and particular injury has been held not to be sufficiently direct to give a cause of action. Further, the injury must be shown to be of a substantial character, not fleeting or evanescent. If these propositions be correct, in order to entitle a person to maintain an action for damage caused by that which is a public nuisance, the damage must be particular, direct, and substantial." 19 Eng. Rul. Cas. 270. I submit that, under these authorities, the complainant in this case shows no right of recovery. Where damages to realty are sought, the injury must be direct and attinent to the land itself, not remote or consequential, as is shown in this case. If it be injury personal, to business or to trade, then the nuisance may be more or less remote. If the nuisance complained of in such case be an obstruction of a highway, then, as to personal damages, the obstruction need not abut plaintiff's property, provided the injury can be shown to be the direct and not the consequential result of the nuisance, and different in kind from that suffered by the public similarly situated. There is, and can be, no difference between a suit like this, where the private damages sought to be recovered as for a public nuisance are to the land only, and actions for damages to land taken or "injured," for public purposes, by virtue and authority of law, constitutional or statutory. It has been repeatedly decided by the English and American courts that such statutes or constitutional provisions are intended to give the right of action as to the land which the owner would have had, but for the act of Parliament or of the Legislature authorizing the taking or injuring of property. So, if the injury is private, and it is to land only, then, of course, the same rules of law must apply, whether the injury to, or the taking of, the land, was lawful or unlawful, except as to punitive damages, which might be allowed in the one case and not in the other. In other words, if a street or a road is so obstructed as to prevent its use as a highway, and the value of the land in the vicinity is thereby depreciated, it is immaterial, under our Constitution and statutes, so far as private actions can be maintained solely for depreciation in value of such land on account of the obstruction, whether the obstruction is au-

thorized or not. If the act obstructing or vacating was authorized by law, then the Constitution and statutes allow the same recovery as for injury to the land as the owner would have had, if the act of obstructing or vacating had not been authorized; but, as to personal injuries not connected with the land, the constitutional provision and statutes do not apply. It is only damages to the specific property which is taken or injured that are saved to the owner; but those so saved are the same as he would have had but for the authorized taking or injury.

Having quoted from the leading and ruling English case upon this subject, it may be well to give the leading and ruling American cases. The leading American case upon the subject is conceded by the text-writers and annotators to be that of *Smith v. Boston*, 7 Cush. (Mass.) 254, the opinion therein being written by that great jurist, Chief Justice Shaw. From his opinion I quote: "The court are of opinion that the direction given by the judge at the trial was correct, and that the inconvenience sustained by the petitioner, if any, was not such an injury done him in his property, as to entitle him to damages within the true intent of the law. There is obviously a difficulty in laying down a general rule applicable to all cases. One limit, however, must be observed, which is that the damage for which a recompense is sought must be the direct and immediate consequence of the act complained of, and that remote and contingent damages are not recoverable. The inconvenience of the petitioner is experienced by him in common with all the rest of the members of the community. He may feel it more in consequence of the proximity of his lots and buildings; still it is a damage of like kind, and not in its nature peculiar or specific. The creation of a public nuisance by placing an obstruction in a highway can only be punished and suppressed by a public prosecution; and though a man who lives near it, and has occasion to pass it daily, suffers a damage altogether greater than one who lives at a distance, he can have no private action, because in its nature it is common and public. But if he suffers a peculiar and special damage, not common to the public—as by driving upon such an obstruction in the night, and injuring his horse—he may have his private action against the party who placed it there." Further on, in the same opinion, the great chief justice says: "We do not mean to be understood as laying down a universal rule that in no case can a man have damages for the discontinuance of a highway unless his land bounds upon it, although as applicable to city streets, intersecting each other at short distances, it is an equitable rule. A man may have a farm, store, mill, or wharf, not bounding on a street, but communicating with it by a private way, so situated that he has no access to his property but by the

public way. If this is discontinued, he must lose the benefit of his estate, or open a way at his own expense, which might be a direct and tangible damage, consequent upon the discontinuance of the public way, and we are not prepared to say that he would not have a claim for damages under the statute." The two and only Alabama cases which can be said to support the decision in the case at bar are those of *Jones v. Bright*, 140 Ala. 268, 37 South. 79, and *Johnson's Case*, 147 Ala. 384, 41 South. 907, 8 L. R. A. (N. S.) 226, 119 Am. St. Rep. 89, 11 Ann. Cas. 285, and each of those clearly fell within the exceptions mentioned by Chief Justice Shaw. The nuisance complained of in each of those cases was clearly a private as well as a public one, and the opinion in each is expressly put upon the ground that the nuisance was a private, as well as a public one.

I do not think that any one ever did or could contend upon the facts in the case at bar that the nuisance complained of is one peculiar to the plaintiff or to any other person. The case at bar indisputably falls within the general class, in which the English judges and Chief Justice Shaw say there can be no private action as to the public nuisance. To be sure of this, let us see what the later judges of these same great courts say of the English and American leading cases above quoted from. Justice Bigelow, in the case of *Brainard v. Connecticut River Co.*, 7 Cush. (Mass.) 510, 511, said: "It is only when he suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him; and certainly no rule of law rests on a wiser or more sound policy. Were it otherwise, suits might be multiplied to an indefinite extent, so as to create a public evil, in many cases much greater than that which was sought to be redressed. *Stetson v. Faxon*, 19 Pick. 147 [31 Am. Dec. 123]; *Proprietors of Quincy Canal v. Newcomb*, 7 Metc. 276 [39 Am. Dec. 778]; *Smith v. Boston*, ante [7 Cush.] 255. The same rule is recognized and applied in cases where equitable relief is sought, as well as law. A recent case in England—*Soltau v. De Held*, 2 Simons, N. S. 133—contains a full discussion of this subject, and the principle is clearly stated, and the authorities sustaining it are fully reviewed in the elaborate judgment of the vice chancellor." In *Stanwood v. Malden*, 157 Mass. 17, 31 N. E. 702, 16 L. R. A. 591, the headnote, which clearly states the question decided, is as follows: "The discontinuance of a part of a street in a city is not a ground of action by an owner of land on another street, into which, opposite his land, the part of the street discontinued runs obliquely, if the means of access to his estate remain ample, although its money value is diminished by the diversion of travel; and it is immaterial that a small point of land, of which he owns the fee simple subject to the public right of way, touches the discontinued parts of the street." The case of

Harvard College v. Stearns, 15 Gray (Mass.) 1, was an action for damages for obstructing a highway, in which, as in the case at bar, the damages claimed were solely for the depreciated value of the premises due to closing of access. The lower court instructed the jury that such damages were not recoverable, and the Supreme Court of Massachusetts, after reviewing the authorities on the subject, concluded as follows: "If we now turn to the case before us, it will be found that the claim of the plaintiffs is solely for the injury to their land in consequence of the alleged obstruction. The brief of the plaintiffs' counsel puts the case thus: 'The injury which the plaintiffs sue for is the reduction in value of their land, because not only the servants of the plaintiffs, but others, cannot approach it by water.' No evidence appears to have been offered, or any claim set up, or instructions asked of the court, upon the ground of any particular actual hindrance or delay to the plaintiffs, or obstruction in reference to any case of actual intended use of their land by passing through the creek. The claim was for injury to their land by reason of an obstruction placed in a navigable stream or public way, whereby their land would be rendered more difficult of access and less valuable. Upon the case as presented, the court are of opinion that no exception lies to the instruction given."

In the case of *Aldrich v. Metropolitan W. S. Elev. R. Co.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237, a case very much like this, the court said: "There are certain injuries which are necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, for which the law does not and never has afforded any relief. For instance, the building of a jail, police station, or the like will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of *damnum absque injuria*. So as to an obstruction in a public street, if it does not practically affect the use or enjoyment of neighboring property, and impair its value, no action will lie. In all cases, to warrant a recovery, it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that, by reason of such disturbance, he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provision on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present Constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law. Here there has been no direct physical disturbance of

any right, public or private, which the plaintiff enjoys in connection with her property, and which gives to it an additional value, whereby she has sustained a special damage in excess of that sustained by the public generally. The damages sued for are of the same kind and character as those sustained by the public generally in the ownership of property, which property may have been lessened in value by the construction and operation of the road."

In my opinion the case at bar cannot be distinguished from the Case of Albes, twice considered by this court. While one was a suit in equity and the other an action at law, the facts and the rights of the parties are substantially the same. If Albes and Jackson were not entitled to damages in the cases cited in the majority opinion, I fail to see how this plaintiff has shown any greater or different right. If this plaintiff can recover in this action under the facts stated, then it is certain that there is no end to the suits that may be brought for this alleged public nuisance. The courts will be absolutely flooded with actions as for this one wrongful act. From the plaintiff's complaint it appears that, if his two lots were damaged as he alleges, then all other lots in that vicinity—hundreds if not thousands—were damaged like his, more or less, of course, according to their proximity to the obstruction. If a public highway, such as a river or a public road, should be obstructed at one point, is it possible that all landowners upon such highway whose property may be thereby depreciated in value may maintain actions, either at common law, or under the statutes and constitutional provisions? I think not; but in my opinion the effect of this decision is to hold that they can. I concede that, if they abut the obstructed part, they can; that, if they or their property is thereby put in a cul-de-sac, they can; or that, if their ingress and egress to and from their property is thereby cut off, they can maintain such action, or that if they suffer any direct damages, different in kind from that suffered by the public, they have their action as to such damages; but they have no right of action as for consequential damages to their property—such only as are shown in the case at bar—which are not at all different in kind, though they may be, in a degree, from those suffered by the public.

Meighan's Case, 165 Ala. 591, 51 South. 775, is clearly distinguishable from that at bar, and falls within the class of Albes' Case; and from the report of it (page 593 of 165 Ala., page 776 of 51 South.) it appears that the obstruction complained of was "immediately next to where plaintiff's lot abuts thereon," thus making it an entirely different case from that here under consideration. This point of difference is the very reason, as said in Albes'

Case, that makes the damages recoverable—that is, that they are direct, attingent, and different in kind from those suffered by the public and by owners whose property does not abut upon the part of the street vacated or obstructed. McLaughlin's Case, 55 South. 522, is the counterpart of Johnson's Case, above referred to, and is expressly placed upon the latter as an authority. There the obstruction was upon two sides of the property, thus putting it in a cul-de-sac and shutting off plaintiff's way to the city of Birmingham, her property being on the outskirts of the city, which fact clearly made the plaintiff's damages different in kind from those suffered by the public. Moreover, McLaughlin's and Johnson's Cases, and that of Jones v. Bright, were suits in equity to abate a nuisance which was obviously both a public and a private one as to the complainants, in that they had the individual and personal right to have the obstruction removed, so as to give them a right of way to market and to communicate with the outside world. While not a "way of absolute necessity," it was one special and personal to the complainants in those cases; and hence the bills in those cases had equity independent of the question of damages to the land. In fact, in those cases it was the question of right of way to be protected, rather than that of damages to be recovered.

The statutes and constitutional provisions applicable to this case are not in abrogation of the plaintiff's common-law rights, but they are in this particular case (the statute specially) declaratory of his common-law rights; and how it results that he can recover under his common-law rights, but not under constitutional rights, I am not able to understand. It may be that I fail to comprehend the true holding of the majority opinion; but, as I understand it, it holds that plaintiff may recover under his common-law right but not under the statute, and I think the statute declaratory of his common-law rights.

McSWEAN v. STATE.

(Supreme Court of Alabama. Feb. 8, 1912.)

1. CRIMINAL LAW (§ 995*)—JUDGMENT RECORD—CAPITAL CASES—SPECIAL VENIRE—WAIVER.

Failure to record a waiver of a special venire in a capital case, as required by Code 1907, § 7264, does not invalidate a conviction.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 995.*]

2. CRIMINAL LAW (§ 995*)—JUDGMENT RECORD—CAPITAL CASES—SPECIAL VENIRE—WAIVER.

Waiver of a special venire in a capital case, authorized by Code 1907, § 7264, may be shown by the trial judge's bench notes.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 995.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

3. CRIMINAL LAW (§ 627*)—SERVICE OF COPY—NECESSITY.

Jury Law (Acts [Sp. Sess.] 1909, p. 317) § 32, providing for special venires in capital cases, and requiring service of a copy of the indictment with a list of the jurors specially drawn, did not require service of a copy of the indictment where a special venire was waived as authorized by Code 1907, § 7264.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1399-1412; Dec. Dig. § 627.*]

4. CRIMINAL LAW (§ 1144*)—PRESUMPTION OF ACCUSED—PRESUMPTION.

When a trial was begun and verdict returned the same day, a recital in the judgment entry showing accused's presence when the trial began creates a presumption that he was present continuously, and when the verdict was received.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3027; Dec. Dig. § 1144.*]

Dowdell, C. J., and Mayfield, and Sayre, JJ., dissenting.

Appeal from Circuit Court, Coffee County; H. A. Pearce, Judge.

Henry McSwean was convicted of an offense, and he appeals. Affirmed.

J. A. Carnley, for appellant. Robert C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

McCLELLAN, J. The defendant was convicted of carnally knowing or abusing in the attempt to carnally know a girl under the age of 12 years; and the penalty imposed was 50 years imprisonment.

The judgment entry reads: "This the 30th day of March, 1910, came Claud Riley, special solicitor, who prosecutes for the state of Alabama, and also came the defendant in his own proper person and by attorney, and the said defendant, being duly arraigned upon said indictment, for his plea thereto says not guilty, thereupon came a jury of twelve good and lawful men, to wit, L. M. Bowden, and eleven others, who, being impeached and sworn according to law, upon their oaths do say, 'We, the jury, find the defendant guilty and fix his punishment in the penitentiary for fifty (50) years.'" The trial was had and concluded on the day upon which it was set, viz., March 30, 1910; and on that date sentence, conforming to the verdict, was imposed.

In response to certiorari the clerk certifies as follows: " * * * That I find on the trial docket the following bench notes, made in said cause, to wit: 'March 25, 1910, Deft. in open court in person and with his attorney being duly arraigned, pleads not guilty, and his case is set for trial on Wednesday, March 30, 1910, and the defendant in open court and in writing waives special venire for his trial. Written waiver on file.' 'March 30, 1910. J. & V. Guilty and punishment fixed at 50 years imprisonment in the penitentiary.' 'Deft. is sen. to imp. in pen. for 50 years.' I further certify that the above

bench notes is all that appears upon the records and proceedings in said cause, and that I do not find any agreement on file waiving special venire."

[1] The crime charged being punishable capitally, the procedure requisite in such cases should, unless waived, have been observed in the trial of this defendant. Code, § 7264, provides: "At any time before a special venire has been drawn for the trial of any capital case, if the defendant enters a plea of guilty or in writing waives the right of a special venire, such plea of guilty or such waiver of special venire shall be entered of record, and, in either event, no special jury or venire shall be necessary for the trial of such cause; but the trial of the cause shall be had and the question of the degree of guilt must be ascertained and the punishment fixed by a jury to be selected from the panel of regular petit jurors organized by the court during the week such case is set for trial, in the same manner as juries are organized for the trial of felonies not capital; and the state and the defendant shall be allowed the same number of peremptory challenges as they are respectively allowed in the trial of felonies not capital." Had the statute been complied with, the written waiver would have been entered of record. However important the observance of that feature of the statute may be, it is, when observed, but a ministerial act of the clerk of the court. Its office is to preserve a memorial of the fact that the prisoner, capitally charged, has waived the special venire the law provides. If the waiver has been filed, the omission of the clerk to comply with this ministerial requirement of the statute cannot in the very nature of the thing avail the prisoner to avoid the penalty the law imposes. It bears no relation to the inquiry of his guilt or innocence. He is not prejudiced by the failure of the clerk to record the evidence of his own act, namely, his waiver of a special venire. No judicial action, with respect to the waiver contemplated, is required by the statute. The court cannot deny the effect of the waiver, as presented, when the prisoner presents it. The court is as powerless in that case as when the prisoner pleads guilty, the other act of the prisoner, specified in the statute, whereby the provisions of law for special venire are rendered inapplicable, unobligatory in any degree. Hence it is the act of the prisoner capitally charged in waiving the special venire, which is his due, and not that of the court, thus distinguishing that line of decisions in which it is held that bench notes are simply directions to the clerk what judgments and orders should be entered in expression of judicial action of the court, viz.: Wynn v. McCraney, 156 Ala. 630, 46 South. 854; Condon v. Enger & Co., 113 Ala. 233,

21 South. 227; *Morgan v. Flexner*, 105 Ala. 356, 16 South. 716; *Baker v. Swift*, 87 Ala. 530, 6 South. 153; *Park v. Lide*, 90 Ala. 246, 7 South. 805; *Brightman v. Meriwether*, 121 Ala. 602, 25 South. 994.

[2] In this instance the fact and form of the waiver appears alone in the bench notes on the trial docket of the court in this cause. It is urged, in effect, that the bench notes cannot serve the purpose to show a waiver in the premises, in consequence of which the necessity for the special procedure prescribed for capital cases was avoided. To sanction this contention is to ignore the bench notes, is to deny those memoranda any effect whatsoever, and so upon a matter the verity of which the defendant has not disputed and does not dispute or question in any way. Mindful of the purpose and provisions of the statute providing for the waiver, taking into account the confirmatory fact that no objection to being tried without a special venire appears to have been interposed in the court below by the prisoner, and this while represented by skilled counsel, observing the statute impelled duty of the court to pretermitt the special venire when the prisoner has waived it, it is clear that the affirmation of fact made in the bench notes cannot be ignored, cannot be disregarded. Their recitals are at least prima facie true—prima facie correct. In determining the propriety and validity of amendments nunc pro tunc, such a memorandum has from an early day in our jurisprudence been treated and regarded as, at least, quasi record. *Harris v. Bradford*, 4 Ala. 214, 221; *Glass v. Glass*, 24 Ala. 468. Such dignity has been accorded that character of memoranda in our judicial processes as that beyond the term in which made final permanent records of causes have been conformed thereby and thereunto. So a discontinuance of a cause has been avoided in consequence of amendment nunc pro tunc supported by such memoranda. *Yonge v. Broxson*, 23 Ala. 684. And we know, as from common knowledge, that in the actual, final transcription of the minutes of the courts, expressing the rulings upon the pleadings especially, the clerical officers thereof avail, of necessity, of the memoranda—the bench notes. Naturally so, since amendment nunc pro tunc finds its first aid in essential requisite in such quasi records set down by the judge. Accordingly, the fact is shown prima facie that the defendant waived a special venire for his trial.

[3] Did this waiver carry with it the avoidance of the requirement that an order of the court for the service of a copy of the indictment should enter in capital cases, presents the second and major question discussed by counsel. The appellant was tried when the jury law of 1909 (Acts Sp. Sess. 1909, pp. 305, 318, 399) was in force. In section 32 thereof provision was made for special venires in capital cases. It did not repeal the waiver statute before quoted. A perti-

nent part of that section (32) reads: "Whenever any person or persons stand indicted for a capital felony, the court must on the first day of the term, or as soon as practicable thereafter, make an order commanding the sheriff to summon not less than fifty nor more than one hundred persons including those drawn and summoned on the regular juries for the week set for the trial of the case, and shall then in open court draw from the jury box the number of names required with the regular jurors drawn and summoned for the week set for the trial to make the number named in the order, and shall cause an order to be issued to the sheriff to summon all persons therein named to appear in court on the day set for trial of the defendant and must cause a list of the names of all the jurors summoned for the week in which the trial is set, and those drawn as provided in this section, together with a copy of the indictment, to be forthwith served on the defendant by the sheriff, and the defendant shall not be entitled to any other or further notice of the jurors summoned or drawn for his trial nor of the charge or indictment upon which he is to be tried." It readily appears from the special venire feature of the jury law of 1909 that it superseded all other statutes and enactments touching the service of a copy of the indictment on the prisoner. It is apparent that, as provided for in the jury law of 1909, the requirement that the court cause the service of a copy of the indictment on the prisoner is but and only a part of the system prescribed for a special venire—a requirement that is simply and only a spoke in the wheel of the special venire. It is not an independent, distinct, prescription of the law, as now written. Indeed, the term "together" emphasizes the dependence, in contemplation of the lawmakers, of the provision for a copy of the indictment upon that for a copy of the special venire. A different conclusion prevailed here under other statutes, affirming as distinct, independent provisions, disassociated from the detailed provisions now of force with respect to special venires. See *Spicer's Case*, 69 Ala. 159, among others cited on brief for appellant. Under the jury law of 1909 the omission to "cause" a copy of the indictment served upon the defendant was not error in any degree, for it was waived when the special venire was waived. Having so waived the legal requirement for the special venire, all incidental prescriptions of the law were likewise rendered unobligatory. His trial was, then, to proceed as in felony cases, not capital. Code, § 7264.

[4] There is no merit in the suggestion that error must be predicated on the silence of the judgment entry to show the prisoner's presence when the verdict was received. The trial having been begun and concluded and the sentence imposed during the same day, and it appearing from the judgment entry that the defendant was present in the incep-

tion of the trial and when the sentence was imposed, it will be presumed that he was present continuously. *Dix's Case*, 147 Ala. 70, 76, 41 South. 924, and authorities therein cited.

No error being shown, the judgment is affirmed.

Affirmed.

SIMPSON, ANDERSON, and SOMERVILLE, JJ., concur. DOWDELL, C. J., and MAYFIELD and SAYRE, JJ., dissent.

MAYFIELD, J. (dissenting). But for the decision in this case, I would have thought there was no doubt that a judgment of conviction and sentence in a capital case could not be supported on appeal, unless the record proper showed an order of the court, setting the day for trial and directing a special venire for the trial, or a waiver thereof, made in the mode prescribed in the mandatory statutes on the subject. There are scores, if not hundreds, of cases holding to this effect, and none to the contrary except this one. This is certainly a radical departure from all former decisions of this court upon this subject; and there are many of them which this, in effect, overrules. Heretofore, without exception, this has been said to be as necessary a part of the record, to support a conviction, in a capital case, as the indictment, the verdict, or the judgment. It has been repeatedly held that no one of these can be omitted from the record proper without working a reversal. One is no more important than the other. If one can be omitted, then all can be omitted, provided they are shown by parol or the bench notes.

The mandatory statutes require, and the Constitution guarantees, not that these requisites shall exist, but that they shall appear of record proper, and not otherwise. It is therefore just as necessary that these matters appear of record proper, as it is that they exist. They are not matters that can be waived, except those provided for in the statute, and then only in the mode prescribed by the statute, which is that the waiver must be in writing and appear of record proper. These matters of record cannot be dispensed with—not even at the direct request of the accused. He cannot consent to the omission of any of these requisites from the record in a capital case, so as to cure the error. A man cannot legally consent to be tried for a capital offense without an indictment; nor to be convicted without the verdict of a jury required by law; nor to be executed without a judgment and sentence of the law authorizing such execution. These requisites are not subjects of waiver, nor of control by consent or agreement.

The majority in this case have treated a solemn judgment and record of a court authorized to inflict capital punishment as a mere ministerial act of a judicial or clerical officer of the court. If the defects in this

record were mere clerical omissions or misprisions, I would readily agree with the majority; but they are not such errors. They concern matters of record proper, without which there can be no valid judgment or sentence, matters which absolutely admit of no waiver, consent, or substitution, matters the sine qua non of a valid judgment of conviction or sentence in a capital case. It has been repeatedly asserted by this court that these requisites in capital cases are of prime importance to a prisoner in securing his constitutional guaranty that "the right of trial by jury shall remain inviolate." The acts complained of in such cases are acts of the court, not those of the judge or the clerk, and for this reason they have always by all English and American courts been considered parts of the record essential to support the judgments of conviction in such cases, and they must always affirmatively appear from the record itself—not from the bill of exceptions, the bench notes, or memoranda—to have been performed by the court. The forms and the substance of the records in capital cases are thus deeply imbedded in the foundations of our law; and, as has been well said by this and other courts, they ought not to be disregarded, certainly not when the liberty or even the life of the citizen depends upon such record.

As to these matters, it has been uniformly ruled (without a solitary exception, so far as I know) by this court that a prisoner charged with a capital offense who proceeds to trial without objection as to these acts which are required to be performed by the court, and which are required to be made a part of the record, in order to support a judgment of conviction and sentence, does not thereby waive his right to insist upon such defect in the appellate court, although no objection was made and no question raised as to such matters in the lower court. As was said by this court (*Spicer's Case*, 69 Ala. 163) by Somerville, J.: "Unless the proper order had been made [referring to the order setting a day for the trial, and directing a special venire], no fair field for the exercise of an untrammelled option could be presented. We cannot judicially know that a trial was not the sole alternative to continued incarceration." It was first said by Gipson, C. J., and has often been repeated by this court, in speaking of the necessity of an order setting the day for trial and for a special venire in capital cases, that these forms of records are deeply seated in the very foundations of the law, and, as they conduce to safety and certainty, they surely ought not to be disregarded when the liberty or the life of a human being is at stake. The record in a capital case like this is constituted of the proper and legitimate elements set down in their proper order—elements by the Constitution and the statutes made requisite to support a judgment of conviction and sentence.

As was said by this eminent Chief Justice, (Hamilton v. Com., 16 Pa. 183, 55 Am. Dec. 485): "For it is certainly not the law that all the gossip a clerk or prothonotary writes down on his docket ipso facto becomes the very voice of undeniable truth. The judges of a court of error must determine for themselves, and consequently on facts, instead of sweeping assertions." In speaking of the insufficiency of the record proper in that case, which was attempted to be supplemented by memoranda from the dockets, the same learned Chief Justice remarked: "There is nothing on the docket to show even that the prisoner was present when he was sentenced, except the supplementary memorandum that 'he was present in the court from the time of his arraignment up to the time when the sentence was passed upon him; indeed the whole trial, from its commencement to its termination, was according to law.'" Notwithstanding this memorandum, and the fact that it was made by the officer required to certify the record, it was held, and properly so (the case being frequently quoted by this court), that it did not form any part of the record, and could not be looked to for that purpose. In the language of Lord Coke: "Records are memorials or remembrances, in rolls or parchments, of the proceedings or acts of a court of justice, and are of such uncontrollable solemnity and verity that they admit of no averment, plea, or proof to the contrary. They are the memorials of the end of strife, when a dispute has been settled by the judgment of the court." As has been well said, if it were otherwise, there would be difficulty to see where litigation would end. A matter of record can be made so only by inserting it in the record.

It was said by the Supreme Court of the United States (Taylor's Case, 147 U. S. 695, 18 Sup. Ct. 479, 37 L. Ed. 337) that the best definition of a common-law record in a criminal case, in the American practice, is found in McKinney v. People, 7 Ill. 552, 43 Am. Dec. 65, where it is stated that in a criminal case, after the caption stating the time and place of holding the court, the record should consist of the indictment properly indorsed, as found by the grand jury, the arraignment of the accused, the impaneling of the jury, verdict, and judgment of the court. Mr. Chitty, in stating the contents of a record in a case of felony, says: "The record states the session of oyer and terminer, the commission of the judges, the presentment by the oath of the grand jurymen by name, the indictment, the award of the jury process, the verdict, the asking the prisoner why sentence should not be passed on him, and the judgment of death passed by the judges." 1 Chitty, Crim. Law, 719.

Of course, some of these matters are not now appropriate to our system. We have, however, statutes making other matters a part of such record, and making them necessary to support convictions in such cases.

Among these requirements is the order setting the day for trial, and providing for the special venire from which the jury to try the case shall be selected. There is an entire absence from this record of any such order. This court has repeatedly held that this cannot be dispensed with in a capital case, not even with the consent or by the request of the defendant. No question as to it need be raised in the lower court, nor even in this court. Our statute requires this court to search the records for error. It does not even require the assignment of errors by the defendant, nor the filing of any brief calling attention to errors. Being thus by statute required to search the record for errors, and, if such are found, to reverse the case, it has been repeatedly decided by this court that this record proper cannot be supplemented by the bench notes nor by parol evidence; that the record itself, alone, must avouch its own verity, declare its own validity, or confess its invalidity; that other evidence for these purposes cannot be looked to.

How this court can affirm this judgment in a capital case, in the absence of this part of the record, I am unable to understand. The opinion it is true seems to proceed upon the theory that under the existing statutes the defendant could waive the necessity of the order, setting the day and providing the special venire; but the bench notes are the only evidence relied on to show such waiver. In this I think my Brothers have fallen into grave error, for the reason that the bench notes are not a part of the record, and cannot be made so by this court. They are not a part of the record of the lower court, and are not intended to be such, but are mere memoranda, for the aid of the court and of the clerk, in writing up the judgment and making the record proper. They are no more a part of the record proper to support a capital sentence than the indorsements or memoranda of a grand jury upon their docket to the effect that a certain indictment was found or not found would be an indictment. Such bench notes, standing alone, are not appropriate matter for the record proper, nor for the bill of exceptions. They may be looked to in making up the record proper or the bill of exceptions, but per se are not a part of either; and, of course, cannot be considered to vary, control, add to, or take from either the record proper or the bill of exceptions. They are often looked to or used as evidence in amending judgments nunc pro tunc; but, even after a judgment is amended in this manner, the bench notes themselves do not become a part of the record, but remain merely evidence thereof.

It has been repeatedly held by this court for the defendant cannot waive this order of the court setting the day for his trial and ordering the special venire. The absence of such order will work a reversal, though the defendant not only consented to the omission, but requested a trial by the regular

venire for the week, and though he was acquitted of murder by being convicted of manslaughter. And his case must be reversed on appeal, though no question was raised as to the omission in either the lower court or this court. *Bankhead v. State*, 124 Ala. 14, 26 South. 979; *Kilgore v. State*, 124 Ala. 24, 27 South. 4. It is true that section 7264 of the Code was not in effect when the *Bankhead* and *Kilgore* Cases, supra, were decided; but it was not the intention of the lawmakers, nor is it the effect of that section, to dispense with the order required to be made by section 7263 of the Code, except in the cases and in the manner prescribed by section 7264. This section merely provides that no special jury or venire shall be necessary for the trial of such cases, if before the special venire has been drawn the "defendant enters a plea of guilty or in writing waives the right of a special venire," stipulating that "such plea of guilty or such waiver of special venire shall be entered of record." Consequently it is just as necessary that this plea of guilty or this waiver in writing be entered of record as it is that the order shall be made setting the day for trial and for the special venire. The statute is not susceptible of any other construction, and there is no pretense in this case that such a plea of "guilty" was filed, or that such waiver was entered of record. On the other hand, the record proper absolutely refutes any such presumption, for the reason that it shows a plea of "not guilty," and there is no mention therein of his having waived a special venire.

I think that the record of this court in the concrete case bears out my position as to the insufficiency of the record to support a judgment of conviction and sentence. At a former term of this court, on a call of this case, it was contended that, because of this defect in the record, a certiorari should issue to the trial court to send up a complete record, which writ was awarded; and in response thereto the clerk of that court certified to us that the record was complete, that the only thing tending to show a waiver of a special venire was certain bench notes upon the trial docket, which, as shown above, cannot be considered by this court as part either of the record proper or of the bill of exceptions. It is matter foreign to the record in this court, whatever effect might be given to such notes, in the lower court, on an application to amend the judgment nunc pro tunc. I submit that it is a reasonable presumption that if the record could have been amended in the court below, so as to support the judgment, it would have been so amended, and, as amended, would have been certified to us in response to the certiorari issued for that purpose.

I am aware that there is much complaint in these days against appellate courts on account of what is termed "reversals on

technical errors." To many this defect may seem a technical error; but, if so, it is not the fault of this court nor of any other court. The fault is in the law, which it is the duty of the courts, not to make, but to construe and declare. As answering such complaints, the words of Gipson, C. J. (*Commonwealth v. Leshner*, 17 Serg. & R. [Pa.] 164), are very apt, and his language has been several times quoted in the decisions of this court. In speaking of the advantages which the law has conferred upon the defendant in criminal cases, he says: "We can have nothing to do with the unreasonableness of this particular advantage. Our jurisprudence abounds with unreasonable advantages enjoyed by the accused. The least slip in the indictment is fatal. A new trial cannot be awarded after an acquittal produced by the most glaring misdirection, and the prisoner is to be acquitted wherever there is a reasonable doubt of his guilt. These and many other unreasonable advantages the law allows on principles of humanity or policy; and, if the Legislature chooses to throw in the full and exclusive benefit of peremptory challenges, who can object? No one is more thoroughly convinced of the mischievous consequences of the act of the assembly in practice and the abstract propriety of the objection to the juror here, or is more desirous of seeing the common-law remedy restored by the proper authority. But feeling, as I do, a horror of judicial legislation, I would suffer any extremity of inconvenience, rather than step beyond the legitimate province of the court, to touch even a hair of any privilege of a prisoner on trial for his life. That Chief Justice argued very ill, who, in a capital case, admitted a jury not freeholders, saying, 'Why may we not make precedents to succeeding times, as well as those who have gone before us have made precedents to us?' Such an occurrence in the trial of Algernon Sydney is spoken of in terms of indignation. Were the judges to set the law to rights as often as it should differ from their ideal standard of excellence, it is a hundred to one that their corrections would not hit the taste of those who came after them; and we should have nothing but corrections, while there would be no guide in the decision of causes but the discretion of fallible judges in the court of last resort, and no rule by which the citizen might beforehand square his actions. 'The discretion of a judge,' said a great English constitutional lawyer, Lord Camden, 'is the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper, and passion. In the best it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature can be liable.' I concede it to be one of the excellencies of the common law that it admits of perpetual improvement by accom-

modating itself to the circumstances of the age. But every beneficial change has been by gradations so slow as to be absolutely insensible; and to prevent even those by whom it was wrought from being conscious of it." The remarks of Chief Justice Chilton, in *Noles' Case*, are apt in this connection. That was a capital case, in which the defendant was sentenced to be hanged for murder, and the case was reversed solely upon the ground of a defective warrant, under which the defendant was arrested when he committed the homicide for which he was tried. In concluding the opinion, Judge Chilton said: "We are aware that this looks like a technical ground upon which to reverse a cause of this grave importance; but it is our duty to decide the law irrespective of consequences, and, being satisfied that the warrant is void, we have no alternative but to reverse the sentence and remand the cause that the prisoner may be again tried." 24 Ala. 672, 697.

If criminal cases were reversed on appeal only when necessary to prevent the punishment of innocent persons, no ground of reversal, if legal, would ever be considered technical by a just and fair people. It is because cases are of necessity often reversed when, according to public opinion, the defendant was unquestionably guilty, and had received nothing but a just sentence. It is such cases as these that cause the public to complain of reversals upon technical errors. But here no fault can be justly ascribed to the courts. They are to construe and declare the law which casts its protection over all persons alike. The fact that a man has committed a crime does not diminish his right to the protection which the law affords him. The innocent man, equally with the guilty, is subject to arrest, trial, and punishment. If both are convicted, the law punished both, and, if acquitted, both go free. Before either can legally be made to suffer for a crime, he must be arrested and detained in the same meshes which the law has provided. The innocent and the guilty must be proceeded against alike, step by step, according to the rules and forms which the Constitution, the statutes, and the common law have ordained. The law's forms in such cases must be pursued, or its penalties cannot be imposed. An innocent man, who, having been imprisoned in due form, breaks prison, commits as great an offense in the eyes of the law as if, being guilty, he thus escapes custody. On the other hand, a guilty man, no less than an innocent one, may refuse to be committed to prison on a warrant not conforming to the law. The law must treat all alike, whether innocent or guilty, until the judgment of the law has been pronounced upon them. An innocent man has no more rights in arrest, detention and conviction than has the guilty man. The latter in a court has the same right to protest the

proceedings against him that he has to declare his innocence. In passing upon the question whether or not the record on appeal is sufficient to support a judgment of conviction and sentence in a capital case, the question whether the defendant is guilty or innocent is a matter of no concern to the appellate court. Its duty is the same in either case. It is the court's business to see that he be not convicted except in accordance with the rules of procedure which the law prescribed, and to see that that judgment is executed if he has been so convicted and sentenced.

In my opinion appellate courts cannot afford to disregard the forms and the sufficiency of records in capital cases to support the judgments and sentences imposed. It has been well and truly said that these forms are conducive to the liberty and safety of the citizen. They are created for that purpose, and the principle has been resolutely maintained, both in England and in America, by the most distinguished jurists of these countries. It is true that, when instituted, they were intended to prevent encroachments upon the crown, as well as upon the liberty of the people in times of political persecution. These forms were brought across the water by our fathers, and claimed as a part of their heritage of the common law of England; and, while we have abandoned many of the common-law forms which were unsubstantial, we have never abandoned those which relate to the trials affecting the life and liberty of the citizen. Our Constitutions guarantee them, our statutes declare them, and they still live, to protect the life and liberty of the citizen. It is very true that, if we were allowed so to do, we might as individuals safely presume that the defendant had a fair and impartial trial in the trial court, that he there waived the rights secured to him, which the record fails to show that he so waived, and that his trial was in all things right; but, sitting here as a court, we can only look to the record, to this judgment and this record, which will be regarded as a precedent for all time, and, if we thus allow presumptions to be indulged, to supply omissions of these matters by the Constitution and the statutes required to be recorded, it will soon be deemed scarcely necessary to show by the record any of the important safeguards which the Constitution and statutes and the common law have so long and so strongly asserted as a shield of the liberty and life of the citizen. It will not do to say that these forms were intended only to protect the citizen against the despotism of crowns and tyrants; that he needs no such forms to protect him in this state during these times. It has been well said by a great jurist that there is no despotism so terrible, so cruel, and so unrelenting as that of the people themselves in times of great tumult and ex-

citement, when passion and rage are stirred. These safeguards, these stern and inflexible rules of law, are, during such times of excitement, the only protection that the accused citizen has against mock trials and judicial lynchings. In this connection it may be well to remember the words of Blackstone, when comparing the English law with that of other countries. He said: "It will afford pleasure to an English reader, and do honor to the English law, to compare it with that shocking apparatus of death and torment to be met with in the criminal codes of almost every other nation in Europe. And it is, moreover, one of the glories of our English law that the species, though not always the quantity or degree, of punishment is ascertained for every offense; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained for every subject alike, without respect of persons; for, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates, and would live in society without knowing exactly the conditions and obligations which it lays them under. And, besides, as this prevents oppression on the one hand, so, on the other, it stifles all hopes of immunity or mitigation, with which an offender might flatter himself, if his punishment depended on the humor or discretion of the court." 2 Cool-ey's Bl. 376.

I am fully persuaded that the concrete error into which my Brothers have fallen in this case is that they have failed to distinguish the record in this case from those in cases like *Paris v. State*, 36 Ala. 232. In my opinion they have failed to observe this distinction pointed out in *Spicer's Case* cited and quoted from in the majority opinion. This distinction was again pointed out by *Somerville, J.*, in *Sylvester v. State*, 71 Ala. 24, where he says: "There are few if any preliminary proceedings prior to the verdict of more importance in criminal trials than the legislative details securing the right to have a fair and impartial jury. Of these the most vital in many cases often is the order appointing a day for the trial and fixing the number of jurors to be summoned. Such an order should never be made in the absence of a defendant, and we must not presume he was present when the record omits to show the fact by positive affirmation. We believe it to be the sounder rule, and the one more in harmony with the past decisions of this court on similar questions, that the defect presented for our consideration is a reversible error, and that the failure of the prisoner to object was no waiver. The distinction between the principle settled here, and that in *Paris's Case*, 36 Ala. 232, is fully pointed out in *Spicer v. State*, and nothing need be added on that point. The two de-

cisions are in perfect harmony." In the case last mentioned the judgment of conviction was reversed, not because no order at all was made (which is a fact in this case), but because that order failed to affirmatively show that the defendant was personally present in court when the order was made, and although the prisoner failed to object to such order or proceedings upon the trial in the lower court. Since he could not be held to have waived the privilege of being present when the order was made, surely he ought not to be held to have waived the making of any order in the premises.

This same strictness as to what the record proper should show in order to support a judgment of conviction and sentence in a capital case has been uniformly adhered to by this court as to many other parts of the record proper. This court has not only uniformly reversed, because of the absence of material parts of the record, but repeatedly reversed because of mere defects, sometimes very slight, as in the last-quoted case, where the record failed to show the appearance of the prisoner when the case was set for trial, or because of its failure to show his presence at the rendition of the verdict, or to show that the trial judge asked him if he had anything to say as to why the sentence of the law should not be pronounced upon him, or because it failed to show that the jury by their verdict determined the degree of murder as the statute requires, notwithstanding the verdict found him guilty as charged in the indictment, and fixed a punishment which was apt only as to one degree of murder. In another case, where the murder was committed by poisoning, and the indictment so alleged, the statute making murder by that means murder in the first degree, yet the judgment of conviction was reversed because of a mere defect in the record.

For these reasons, and many others which might be mentioned if time and space allowed, I am fully persuaded that my Brothers are in error in their decision of this case.

MILLS et al. v. HUDMON & CO.

(Supreme Court of Alabama. Feb. 17, 1912.)

1. TRIAL (§ 82*)—INTRODUCTION OF EVIDENCE—OBJECTIONS.

A general objection to introduction of the record of a mortgage, the original of which had been introduced, is not enough.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 194-210; Dec. Dig. § 82.*]

2. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—INTRODUCTION OF EVIDENCE.

Any error in admission of the record of a mortgage is harmless, it being an exact duplicate of the original mortgage, already in evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

3. TRIAL (§ 83*)—INTRODUCTION OF EVIDENCE—OBJECTIONS.

The objection to the competent testimony that witness at the mortgage foreclosure sale bought the land in for plaintiff, that it was in writing, or else void, is inapt.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 193-210; Dec. Dig. § 83.*]

4. FRAUDS, STATUTE OF (§ 56*)—NECESSITY OF WRITTEN AUTHORITY.

Written authority is unnecessary to enable an agent to bid in land for his principal at mortgage foreclosure sale, even though the principal be a corporation.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83-138; Dec. Dig. § 56.*]

5. MORTGAGES (§ 213*)—EJECTMENT BY MORTGAGEE—VALIDITY OF FORECLOSURE—MATERIALITY.

Defendant in ejectment by a mortgagee, who had also bought in the land at foreclosure sale, not having, as permitted by Code 1907, § 3851, pleaded payment on the mortgage debt, the validity of the foreclosure is immaterial.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 213.*]

6. MORTGAGES (§ 213*)—PAYMENT AS DEFENSE—PLEADING AND PROOF.

Defendant in ejectment by mortgagee not having, as permitted by Code 1907, § 3851, pleaded payments on the mortgage debt, exclusion of evidence of such payments was not error.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 213.*]

7. HUSBAND AND WIFE (§ 232*)—MORTGAGE OF WIFE'S PROPERTY—SURETYSHIP—BURDEN OF PROOF.

A married woman seeking to defeat a note and a mortgage on her land, both signed by her and her husband, on the ground that the debt was her husband's only, and that she executed them merely as surety, has the burden of proof.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 232.*]

8. HUSBAND AND WIFE (§ 171*)—MORTGAGE ON WIFE'S PROPERTY.

Part of the debt secured by mortgage on a wife's property being her personal debt or the joint debt of her and her husband, the mortgage would be valid to that extent, though void to the extent that the debt was exclusively his, and she was only surety therefor.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 671-683; Dec. Dig. § 171.*]

Appeal from Circuit Court, Chambers County; S. L. Brewer, Judge.

Action by Hudmon & Co. against A. B. Mills and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Strother, Hines & Fuller, for appellants. E. M. Oliver, for appellee.

SOMERVILLE, J. On May 1, 1907, the plaintiff Hudmon & Co. sold to Annie B. Mills 60 acres of land, and executed and delivered to her the deed therefor, for a consideration of \$1,196.28. On the same day Annie B. Mills, and her husband, J. D. Mills, who are here sued as codefendants, jointly executed a mortgage to plaintiff conveying said 60 acres of land, another 80-acre tract, and certain sawmill machinery and appurte-

nances. The mortgage recites that it is given to secure the payment of the mortgagors' two certain promissory notes of even date for \$918.67 each, payable one in January, 1908, and one in January, 1909. It further stipulates that the mortgage is given for the purchase money of the land and machinery described. It recites also the existence of a previous indebtedness of \$369.34, due by the note of said Annie B. and J. D. Mills made March 9, 1904, and payable April 1, 1907, which is included in, but not discharged by, the two notes of May 1, 1909. It does not directly appear what the small note was given for, but as plaintiff had sold the 80-acre tract of land to Mrs. Mills on March 8, 1907, for \$888.69, it may be inferred that it was for part of the purchase money for that land. Nothing was ever paid on this mortgage debt, and the mortgage was foreclosed under the power on October 5, 1908, and bought in for the plaintiff by its agent; but no deed was executed to the purchaser, nor was any written memorial made of the sale. The plaintiff, who was the mortgagee and purchaser at said foreclosure sale, sued the defendants, the mortgagors, in ejectment, for the possession of the two tracts of land referred to, and the trial was had on the general issue, without plea or suggestion of payment of, or payments on, the mortgage debt. The court instructed the jury to find for the plaintiff, and there was verdict and judgment accordingly. The giving of this instruction, as well as numerous rulings on the evidence, are assigned as error. The theory of the appellant is that the debt for which the mortgage was given was not the debt of Mrs. Mills, but of her husband; and that, as the land belonged to her, the mortgage was entirely void as an attempt to secure the husband's debt.

[1, 2] After the plaintiff had introduced the original mortgage in evidence, it was allowed against defendants' general objection to introduce also the record of the mortgage. If it was improperly admitted, still a general objection was not sufficient to exclude it; and it was in any case harmless to defendants, as the record is an exact duplicate of the original.

[3, 4] Plaintiff's attorney, who superintended the foreclosure sale, testified that he bought the land in for plaintiff. Defendants objected to the statement on the ground that it was in writing, or else void. The answer was competent, and the objection itself was inapt. And, as written authority was not necessary to enable the agent to bid in the land for his principal, the question to this witness as to his authority, whether written or not, was properly excluded. Nor was this made necessary by the fact that the principal was a corporation.

[5, 6] However, as there was no plea of partial payment, under section 3851 of the Code, the validity vel non of the foreclosure

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

is not material to the determination of the issue. *Jackson v. Tribble*, 156 Ala. 480, 47 South. 810. And all the rulings of the trial court to the exclusion of evidence of payments on the mortgage debt were for that reason without error.

The real question, therefore, is simply whether the debt evidenced by the two notes of May 1, 1907, or any portion of it, was the debt of Mrs. Mills. It conclusively appears that the debt for which the mortgage was given included at least the purchase money for the 60-acre tract, \$1,196.28, not only from attendant circumstances, but from the express agreement found in the mortgage itself. Nor is there a word of testimony to the contrary. Mrs. Mills herself does not attempt to deny it. True, Mr. Mills testified that the mortgage "was given for an engine and boiler," with respect to which he also stated it was his debt; the latter statement being ruled out by the court against defendants' exception. But these facts were no more than what was shown by the mortgage itself, and in no way contradictory of it. For he *was* plainly bound for the whole debt as well as for its constituent parts; and this did not render the debt, at least as to other portions of it, any less the joint or personal debt also of Mrs. Mills.

[7, 8] The burden of proof is on the wife to show that a debt evidenced by the note and mortgage signed by her and her husband was that of the husband merely, and that she executed them only as surety. *Gibson v. Wallace*, 147 Ala. 322, 41 South. 980; *Sample v. Greyer*, 143 Ala. 613, 42 South. 106; *Mohr v. Griffin*, 137 Ala. 456, 34 South. 378; *Lunsford v. Harrison*, 131 Ala. 263, 31 South. 24. If the mortgage security was given for a joint debt, as to which the wife was an actual coprincipal, the inhibition of the statute does not apply. *Lunsford v. Harrison*, supra. Nor does it apply if *any part* of the debt secured was an original personal obligation of the wife; for, as observed by Weakley, C. J., in *Gibson v. Wallace*, supra, "the question at last is whether, notwithstanding the form of the transaction, the wife was attempting to secure a debt *entirely* her husband's, upon which she was not bound either separately or jointly." And, again, it was said by Coleman, J., in *Clement v. Draper Mathis & Co.*, 108 Ala. 211, 214, 19 South. 25, 27, in defining the scope of the statute: "The material question is whether the debt secured by the mortgage sought to be foreclosed, *or any part of it*, was the debt of the wife." Of course, if any distinct portion of the debt was exclusively the husband's, the wife's security obligation would be null and void to that extent, but no further.

In our view of the case the plaintiff was entitled to the general affirmative charge, without regard to the testimony excluded

or admitted against defendants' objection. The judgment must therefore be affirmed.

Affirmed. All the Justices concur.

GRAHAM et al. v. CAPERTON et al.

(Supreme Court of Alabama. Feb. 8, 1912.)

1. FERRIES (§ 10*)—PUBLIC FRANCHISE.

The right to keep a public ferry for toll is a franchise which cannot be exercised without legislative authority, and hence such right is not appurtenant to the land of the riparian owner.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 9, 10; Dec. Dig. § 10.*]

2. CONTRACTS (§ 22*)—EXECUTION.

A contract relating to ferry rights was not operative for any purpose, where it contemplated that it should not take effect until signed by all of the descendants of a certain person, and by another who owned the soil at a landing, if a part of such persons did not sign the contract, and the fact that a part of such descendants were given free ferriage, under the mistaken idea that they were entitled to it, did not show a valid contract.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 22.*]

Appeal from Chancery Court, Jackson County; W. H. Simpson, Chancellor.

Suit by George H. Caperton and others against W. K. Graham and others. From a decree for complainants, respondents appeal. Reversed and rendered.

W. H. Norwood and Tally & Fricks, for appellants. Virgil Bouldin, for appellees.

SAYRE, J. Prior to 1850, George Caperton, who owned the north shore land, established a ferry across the Tennessee river where it intersects a public road. This ferry was operated by George W. Caperton, son of George, for a number of years prior to 1868, when George W. died. After the death of George W., his son Samuel operated the ferry until 1880, when, having acquired the shore land, he conveyed the same and his interest in the ferry to S. C. Norwood, under whom the defendants claim land and ferry by mesne conveyances. Prior to the purchase by Norwood, in, to wit, 1874, he, along with several of the descendants of George Caperton, signed a paper writing the purpose of which was to set apart a small tract upon the north shore as appurtenant to the ferry. The language of the writing also purports an agreement that said ferry, should it not be abolished by law, should remain the joint property of the signers and be operated at their joint expense. Among other provisions, some of which need not be stated, was the following: "Margaret C. Hardie being the sole owner of the lands on the S. E. side of said river, at said ferry, and a subscriber hereto, shall also have the same privileges and subject to the same restrictions as other subscribers, heirs at law of George Caperton,"

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ton." This so-called agreement is set out in the bill of complaint as a basis for relief, and it is also averred that complainants and other heirs of George Caperton, who are not made parties, had for more than 20 years before their right was denied by defendants asserted and enjoyed a right of free ferriage and had thereby acquired by prescription a perpetual public ferry franchise at the point in question. The chancellor decreed that a ferry franchise had been established by prescription under continuous user by George W. Caperton, a son of George Caperton, and those claiming under and through him, and that the defendants were the owners by purchase of said franchise, subject, however, to the right of the complainants to free ferriage under the conditions and provisions of the written agreement, and also by virtue of continuous acknowledgment of, and acquiescence in, such right since the establishment of the ferry and until the ouster complained of. Defendants were enjoined from refusing free ferriage to complainants.

So far as complainants' title to relief is based upon the agreement, though not so phrased in the bill or decree, the relief sought and that granted must have proceeded upon the theory that complainants were entitled to specific performance of a contract the effect of which was that, if any of the owners in common should operate the ferry, the rest should have free ferriage.

[1] The right to keep a public ferry for toll is a franchise which cannot be exercised without legislative authority. *Milton v. Haden*, 32 Ala. 30, 70 Am. Dec. 523; *Tuscaloosa County v. Foster*, 182 Ala. 392, 31 South. 587. "As a matter of right, and as incidental to the right of property, any one owning lands on both sides of a river could establish a public ferry; but, as it is a matter in which the public is deeply interested, the Legislature has by law taken this right from the citizen, and deposited the power with the court of roads and revenue." *Jones v. Johnson*, 2 Ala. 746. It is therefore not appurtenant to the land of the riparian owner. In the *Tuscaloosa County Case* it was said that whether such a franchise may be acquired by prescription is a question which appeared to have been decided both ways in our earlier reports. In *State v. Commissioners of Talladega*, 8 Port. 412, it was held that: "There is no prescriptive right to a ferry in this state; the ownership of the land on the banks of our navigable streams gives none." *Milton v. Haden*, supra, was the case of a suit on a promissory note given for the rent of a ferry. After observing that the authorities were not entirely in harmony on the question whether franchises might be held by prescription, the court held that where the question of the right to the franchise is presented collaterally only, from the uninterrupted use and occupation of the public ferry for 20 years the presumption may

be drawn that it had a legal origin. In a later appeal in the same case (35 Ala. 230) the defendant appears to have pleaded that he had been ousted of the franchise by one Nance claiming under title paramount, i. e., a license from the court of county commissioners. The court said: "If the lessors, and those under whom they held, had enjoyed the uninterrupted use of the franchise for more than 20 years, and there was no countervailing proof to disturb the presumption of judicial license, or legislative grant, thereby created, it is obvious that the court of county commissioners had no power to grant a license for a ferry at the same point to Nance." In the latest case touching the subject (*Tuscaloosa County v. Foster*, supra) *McClellan, C. J.*, expressed his inclination to the opinion that such a franchise could not be so acquired. The parties, though differing as to complainants' alleged right of free ferriage, follow the lead of their respective interests in agreeing, and so the chancellor held, that a franchise had been established by prescription, and, as we understand the decree, an alienable interest or estate in land thus created. And upon this foundation, this establishment of the existence of the subject-matter of that contract as a property right in real estate, seems to have been builded the proposition that the contract of 1874, entered into by the predecessors in interest of the respective parties, is binding upon these defendants. If it should for a moment be conceded, agreeably with the interest and opinion of all parties—the interest of the defendants in this particular being outside of this suit, of course—but contrary to what seems to have been the better opinion of our predecessors, that a franchise to maintain and operate Caperton's ferry has been established by prescription and thereby an incorporeal hereditament acquired by complainants' ancestors, in judgment of law real property, descendible and alienable as such, though subject to revocation if bonds be not made and kept good as required by statute law (*Lewis v. Gainesville*, 7 Ala. 85), still on the facts shown complainants are not entitled to relief. As a conveyance for the alienation of land or the creation of an interest in land, the paper writing of 1874 is void for lack of those formalities of execution which are required by statute. If it should be further conceded that such a paper as that to which the predecessor of defendants and some of the descendants of George Caperton put their signatures in 1874 might witness a personal obligation which is enforceable by the latter against the vendees of the former by an injunction against the exercise of the franchise unless upon the terms secured by the contract, a species of specific performance, complainants are still not entitled to relief for a reason more comprehensive and as effective as that already stated.

[2] It appears by what seems to us the weight of the evidence that the so-called contract was never intended to take effect until and unless signed by all the heirs—by which the negotiating parties seem to have meant descendants—of George Caperton and by Margaret C. Hardie who owns the soil at the south landing. This appears in the instrument itself. It is also shown by evidence aliunde. The chancellor found, and properly so, that George Caperton had acquired no franchise. But the parties were dealing with the ferry and the parcel of land adjacent to the north landing as having been the property of George Caperton. They dealt with the ferry as appurtenant to the shore land. A majority of the descendants of George Caperton, as well as Margaret C. Hardie, failed or refused to sign the paper, and the testimony goes to show that this they did because some of them, at least, came to understand that the land, to which they conceived the ferry to be appurtenant, had passed into the sole ownership of Samuel Caperton, who also failed or refused to sign. We conclude that the paper writing was not effectual for any purpose whatever. Nor is there evidence that, apart from the instrument declared upon and offered in evidence, there was ever any agreement to a like effect among the heirs or descendants of George Caperton. That the complainants and others composing a minority of the descendants of George Caperton have been accorded free ferriage upon a mistaken notion that they were entitled to it by reason of their descent, which is as far as the proof goes, falls short of proving an agreement, on valuable consideration, vesting such a right in them. But the relief decreed was such as could have been based upon an agreement only.

Being of opinion that complainants are not entitled to the relief awarded nor any other, the decree will be reversed, and a decree here rendered dismissing the bill at the cost of complainants.

Reversed and rendered. All the Justices concur.

BLACKSHER CO. et al. v. NORTHRUP.

(Supreme Court of Alabama. Dec. 29, 1911.
Rehearing Denied Feb. 15, 1912.)

1. WILLS (§ 69*)—DEFINITION.

A will is an instrument by which a person makes a disposition of his property, to take effect after his decease, and which is in its own nature ambulatory and revocable during his life.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 183; Dec. Dig. § 69.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7461-7468.]

2. WILLS (§ 115*)—EXECUTION—REQUISITES.

Code 1907, § 6172, prescribing the requisites of a valid will, and requiring that wills,

to be effective to pass real or personal property, except nuncupative ones, must be in writing, signed by the testator or some one in his presence, and by his direction and attested by at least two witnesses, etc., applies to all wills, and hence an instrument purporting to devise real or personal property, but signed only by one witness, was ineffectual for any purpose; there being no such thing under the statutes of Alabama as a will which does not dispose of property.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 115.*]

3. EXECUTORS AND ADMINISTRATORS (§ 14*)—GUARDIAN AND WARD (§ 11*)—FORM AND REQUISITES—APPOINTMENT OF EXECUTOR OR GUARDIAN.

Testamentary executors and guardians are only such as are named by a will executed in the manner prescribed by Code 1907, § 6172, since, by section 2507, letters may only be granted to them after the will has been admitted to probate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 29-31; Dec. Dig. § 14;* Guardian and Ward, Cent. Dig. §§ 34-39; Dec. Dig. § 11.*]

4. WILLS (§ 421*)—PROBATE—JUDGMENT—COLLATERAL ATTACK.

Where a probate decree admitting an alleged will to probate recited on its face that the paper was attested by only one witness, it showed that the court had no jurisdiction to admit the paper to probate, and hence was subject to collateral attack.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 904-910; Dec. Dig. § 421.*]

5. WILLS (§ 70*)—WHAT LAW GOVERNS.

The law of the domicile prevails as to bequests of personal property, but the lex rei sitæ governs the devise, descent, or heirship of real property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 184-186; Dec. Dig. § 70.*]

McClellan, J., dissenting.

Appeal from Law and Equity Court, Monroe County; H. H. McClellan, Special Judge.

Bill by Mary S. Northrup against the Blacksher Company and others to sell lands owned jointly. Decree overruling demurrer to the bill and certain of the respondents appeal. Reversed, rendered, and remanded.

As amended, the bill alleges: That Dr. J. W. Shomo died leaving certain heirs named. That at the time of his death he was seised and possessed of a considerable quantity of real estate and personal property, situated in Monroe county, Ala., describing the real estate. That said Shomo left a last will and testament, by which he devised and bequeathed said real estate to his daughter, Nellie S. King, and her three children, this complainant and two others named, and certain other property to his other daughter and her children. That the executor therein named filed an instrument in writing purporting to be the last will and testament of said Shomo, and that it was duly propounded and admitted for probate, giving the dates, and the orders as exhibits. It is then alleged: That the one-fourth interest of Nellie S. King in said above-described real

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

estate has passed by meane conveyances since said will and prior to her death to the Blacksher Company and others named therein, in the following manner: On the 20th day of September, 1900, by deed executed and delivered jointly by Nellie S. King and her husband to G. G. Scott and T. W. Weatherford, and later by deed from Weatherford to Scott for his undivided interest in said land; in March, 1902, by deed from Scott and wife to the Blacksher Company, purporting to convey to the same all of the trees and timber on the lands above described for a consideration, with a time limit that has not yet expired, to remove said trees, which deed purported to convey all the trees and timber, but which conveyed really an undivided one-fourth interest in said trees and timber. That Scott died in April, 1908, leaving a last will and testament, by which he devised all of his right, title, and interest in the soil of the above-described land, and such timber as might not have been cut by the Blacksher Company within the time limited to them, to his wife, Anna S. Scott. That before the filing of this bill the said Anna S. Scott executed and delivered to the children of Dr. Scott and his first wife, Kate (naming them), said above-described land, reserving a life estate therein to herself. It is then alleged that G. G. Scott, Jr., a son of G. G. Scott and his first wife, Kate, died in September, 1909, and that his sister, Kate M. Scott, was appointed administratrix of the estate. It is then alleged that the estates of Nellie King, Kate Scott, and G. G. Scott are solvent, and that G. G. Scott left no heirs at law, except his brothers and sisters. The sixth paragraph sets forth the interest of each in the lands and timber, alleges that it cannot be equitably divided, and prays for a sale of division. The will is made an exhibit to the bill, and is in the ordinary form, with only one witness, and without the usual formula as to the signing and sealing in the presence of the witness, who signs in the presence of the testator, etc. The demurrers were interposed by Charles E. Farish, David S. King, the Blacksher Company, and Anna S. Scott, and are that it affirmatively appears from said amended bill of complaint that the only right asserted by the complainant to an interest in the lands in controversy is based upon said alleged will of J. W. Shomo, and it further appears affirmatively it was attested by but one witness, and that the decree purporting to probate the same recites that there was but one witness. It therefore affirmatively appears that the complainant has no interest in the lands therein described.

Stevens & Lyons and O. J. Torrey, for appellants. Barnett & Bugg, for appellee.

ANDERSON, J. While impressed with the logic and reasoning of the argument of

appellants' counsel, to the effect that the formalities as to the execution of wills as contained in section 6172 of the Code of 1907 apply only to wills which devise real or personal property, and are not essential as to wills appointing an executor or guardian, that a will devising property, though not executed according to the statute, may be invalid as a devise or bequest of property, and yet may be a valid will for other purposes, under the common law, and entitled to probate and proof, and is operative to the extent to which it may be valid as a testamentary document. We do not think the question, however, now open or debatable in this jurisdiction, since the adoption of a complete system of statutes, as far back as the Code of 1852, covering the subject of wills, and providing how they must be executed and proven. *Barker v. Bell*, 46 Ala. 216.

[1] A will has been defined to be "an instrument by which a person makes a disposition of his property, to take effect after his decease, and which is in its own nature ambulatory and revocable during his life." 1 Jar. on Wills, § 1. This definition has been approved and adopted in the cases of *Rice v. Rice*, 68 Ala. 216, and *Daniel v. Hill*, 52 Ala. 486.

[2] In other words, there must be some disposition of property by the testator in order for the paper to amount to a will, and it must be executed as required by the statute. Therefore section 6172, in requiring that wills to be effective to pass real or personal property, except nuncupative ones, must be in writing, signed by the testator or some person in his presence, and by his direction, and attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator, covers all wills, as there is no such thing as a will under our laws which does not dispose of property. As was said by this court through Tyson, J., in the case of *Woodruff v. Hundley*, 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145: "One of the essential requirements to the validity of the instrument as a will is that it must be attested by at least two witnesses who must subscribe their names thereto in the presence of the testator. Code 1896, § 4263. Unless this requisite of the statute was complied with, the instrument was ineffectual to pass real or personal property. It was not a will at all within the purview of the statute, and cannot be admitted to probate. Proof of this essential requisite is just as necessary in order to probate the paper as a will as was a compliance with the statute necessary to give validity to it."

[3] True, our statute authorizes testamentary executors and guardians, but that means that they should be named by a will, such a will as is defined by our court and which has been executed in compliance with

the statute, and authorizes the issue of letters only after the will has been admitted to probate. Section 2507 of the Code of 1907. There are cases to the effect that there can be a will appointing an executor, but making no general disposition of the property, and that it can be proved as such. *Mulholland v. Gillan*, 25 R. I. 87, 54 Atl. 828, 1 Ann. Cas. 366, and cases there cited. Whether such a rule can prevail in our state we need not determine, but it could be doubtless upheld as a will for the reason that it is a special disposition of the property to the executor for administration purposes. It gives him the legal title to the personalty and the right to control or sue for the realty and to be operative and valid should be executed and proven as required by our statute. The paper in question was attested by but one witness, and was not therefore a will, and should not have been admitted to probate.

[4] So the remaining question is, Was the decree of the probate court so admitting same conclusive as against a collateral attack? While the decree of the probate court declares the instrument in question to be proven and admitted it to probate, it shows upon its face that it was not a will under the laws of this state. The decree affirmatively shows upon its face, and in fact recites, that it was attested by but one witness W. A. Shomo, "the only witness." If this was true, and we must consider all of the recitals of the decree, then the instrument offered was a nullity as a will. It did not purport to be a will, and gave the probate court no jurisdiction. The probate court may be a court of general jurisdiction in matters pertaining to the estates of decedents, but its general jurisdiction in probating wills must be confined to instruments which purport to be wills. It cannot be resorted to for the purpose of making something out of nothing. It has jurisdiction to probate wills, but not to convert something that the law says is not a will into a will, and thus nullify, or, in effect, amend or repeal, our statutes. The proceeding to probate a will is in rem, and, in order for the court to acquire jurisdiction and to proceed to a final decree, there must be a res, not a blank piece of paper or a paper which makes no attempt to, and does not in fact, purport to be a will. Of course, if a paper which purports to be a will is presented and is declared proven, and the decree does not show upon its face that it contravenes the law or public policy, the decree will be binding on the world upon collateral attack, and the paper thus probated becomes the last will and testament of the decedent, and governs the descent and distribution of his property. On the other hand, a decree which upon its face contravenes the law or public policy is coram non iudice. The decree in question bespeaks its own impotency. It is void upon

its face, and is subject to collateral attack. *Black on Judgments*, § 248. Our court, like most others, has often quoted the general rule as to the effect and conclusiveness of a decree of competent jurisdiction admitting a will to probate. The general rule is that "the probate of a will cannot be collaterally impeached on any ground." "The probate of a will establishes its status; and the status thus established adheres to the will as a fixture, and the judgment or decree in the premises, unless avoided in some mode prescribed by law, binds and concludes the whole world." As we say, this broad and general rule has often been quoted and approved by our court, often without exception or qualification, but it has never been enforced or applied in dealing with judgments and decrees, disclosing upon their face that there was no will, and that said decrees thereby contravened the law on the subject of wills. On the other hand, we find our court in the cases of *Jordan v. Thompson*, 87 Ala. 471, and *Knox v. Paull*, 95 Ala. 505, 11 South. 158, while reiterating the general rule, sounding a warning signal by expressly stating that the rule did not prevail if the decree "contravened some rule of law or public policy." While courts have the right to construe laws, they have no authority to amend or repeal a statute, and to sanction a decree, which shows upon its face, that a paper is not a will under the law, but which at the same time declares that it is a will, would, in effect, ignore section 48 of the Constitution by permitting the judicial department of our state to exercise legislative powers, and this would be abhorrent to our system of government. We think our conclusion is not only founded upon sound reason and judgment, but it is supported by several well-considered authorities. In the case of *Wall v. Wall*, 123 Pa. 545, 16 Atl. 598, 10 Am. St. Rep. 549, the Supreme Court of Pennsylvania, in discussing the decree admitting a will to probate, which was involved in a collateral suit, speaking through *Williams, J.*, said: "The general rule on which the court below rested its ruling in this case is well settled. A decree of probate made by the register of wills is a judicial decree, and, after the lapse of five years without appeal, it is conclusive as to the real estate disposed of by it. This rule has been recognized and applied in many cases, among which are *Holliday v. Ward*, 19 Pa. 485, 57 Am. Dec. 671; *Cochran v. Young*, 104 Pa. 333; *McCay v. Clayton*, 119 Pa. 133, 12 Atl. 860. But the general proposition thus affirmed must be understood as qualified by the same considerations that qualify the conclusiveness of judgments at law. Of these the most obvious is that which relates to the jurisdiction of the court over the subject-matter and the persons affected by the judgment. If the court has no jurisdiction, it is of no consequence that the proceedings have been

formally conducted, for they are coram non iudice. A judgment rendered by a justice of the peace in a cause over which he has no jurisdiction is void, notwithstanding service may have been regularly made on the defendant, and he may have failed to appeal or take a certiorari within the time prescribed by law. A judgment rendered in the court of quarter sessions in a proceeding exclusively within the jurisdiction of the common pleas, and vice versa, is void for want of jurisdiction in the court rendering the judgment. So, although the court may have jurisdiction of the subject-matter, yet, if there was no service, actual or constructive, on the defendant, the judgment is void for want of jurisdiction over the persons to be affected. If such want of jurisdiction appears upon the record, it can be taken advantage of at any time and in any court where the conclusiveness of the judgment is the subject of judicial inquiry. The reasons for this is found in the fact that the record of the judgment bears on its face the proof of its illegality, and shows the want of power in the tribunal to render it. When it is offered as a conclusive adjudication between the parties, an inspection shows that it is not, because the court had no power to make an adjudication. In the case now under consideration the jurisdiction of the register is conferred by statute, and the limitations within which it is to be exercised are very plainly prescribed. Within these limits his decrees are conclusive. Outside of them he is without any authority to make a decree, and his decree, if made, is a nullity. The act of 1833 provides that 'every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof or by some person in his presence and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more witnesses, otherwise said will shall be of no effect.' "

The Supreme Court of Georgia in the case of *Gay v. Sanders*, 101 Ga. 601, 28 S. E. 1019, in passing upon the validity of a decree admitting a will to probate, speaking through Simmons, C. J., said: "The paper upon which the defendant relied, as giving authority for his becoming executor, purported to be a last will and testament, but was attested by only one witness. As a will it was void. 'All wills (except nuncupative wills) disposing of realty or personalty * * * shall be attested and subscribed in the presence of the testator by three or more competent witnesses.' Civil Code, § 3272. And in the case of *Thornton v. Ohlsholm*, 20 Ga. 338, this court held that an instrument attested by two witnesses only was void as a will. A judgment of the court of ordinary ordering the probate of such a paper attested by one witness only gives that paper no effect as a will in any proceeding in which its validity may be called in question. The

court of ordinary is without jurisdiction to render such judgment, which is therefore void. The will * * * had been proven and admitted to record; and yet it had no attesting witnesses, as appears from the probate itself. * * * It is conceded that it had no subscribing witnesses. The will was therefore utterly void, and of no effect. It was competent, therefore, to move, at any time, to set aside the judgment of the ordinary admitting this paper to probate. It was a nullity upon its face; and in favor of such a judgment nothing can be presumed.' *Hooks v. Stamper* 18 Ga. 471. 'A will attested by only two witnesses is void, and can derive no aid from probate and being admitted to record. The judgment of probate is not merely erroneous, but an absolute nullity on its face. No motion to set aside is requisite, nor is it ever too late to urge its invalidity.' *Cureton v. Taylor*, 80 Ga. 490 [15 S. E. 643]." This case is in point, except as to the number of witnesses required, which are three in Georgia and two in Alabama.

The Alabama cases cited and relied upon by appellee's counsel, while quoting or expressing the general rule without exception or qualification, do not conflict in conclusion with the present holding. Many of them deal with foreign wills, and the probate thereof in the testator's home state entitled them to probate as wills, and they became valid bequests of personalty and which said probate was conclusive, unless, perhaps, it appeared upon the face of the decree that they were void under the laws of the sister state, in which event we would not be bound by said decree. *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464. As to real estate, however, they could not be binding on our courts, as a devise of same, unless executed in conformity with the statutes of this state.

[5] The law of the domicile prevails as to bequests of personal property, but "the *lex rei sitæ* prevails in regard to the devise, descent, or heirship of real estate, because it does not comport with the dignity, the independence, or the security of any independent state or nation that these incidents should be affected in any manner by the legislation or the decisions of the courts of any other nation or state besides itself." *Redfield on Wills*, § 398; *Brock v. Frank*, 51 Ala. 85. A discussion in detail of the numerous Alabama cases cited by counsel for appellee can serve no purpose other than to prolong this opinion, and we will discuss those two which appear to be in conflict. The others, while approving the general rule as to the conclusiveness of decrees admitting wills to probate did not decide the abstract question that a decree void upon its face could not be collaterally impeached, and, if they did, we would not hesitate to overrule them as being unsound. We cannot sanction any ruling upholding and giving life to a decree or judg-

ment which is void upon its face. The case of *Matthews v. McDade*, 72 Ala. 377, did not involve a void decree. The point there involved was whether or not a certain instrument, executed contemporaneously with the will of James McDade, and which was attested by the requisite number of witnesses, and referred to in the will, was in fact a part of the will. In other words, whether or not it was a deed or will. The court held that the probate of same was conclusive on collateral proceedings that it was a testamentary document, or, rather, that it was a will. The opinion does contain the expressions that "the power to probate a will necessarily involves the power to decide whether the paper presented for probate is in fact a will or not a will. Hence it has been held that the probate of a forged paper as a will is binding and valid until revoked, and is conclusive on collateral assaillment." There the paper referred to contained statutory requirements as to execution, and the decree was not void, and did not show on its face that the instrument admitted to probate was not a will under the law. We do not think that the court held, or would have held, that the probate of any kind of paper null and void as a will was made a valid will by the probate of same, especially when the decree also disclosed the invalidity of said paper as a will. Of course, the expression as to the conclusiveness of a decree admitting a forged will to probate can have no bearing upon the present case. The paper, if forged, evidently purported to be a will in legal form and possessing the legal requisites of a will, and was therefore such a paper, as upon its face, gave the probate court jurisdiction. We do not think for a moment that a decree admitting a paper to probate would be upheld as conclusive by any court if the said decree recited that the paper was forged, or that it had never been executed. Here we have a decree which recites and shows upon its face that the paper admitted to probate was not a will. The case of *Leatherwood v. Sullivan*, 81 Ala. 458, 1 South. 718, was dealing with the probate of a foreign will upon the certificate of the judge of the Florida court. It was assailed because attested by only one witness, when the Florida statute required three witnesses. The court declined to condemn the will because of the verity of the certificate from the Florida court, and because the statute of said state was not in evidence, and properly declined to take judicial notice of same. The "moreover clause" in paragraph 3 of the opinion was not decisive of the point, as it had already been decided. Moreover, this identical will and decree was assailed in the subsequent case of *Sullivan v. Rabb*, 86 Ala. 433, 5 South. 746, wherein the Florida statute was introduced, and the court would not or did not invoke the dictum in the case of *Leatherwood v. Sullivan*, *supra*, to the effect that the probate

decree was conclusive, but pretermitted passing upon the validity of the instrument as a will as well as the validity of the decree, but proceeded upon the theory that the personal representative could maintain the suit whether the will was effectual to convey lands or not; that in the instant case the power of an administrator was coextensive with the executor named in the instrument; that, when the title to the land is not vested in the executor, the powers are practically the same, and either could maintain the suit. Whether the decree admitting the will to probate was or was not valid, the probate court had jurisdiction to appoint a personal representative, and, if he was named or designated as executor when it should have been administrator, the issuance of letters was irregular, but not void or open to collateral attack. Just as we would no doubt hold in the present case, if it was necessary to pass upon the question, as the decree admitting the will to probate could be declared void, yet the issuance of letters to the persons named as executors would be irregular, but would operate to clothe them with the right to administer upon the estate until their said appointment was revoked upon direct attack.

The case of *Vanderpool v. Van Valkenburgh*, 6 N. Y. 190, is not in conflict with this opinion. It was not dealing with a decree void on its face. This will involved personality only and was decided upon a statute not set out. The two Virginia cases, *Vaughan v. Doe*, 28 Va. 287, and *Parker v. Brown*, 47 Va. 554, did not deal with decrees void on their face. In each case the wills were valid as bequests of personality, and as such were entitled to probate, but they were not sufficiently attested to operate as a devise of realty. The court, however, held them conclusive for all purposes upon collateral attack after the expiration of seven years. We are not much impressed with this holding, unless it can be justified, and as the opinion seems to indicate that it was, by a Virginia statute, much broader than our own, which not only limited the right to contest to seven years, but further providing that, if not contested within that time, "the probate shall be forever binding." The case of *Dublin v. Chadbourne*, 16 Mass. 433, is not in point. It merely involved the competency of the attesting witnesses, and to all intent and purpose the instrument and decree purported validity upon the face thereof.

Mr. Van Fleet in his work on *Collateral Attack*, p. 224, states that: "Although a will which lacks the statutory number of witnesses, when presented for probate, affirmatively shows that it is a void piece of paper, yet the cases all agree that its probate is simply erroneous and not void." He cites in support of the assertion the cases above discussed, and none of them hold that the probate of a paper absolutely void as a will is conclusive that it is a valid will. It is true

the Virginia cases held that, though the wills considered were not executed so as to devise real estate, they became operative as such after seven years from the probate thereof, if not contested within that period; but it does not appear that the paper probated was a void document as a will. It may have been good, under the law then existing, as a will of personal property, nor does it appear anywhere in the report of the cases that it was even contended that the documents were void as wills. The only point made against them was that they were not so executed as to operate as valid devises of real estate.

In the case at bar the probate court did not attempt to declare the instrument a valid devise or bequest of property, but found that it was not executed as such under the statute, and evidently proceeded upon the erroneous theory that the instrument was a will and entitled to probate, notwithstanding it was not valid as a devise or bequest of property. This theory, however, while sustained in some jurisdictions, is not in harmony with our complete statutory system as to the execution and probate of wills, as demonstrated in the first part of this opinion; but, if such could be the case, in this jurisdiction, it would avail the appellee nothing, for, if the courts could uphold the will as a testamentary document, it would be for limited purposes and could not be construed by the probate court, or any other court, as a valid disposition of property when attested by but one witness, and which is in the teeth of the statute which requires two.

As the appellee bases her sole claim to or interest in the land sought to be partitioned, under the will in question, she shows that she has nothing to be partitioned, and her bill is, therefore, wanting in equity. The law and equity court erred in overruling the demurrer to the bill and one will be here rendered sustaining the general demurrer for want of equity.

The decree of the law and equity court is reversed. One is here rendered sustaining the demurrer, and the cause is remanded.

SIMPSON, MAYFIELD, SAYRE, and SOMERVILLE, JJ., concur. DOWDELL, C. J., not sitting.

MCCLELLAN, J. (dissenting). The jurisdiction of the probate courts of this state of proceedings to probate wills being in rem and original, general, and final, and hence immune from collateral assaillment (save for fraud), it seems clear to me upon all well-considered authority that the decree of probate of the paper propounded as the last will and testament of J. W. Shomo, deceased, cannot now in this collateral way be brought into question and thereupon pronounced void, though, of course, upon direct attack the conclusion must have been fatal to this decree of probate.

The following decisions and texts, among

others, demonstrate, as I view it, the soundness of the opinion just stated: Brock v. Frank, 51 Ala. 85, 89; Matthews v. McDade, 72 Ala. 386; Leatherwood v. Sullivan, 81 Ala. 458, 462, 1 South. 718; Goodman v. Winter, 64 Ala. 410, 426, 38 Am. Rep. 13; Dickey v. Vann, 81 Ala. 425, 429-431, 8 South. 195; Hunt v. Acre, 28 Ala. 580, 593, 594; McCann v. Ellis, 55 South. 303; and, also, Van Fleet on Col. Attack, pp. 224, 609; Herman on Estoppel, p. 112; Dublin v. Chadbourn, 16 Mass. 433, approvingly cited in Goodman v. Winter, 64 Ala. at page 426, 38 Am. Rep. 13; Shultz v. Sanders, 38 N. J. Eq. pp. 156, 157; 1 Woerner's Law of Administration, p. 328; Tarver v. Tarver, 9 Pet. 174, 180, 9 L. Ed. 91.

In my opinion the sole effect of the recital that one witness only attested the instrument, whereas the statute requires two, was and is to show that the probate court egregiously erred in allowing the probate of the thus imperfectly executed testamentary instrument. That fact did not, could not, defeat the jurisdiction of the court—the only condition wherefrom the utter invalidity of its decree could result. The idea that a decree in a proceeding in rem pronounced by a court competently jurisdictioned to so pronounce is absolutely void because it plainly disobeys the law is, it seems to me, a startling proposition, the consequences of which will be, if applied, profound, wide-spread, and recurrently surprising. *Res adjudicata*, as referred to collateral assaillment, becomes a shadow merely, instead of a wholesome and imperatively necessary doctrine, if such an idea finally and fully prevails. Brock v. Frank, *supra*; other authorities, *supra*. The idea was soundly refuted in Shultz v. Sanders, 38 N. J. Eq. 156, where it was said: "A court of general jurisdiction may misconstrue, misapply, or plainly disobey the law in pronouncing judgment, yet, so long as its judgment remains unreversed, it unalterably binds the parties, and pronounces the law which defines and determines their rights in the particular case. * * * The decision of a domestic court acting within the scope of its powers has inherent in it such conclusive force that it cannot be challenged collaterally, and such decision definitely binds all parties embraced in it, unless on objection to the court itself, or in a direct course of appellate procedure. Such judicial act may be voidable, but it is not void. Even if admitted erroneous, such error cannot be set up against a decree in a collateral proceeding founded on the decree." (Italics supplied.)

It is not rationally possible to avert the consequence, in conclusion, of an applicable general principle by the mere fact that in the case or cases it was theretofore announced the particular circumstances thereof do not accord with the case under judgment. The doctrine of *res adjudicata* may be incorrectly applied in a concrete case,

thereby leading to an incorrect result; but this cannot reflect upon the doctrine. So it may be said with every assurance of soundness that, whether the question of probate of a paper as a will by a court of competent jurisdiction arises over the validity (against collateral attack) of a decree of a nondomestic court of probating power, or over that of a decree of such a court in this state, the applicable doctrine of *res adjudicata* is fundamentally the same. Jurisdiction of the subject-matter to so pronounce is and must be the controlling factor. So the doctrine, as respects testamentary papers, inspired this expression in *Brock v. Frank*: "In the absence of statutory provisions in regulation of the subject, the sentence of probate in the proper tribunal of the domicile of the testator is conclusive everywhere, *as to the capacity of the testator, the due execution, and validity of the will.*" (Italics supplied.) In the language of the Lord Chancellor: "No other court could go back upon the factum, and raise any question upon the validity of the will." The assumption that public policy is violated by the probate of a testamentary instrument which is not attested by the requisite number of witnesses is, as I view it, manifestly untenable. Will or no will, is the inquiry submitted to the court of general and exclusive jurisdiction in the premises. Comprehended within the inquiry is, as appears from the foregoing statement taken from *Brock v. Frank* (and others might be added), whether the paper was duly executed. In deciding the issue so submitted the probate court's decree may be obviously erroneous, but it cannot be opposed to public policy, for the simple reason that, under the charter of its existence, such a decree, when the probate court's jurisdiction is invoked to determine the inquiry of "will or no will," only expresses the judicial prerogative. The allusion to public policy in *Knox v. Paull*, 95 Ala. 507, 11 South. 156, and in *Jordan v. Thompson*, 67 Ala. page 471, has reference patently to the instrument, to its provisions, and not to the decree of the court invoked to probate it.

Leatherwood v. Sullivan, 81 Ala. 458, 462, 1 South. 718, is, in my opinion, decisive of the question now under consideration. The suggestion that the pertinent language of the pronouncement was dicta in that case is refuted by reference to the issues in the litigation. D. F. Sullivan, resident of Florida, died leaving a testamentary instrument. He owned lands in Escambia county, Ala. The testamentary instrument was attested "by only one witness," a certified copy thereof being introduced in evidence, as was also a certificate of the judge of probate in Escambia county, Fla., stating that the instrument had been "regularly proved and established." M. S. and Emily S. Sullivan were named as executors in the instrument and letters testamentary were issued by the Florida court to them. The probate court of

Escambia county, Ala., upon certificate of the Florida judge of probate as indicated, issued letters testamentary to the Sullivans. The action was detinue, brought by the executors, "for the recovery of 35 pieces of timber, more or less, alleged to have been cut from section 13, township 2, and range 6, *in the county of Escambia, Ala.*" (Italics supplied.) The right of the plaintiffs to maintain the action was questioned; and one ground thereof went to the sufficiency of the certificate of the judge of the Florida court in granting letters testamentary, and so upon the theory that the issuance of the letters testamentary by our probate court to nonresident executors was conditioned upon the statute-defined (Code 1876, §§ 2379-80; Code 1907, §§ 2556-7) facts, viz., that such persons were named as executors in wills regularly probated, and that a copy of the will probated in another state, under which will such nonresident executor has been appointed, "together with a certificate of the judge of the court in which the will was probated, that such will was regularly proved and established, and that letters testamentary were issued thereon to the person applying for letters on same in this state, in accordance with the laws of the state or territory in which such original letters were granted. * * *"

From this status of fact and law it readily appears that this court in *Leatherwood v. Sullivan* was specifically invited to determine the questions it did decide in these words: "There is no merit in the other objection urged to the sufficiency of the certificate made by the judge of the court in Florida, which granted the original letters to the plaintiffs. The will, it is said, has but one witness, and the laws of Florida require three witnesses to such a paper. The record fails to show what is the law of Florida on this subject, and we can take notice of the statutes of other states only when they are introduced in evidence. Moreover, even were this true, the probate of the will and the grant of letters by a court of competent jurisdiction in Alabama would not for this reason be rendered void. Such judgment of probate would be valid until set aside, and would not be subject to collateral attack, as is here attempted by objecting to the introduction of the letters testamentary in evidence. *Dickey v. Vann*, present term [81 Ala. 425, 8 South. 195]; *Brock v. Frank*, 51 Ala. 85; *Ward v. Oates*, 43 Ala. 515; *Goodman v. Winter*, 64 Ala. 410 [38 Am. Rep. 13]."

This pronouncement in the *Leatherwood-Sullivan* appeal has long since become a rule of property in this state; and considerations of the highest moment forbid in this late day a departure from its ruling, whatever may have been held elsewhere. To avoid its effect as a wholesome precedent in this regard on an untenable assumption that its pertinent announcement is dicta is, as I view it, unfortunate.

I therefore dissent.

HUNTSVILLE ELKS' CLUB v. GARRITY-HAHN BLDG. CO. et al.

(Supreme Court of Alabama. Nov. 21, 1911.
Rehearing Denied Feb. 15, 1912.)

1. CONTRACTS (§ 247*)—BUILDING CONTRACTS—MODIFICATIONS—BURDEN OF PROOF.

A party to a building contract, which fixes the time for the completion of the work and makes time of the essence, has the burden of proving a subsequent change in the contract, extending the time for the completion of the work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1139; Dec. Dig. § 247.*]

2. EVIDENCE (§ 596*)—MODIFICATION OF CONTRACT—WEIGHT OF EVIDENCE.

The proof of a parol alteration of a written contract must be clear and satisfactory, where the change is denied.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2448; Dec. Dig. § 596.*]

3. PRINCIPAL AND SURETY (§ 82*) — BUILDING CONTRACTS—LIABILITY OF SURETY OF CONTRACTOR.

A surety in a building contractor's bond is bound equally with the contractor for the performance of the contract, and is equally responsible in damages for any failure in performance, and the surety, in coming to the relief of the contractor, who is unable to carry out the contract because of financial embarrassment, merely does his duty to the owner, and he does not thereby furnish any new consideration for the original contract.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 82.*]

4. PRINCIPAL AND SURETY (§ 86*)—CONTRACT OF SURETYSHIP.

A surety of a building contractor is chargeable with knowledge of the terms of the contract limiting the time for the completion of the work and making time of the essence, and the owner need not call the surety's attention to the time limit and that he will insist on it.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 86.*]

5. CONTRACTS (§ 305*) — PERFORMANCE — "WAIVER."

An owner who has employed a contractor to erect a building within a specified time, the contract making time of the essence, does not waive nonperformance within the time specified by accepting what was done by the surety of the contractor in furnishing financial aid to the contractor to enable him to complete the building, though he may not be able to do so within the time specified, and in allowing the work to go on to completion after the expiration of the time, the owner not being in fault for the delay, a "waiver" operating by way of an estoppel, or being supported by valuable consideration.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 305.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381; vol. 8, pp. 7831, 7832.]

6. ESTOPPEL (§§ 53, 56*)—CONDUCT AS BASIS OF ESTOPPEL.

Conduct as a basis of estoppel must have been intended for the party relying on estoppel to act on, and he must have been induced to act on it.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 126, 127, 142; Dec. Dig. §§ 53, 56.*]

7. SET-OFF AND COUNTERCLAIM (§ 27*)—BUILDING CONTRACTS—DAMAGES—RECOUPMENT.

Where the time fixed for completion is made of the essence of a building contract, the owner, when sued on the contract, may recoup the damages sustained by a delay in the completion of the work.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 45, 46; Dec. Dig. § 27.*]

8. DAMAGES (§ 122*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

The measure of damages resulting from a delay in the completion of a building erected pursuant to a contract, fixing a time for the completion and making time of the essence, is the value of the use of the building for the time the owner was deprived thereof by the delay of the contractor.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 309-319; Dec. Dig. § 122.*]

Appeal from Chancery Court, Madison County; W. H. Simpson, Chancellor.

Suit by the Garrity-Hahn Building Company and another against the Huntsville Elks' Club. From a decree for complainants, defendant appeals. Reversed, rendered, and remanded.

Walker & Spragins, for appellant. Strang & Fletcher, Cooke & Swaney, and Brickell & Smith, for appellees.

DOWDELL, C. J. This cause was submitted in the chancery court upon the pleadings and proof as noted by the register, and a final decree rendered by the chancellor in favor of the complainants in the bill, from which the present appeal is prosecuted by the respondent, the Huntsville Elks' Club. The purpose of the bill is to enforce a mechanic's lien on the property described for an alleged balance claimed to be due for the erection of the described building. A copy of the contract, which was in writing, is made an exhibit to the bill. By the terms of the written contract (article 6) the work was to be completed within 10 months from the receipt of the figured drawings from the architect. Time became and was made an essence of the contract by the provisions thereof. In paragraph 6 of the bill it is alleged that after the work was begun a new agreement was made in July, 1906, under which the building was to be completed within a reasonable time from that date. The defendant by its answer expressly denied the making of any new agreement as alleged in the bill or any change or modification of the contract as to the time of the completion of the building, and further set up in its answer to the bill that the contractors wholly failed to complete the building within the time stipulated in the contract, and that by reason of the failure to complete the building within the time limit the contract was breached, to the great damage of the defendant, in that the defendant was deprived of the use of the building for more

than a year, which use was reasonably worth to the defendant a large sum, namely, more than \$7,000, all of which damages the defendant claimed and seeks to recoup against the claim of the complainants set up in the bill.

The chancellor in his decree ignored the respondent's claim for damages sought to be recouped, and doubtless upon the theory that the new arrangement as alleged in the bill between the parties had been established by the proof. But a careful consideration of the evidence by us leads us to a different conclusion, and under the statute (section 5955, subd. 1) we are required to weigh the evidence and decide on the facts without attaching any weight to the decision of the chancellor.

[1, 2] The burden rested on the complainants to establish by proof the alleged change in the original contract. While parties may vary or change written contracts by subsequent parol agreements, yet, when a change is averred and there is a denial of it, the proof of change should be clear and satisfactory. The complainants' testimony here is not of that clear and satisfactory character; besides, the weight of the respondent's evidence is against the alleged change of the original contract as averred in the bill.

The bill contains no averment of an estoppel against the respondent's right to claim damages arising out of a breach by the complainants of the original contract as alleged in the respondent's answer to the bill. Nor are any facts stated in the bill on which an estoppel in favor of the complainants against the respondent's claim of damages might be predicated.

[3] The sureties on the bond of the contractors, the Garrity-Hahn Building Company, which was given for the faithful performance of the contract, were in law equally bound with their principals, the Garrity-Hahn Company, for the carrying out of the contract and equally responsible in damages for any failure in performance, or breach, of said contract on the part of their said principals. This is a proposition of law too plain to require citation of authorities. When the principals, the Garrity-Hahn Company, because of financial embarrassment, were unable to carry out the contract and their sureties came to their relief by furnishing them the means to the performance of the contract, the sureties did no more than was their duty to the other party to the contract, and in doing so it was for their own benefit in saving themselves from damages consequent upon a breach of the contract by their principals; and in no sense did such action furnish any new or additional consideration to the original contract.

[4] The sureties were bound to know the terms of the contract, the performance of which they guaranteed, and the time limit

for the completion of the building, and that time was an element of essence of the contract.

[5] The respondent was under no legal duty to call the attention of the sureties to the time limit in the contract and to notify them that the respondent would insist on it, and therefore could not be held to waive it in accepting what was done by the sureties in furnishing financial aid to their principals, the Garrity-Hahn Company, in order to enable them to complete the building, although they might not be able to do so within the time specified; no fault or blame for the delay attaching to the respondent. A waiver, to be binding, must operate by way of an estoppel or be supported by a valuable consideration. 28 Am. & Eng. Ency. Law (1st Ed.) 531.

[6] As we have said, no new agreement was shown, and the respondent did not by its conduct estop itself to claim the benefit of the time provision in the contract. Conduct, as the basis of an estoppel, must have been intended for the other party to act on, and he must have been induced to act upon it. *Scharfenburg v. Town of New Decatur*, 155 Ala. 651, 47 South. 95.

[7, 8] Time being of the essence of the contract, then for the breach of this provision by delay in the completion of the building the respondent was entitled to the damages sustained, and to recover the same by way of recoupment when sued on the contract. The measure of damages in such a case is the value of the use of the building for the time that the owner was deprived of the use by the delay of the contractor. 6 Cyc. 91; *Fidelity & Deposit Co. v. Robertson*, 136 Ala. 379, 34 South. 933; *Hutchins v. Munn*, 209 U. S. 246, 28 Sup. Ct. 504, 52 L. Ed. 776.

As we have already intimated, by merely allowing the work to go on to completion after the expiration of the time named in the contract, the owner did not waive its claim to damages for delay, and, when sued on the contract, the owner is entitled to recoup the damages sustained by such delay. *Lawrence County v. Stewart Bros.*, 72 Ark. 525, 81 S. W. 1059; *Sinclair v. Tallmadge*, 35 Barb. (N. Y.) 602; 30 Am. & Eng. Ency. Law (2d Ed.) 1260.

It follows, therefore, from the views entertained by us and herein above expressed, that the decree of the chancellor must be reversed; and one will be rendered here, ordering a reference to the register to ascertain the balance due the complainants on the contract, as well, also, the amount of damages sustained by the respondent on account of the delay in the completion of the building, to be allowed as a set-off against the claim of the complainants. And in the holding of such reference, both parties will be allowed, in addition to testimony already

taken, to offer such evidence as they may see fit, that is competent and relevant.

Reversed, rendered, and remanded. All the Justices concur.

ELLIOTT et al. v. KYLE.

(Supreme Court of Alabama. Feb. 8, 1912.)

1. CREDITORS' SUIT (§ 11*)—CONDITION PRECEDENT—RECOVERY OF JUDGMENT.

Under Code 1907, § 3740 et seq., which expressly authorize a simple creditor to bring a bill for discovery, a creditor whose debt is evidenced by a foreign judgment need not bring suit upon or obtain judgment thereon in this state.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 46-66; Dec. Dig. § 11.*]

2. JURY (§ 31*)—RIGHT TO JURY TRIAL—BILL FOR DISCOVERY.

Code 1907, § 3740 et seq., which provide that a judgment creditor, or a simple creditor without judgment or lien, may maintain a bill for discovery of the assets of the debtor subject to the payment of debts, is not unconstitutional as impairing the right to trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204-219; Dec. Dig. § 31.*]

3. CREDITORS' SUIT (§ 7*)—GROUNDS—FRAUDULENT CONVEYANCES.

It is not necessary that a creditors' bill for discovery of the debtor's assets should show any fraudulent conveyance or disposition, other than the concealment of the assets which, if discovered, would be liable to the satisfaction of complainant's debt.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 8, 9-11; Dec. Dig. § 7.*]

4. CREDITORS' SUIT (§ 39*)—BILL—AVERMENTS AS TO PROPERTY SOUGHT TO BE REACHED.

A creditors' bill for discovery of the debtor's assets, under Code 1907, § 3740 et seq., which alleges as a fact the existence of property, and that it is concealed from the creditors, and that it can be discovered and subjected to the debts only by the aid of the chancery court, sufficiently avers the necessity for discovery, though the nature and location of the property are not stated.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 154-164; Dec. Dig. § 39.*]

5. CREDITORS' SUIT (§ 22*)—DISCOVERY—PROPERTY OUTSIDE OF STATES.

A creditors' bill for the discovery of concealed assets may be maintained under Code 1907, § 3740 et seq., although the property sought to be discovered is outside of the state; the statute expressly providing for the discovery of property wherever located.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. § 98; Dec. Dig. § 22.*]

6. EQUITY (§ 39*)—DEMURRER TO BILL—OBJECTION TO DISCOVERY.

Where a court of chancery acquires jurisdiction of a controversy containing some element of purely equitable cognizance, it does not confine its remedy to mere adjustment of the equity, but retains the case and administers complete justice between the parties, although in doing so, it may decide questions which were otherwise of purely legal cognizance; and hence a bill in which discovery is the main equity is not demurrable because

some additional relief is sought that may be obtained in conjunction therewith.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

7. CREDITORS' SUIT (§ 39*)—DISCOVERY—AVERMENTS OF BILL.

A creditors' bill for discovery of a debtor's concealed assets, brought under Code 1907, § 3740 et seq., which alleges that a debtor has no visible property or means subject to legal process, and that a discovery of property alleged to be owned by the debtor is necessary to enable complainant to reach and subject it to the satisfaction of his debt, sufficiently shows that the complainant has no other means of ascertaining the facts which are sought to be discovered, and that those facts are peculiar and solely within the knowledge of the defendant.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 154-164; Dec. Dig. § 39.*]

Appeal from City Court of Gadsden; John H. Disque, Judge.

Bill by T. S. Kyle against J. M. Elliott, Jr., and others, for discovery. From a decree overruling demurrers to the bill, defendants appeal. Affirmed.

The bill alleges that Kyle recovered a judgment against Elliott in Tennessee (naming the court and alleging its jurisdiction) in the sum of \$72,075.72, which had been credited with the sum of \$42,308, leaving a balance still due on said judgment of \$32,000, with interest. It is then averred that Elliott had no visible property or means subject to legal process of value sufficient to pay complainant, and complainant is informed and believes, and on such information and belief states, that said Elliott has property, means, or assets not accessible under legal process, or interest in property, real or personal, or money, or effects, or choses in action which are not accessible under legal process, which are liable to the satisfaction of his debts to complainant, but the kind and description of said property, and how it is held, is kept concealed and hidden out, is unknown to complainant, and that the discovery of the same by the defendants herein named is necessary to enable complainant to reach and subject same to the satisfaction of said debt owing complainant by said defendant. Complainant then on information and belief states that the defendant has and owns certain valuable interests, title, claim, or estate in the following corporations, to wit: Here follow a list of corporations. It is then alleged that the corporations have their principal place of business in Etowah county, Ala., and that said Elliott holds and owns, or owns held by another or others, stock, bonds, notes, or other property interests, real or personal, liable to the satisfaction of plaintiff's debt, but not accessible under legal process; that the kind and description of the property, and how held, is kept concealed and hidden out, and is unknown to complainant, and the discovery

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indexes

of the same is necessary to reach and subject the same to the satisfaction of said debt. It is then alleged that, as trustee for his wife, he has from time to time conveyed to himself as such trustee, or has had others to convey to him as such trustee, valuable property, and has conveyed valuable property to his wife, and that such conveyances by him to his wife were voluntary and without consideration, and the said property is liable to the debt above set out, but not accessible under legal process, etc. Then follow to each of the defendants named certain interrogatories; also certain interrogatories to James M. Elliott, Jr., and to his wife. A number of demurrers were filed, raising the point that there was no judgment in Alabama against J. M. Elliott, Jr., and no excuse given for not having obtained one; also raising the question that it does not appear that complainant has made any effort to ascertain what property Elliott owns subject to execution; and other grounds raising the sufficiency of the allegation as to the necessity for the discovery.

Hood & Murphree and Dortch, Martin & Allen, for appellants. Goodhue & Blackwood and W. J. Boykin, for appellee.

MAYFIELD, J. Appellee filed this bill, under section 3740 et seq., of the Code, as a creditor of J. M. Elliott, Jr., one of the appellants, for a discovery. The debt alleged to be due and owing from appellant to appellee was evidenced by a judgment in the Supreme Court of Tennessee and was for more than \$30,000. There is no allegation or insistence that any suit has been brought in this state upon that judgment; but complainant falls clearly within the class of simple contract creditors who are expressly authorized to maintain such a bill. So, under the statute, it is wholly immaterial whether the bill be treated as one by a judgment creditor or one by a simple creditor. The other appellants who were made parties to the bill were corporations and individuals alleged nominally to hold or control the property of the defendant Elliott, for the purpose of secreting it from the complainant and the other creditors of the said Elliott. The constitutionality and validity of the statute has been repeatedly upheld by decisions of this court, and the statute has been repeatedly readopted with that construction placed upon it. The respondents demurred to the bill, assigning numerous grounds, which demurrer was overruled by the trial court, and from that decree this appeal is taken.

[1, 2] We cannot agree with the contention of the appellant that the bill is not one for discovery under the statute referred to, but that it is one for the appointment of a receiver to administer upon the estate of an individual before death. It is wholly unnecessary, under this statute, for the com-

plainant to bring suit in Alabama upon his judgment in Tennessee, and to obtain judgment thereon in Alabama, before maintaining this bill. As before stated, the statute expressly authorizes a simple creditor to maintain the bill.

[3-5] The bill sufficiently avers the necessity for discovery by alleging the existence of assets or property of the defendant, which cannot be subjected to legal process because it is concealed from the creditors, and that such assets can be rendered availing to the creditors by means of the discovery sought. It is not necessary that the bill should show any fraudulent conveyance or disposition, other than the concealment of the assets which, if revealed or discovered, would be liable to the satisfaction of complainant's debt. This the bill unquestionably does. *Pollak v. Billing*, 131 Ala. 519, 32 South. 639.

The bill is not a mere fishing process, to discover, by chance, whether the defendant has such property—property which may be ascertained and subjected by discovery, but not by legal process; but it alleges as a fact the existence of such property, and that it can be discovered and subjected only by the aid of the chancery court. It is not necessary that the bill should describe the kind, character, or location of the property sought to be reached in any more certain or definite terms than are employed in this bill, for the reason that it is one of the objects of the bill to discover these facts, which are unknown to the complainant, though known to the defendant. It is necessary only that the bill should show the existence of such property, and that it can, by the equitable process sought, be subjected to the payment of complainant's debt; nor does it destroy the equity of the bill if it should show that the property sought to be discovered was beyond the limits of this state, because the debtor himself was brought into and subjected to its jurisdiction, and the statute makes provision for such cases, whether the property be within or without the state. *Sweetzer v. Buchanan*, 94 Ala. 574, 10 South. 552.

[6] As was said by Stone, C. J., in *Montgomery County v. McKenzie*, 85 Ala. 549, 5 South. 322, when any contention or controversy contains within it some element of purely equitable cognizance and a court of chancery acquires jurisdiction of the controversy for the purpose of adjusting the equity, it does not confine or limit its remedial administration to the mere adjustment of the equity, but retains the case and administers complete justice between the parties, although in doing so it may be called on to decide, and does decide, some questions which would otherwise be of purely legal cognizance. Consequently the bill is not demurrable because some additional relief is sought, that may be obtained in connection and conjunction with the discovery

which is the main equity upon which the bill rests.

[7] The bill does allege that the facts sought to be discovered are material, and that the ascertainment of such facts is indispensable to the satisfaction of complainant's debt or demand against the defendant. The allegations also sufficiently show that the complainant has no other means of ascertaining the facts which are sought to be discovered, and that those facts are peculiarly and solely within the knowledge of the respondent.

These are the only grounds of demurrer insisted upon, and we do not think that any one of them is well taken. The decree of the chancellor overruling the demurrer is therefore affirmed.

Affirmed. All the Justices concur.

WOLFF et al. v. McGAUGH.

(Supreme Court of Alabama. Dec. 22, 1911.
Rehearing Denied Feb. 15, 1912.)

1. COURTS (§ 2*)—JURISDICTION—PERSONAL ACTIONS.

Jurisdiction in personal actions depends upon the subject-matter to be adjudged, and the presence in court of the parties whose rights are to be affected by the judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1; Dec. Dig. § 2.*]

2. COURTS (§ 17*)—JURISDICTION—INHERENT POWER OF COURT—"JURISDICTION OF SUBJECT-MATTER."

In respect to jurisdiction over the subject-matter, by which is meant the nature of the cause of action and of the relief sought, jurisdiction is acquired only by the Constitution of the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 46-50; Dec. Dig. § 17.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3886, 3887.]

3. COURTS (§ 21*)—JURISDICTION OF THE PERSON.

Jurisdiction of the person is acquired by the court's own act, by its process properly issued and served, or by voluntary appearance of the defendant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 69-74; Dec. Dig. § 21.*]

4. COURTS (§ 7*)—JURISDICTION—"LOCAL ACTION"—"TRANSITORY ACTION."

Where the cause of action can arise in one place only, the action is local; but, if the cause of action is one that might have arisen anywhere, the action is transitory.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 14; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4202, 4203; vol. 8, pp. 7708, 7072-7074.]

5. COURTS (§ 5*)—JURISDICTION—TRESPASS.

In an action in Alabama to recover damages for trespass to realty, the title to land cannot be adjudicated and is only for damages, to be coerced by process against effects of defendant to be found within the state, and hence is personal, and its inherent character as such

determines the jurisdiction of the court as to the subject-matter.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 5.*]

6. COURTS (§ 37*)—JURISDICTION—PERSONAL ACTIONS—WAIVER.

Territorial jurisdiction, or venue, may be waived, at least in personal actions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 147-151; Dec. Dig. § 37.*]

7. COURTS (§ 18*)—ACTION FOR INJURIES TO REALTY.

It is the general rule that actions for injuries to realty must be brought in the forum rei site.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 50-68; Dec. Dig. § 18.*]

8. COURTS (§ 24*)—JURISDICTION—CONSENT.

Consent cannot confer jurisdiction of the subject-matter; that being derived only from the law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 76-78; Dec. Dig. § 24.*]

9. COURTS (§ 25*)—JURISDICTION—JURISDICTION OF THE PERSON—CONSENT.

Where a court has jurisdiction of the subject-matter, parties may confer jurisdiction of their persons by submitting themselves to its judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 79, 80; Dec. Dig. § 25.*]

10. VENUE (§ 17*)—TRESPASS—WAIVER OF OBJECTION.

Where a party, having cause to set aside any process or proceeding, neglects to assert his rights within a reasonable time, the objection is thereby waived, and Code 1907, § 6110, which provides that all actions for a trespass to land must be brought in the county where the land lies, and that summons issuing contrary to that section must be abated on the plea of the defendant, is within such rule.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 28-31; Dec. Dig. § 17.*]

11. COURTS (§ 39*)—DETERMINATION OF JURISDICTION.

Where it appears to a court that its judgment is asked in a case which it has no power to decide under any circumstances, the court should repudiate the cause *ex mero*; no plea being necessary in order to prevent the court proceeding to the rendition of a void judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 156; Dec. Dig. § 39.*]

12. COURTS (§ 37*)—JURISDICTION—STATUTORY PROVISIONS—WAIVER.

The statutory provisions fixing the local jurisdiction in both law and equity courts may be waived by a failure to make timely objection.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 147-151; Dec. Dig. § 37.*]

13. JUSTICES OF THE PEACE (§ 60*)—INJURIES TO REAL PROPERTY—JURISDICTION—WAIVER.

Defendant, in an action before a justice of the peace of M. county for damages for trespass to lands in L. county, did not plead to the jurisdiction on the ground of the location of the land until after the cause had been twice continued, once at the instance of the plaintiffs and again by consent of the parties and after plaintiffs had announced ready on the merits. Code 1907, § 6110, requires such actions to be brought in the county where the land is located. *Held*, that defendant by his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

delay had waived his right to plead in abatement.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 218-221; Dec. Dig. § 60.*]

14. JUSTICES OF THE PEACE (§ 150*)—APPEAL—PLEA IN ABATEMENT—ABANDONMENT.

The right to plead in abatement, having been once abandoned in the justice's court, cannot be revived by an appeal to the circuit court, on which appeal the case, under Code 1907, § 4720, must be tried, according to equity and justice without regard to any defect in the process or proceedings before the justice.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 509; Dec. Dig. § 150.*]

Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge.

Action by B. Wolff and others against W. Paul McGaugh. Judgment for plaintiffs before a justice of the peace, and on appeal to the Circuit Court defendant's plea to the jurisdiction was allowed to be filed, and plaintiffs reserve the question. Reversed and remanded.

Tyson, Wilson & Martin, for appellants.
H. S. Houghton, for appellee.

SAYRE, J. In their complaint in this action, which was begun before a justice of the peace in Montgomery county, the plaintiffs claimed of the defendant "the sum of \$100 mesne profits as damages for a trespass committed by him" on certain lands in Lowndes county, "which are in the possession of the plaintiffs and upon which the defendant unlawfully entered, thereby putting a tenant upon said lands, renting the same out, and collecting from said tenant said rents for the years 1906, 1907, 1908, and 1909." Judgment went for plaintiffs. Upon appeal in the circuit court, the defendant offered to file a plea to the jurisdiction for that the suit was a suit for trespass to real estate situated in the county of Lowndes. In support of their objection to the filing of this plea plaintiffs showed to the court that the defendant had offered to file the plea in the court of original jurisdiction upon the trial of the cause, but that this offer had not been made until after the cause had been twice continued, once at the instance of the plaintiffs, and the second time by consent of the parties, and after plaintiffs had announced ready on the merits, and that the justice of the peace had declined to allow the plea to be filed. The circuit court allowed the plea to be filed, and plaintiffs reserved the question.

It is suggested, and doubtless it was the case, that the court below was induced by the decision in *Karthauss v. N. C. & St. L. Ry. Co.*, 140 Ala. 433, 37 South. 268, to hold that the plea in question was a plea to the jurisdiction of the court over the subject-matter of the suit, and that the right to

plead it could not be waived in any manner. In that case the complaint contained counts in trover and trespass to realty. The plea, addressed to the complaint as a whole, took the point that a suit for trespass to realty in Marshall county could not be maintained in the circuit court of Madison. The language of the count indicates the opinion that a plea of that character went to the power of the court in such sort that, if the facts stated in the plea were true, any judgment which the court might have rendered in favor of the plaintiff on the count in trespass would have been a nullity. The specific ruling was that the judgment be reversed because the trial court refused plaintiff's offer to obviate the plea by striking the count in trespass, the court saying also that the plea was defective because not limited in purpose to the quashing of the summons as to that count, all of which would have followed with equal propriety had the plea been considered as taking an objection which the defendant might have waived. While it seems therefore, that what was said in respect to the court's utter lack of power to render a judgment for the plaintiff, though no plea were interposed, went beyond the necessities of the case, it must be conceded that it was appropriately said, if sound in principle.

[1-3] Jurisdiction in personal actions depends upon two elements: The subject-matter to be adjudged; the presence in court of the parties whose rights are to be affected by the judgment. In respect of subject-matter the court acquires jurisdiction by the act of its creation; it is inherent in the constitution of the court. The other element it acquires by its own act, by its process properly issued and served, or by voluntary appearance of the defendant. *Lamar v. Commissioners' Court*, 21 Ala. 772. "By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought." *Cooper v. Reynolds*, 10 Wall. 316, 19 L. Ed. 931.

[4] Originally, venue entered into the question of jurisdiction in all cases, and all actions were local. This arose out of the nature of trial by jury in which the jurors, who were but witnesses, were taken from the vicinage because they were presumed to know the parties and the facts. Later, when it became necessary to meet the case of debtors who had learned to run away, transitory actions were invented. The courts finally settled upon this distinction: If the cause of action was one that might have arisen anywhere, then the action was transitory; but, if the cause of action could arise in one place only, then the action was local. Actions for trespass to land are still classed with local actions under our statute, which provides that: "All actions for the recovery of land,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

or of the possession thereof, or for a trespass thereto, must be brought in the county where the land lies; a summons issuing contrary to this section must be abated on the plea of the defendant." Code, § 6110. The rule of the common law concerning jurisdiction in local causes was based upon the theory that such actions, being in the nature of suits in rem, should be "prosecuted where the thing on which they were founded was situated." *Casey v. Adams*, 102 U. S. 66, 26 L. Ed. 52. It may be true that the action of ejectment and the possessory actions partake of the nature of suits in rem for the reason that the court undertakes to deliver the land; but it is true in a limited way only, because those actions are prosecuted without a preliminary seizure of the subject-matter, and jurisdiction must be acquired by personal service upon the defendant.

[5] It is not perceived, however, that an action to recover damages for trespass to realty partakes in any degree whatsoever of the nature of an action in rem. In trespass, in this state where the title to land cannot be adjudicated in the action of trespass, the whole prayer is for reparation in damages to be coerced by process against any effects of the defendant to be found within the state. Not being brought for the specific recovery of lands, tenements, or hereditaments, the action is personal. 3 Bouv. Inst. 2641; *Hall v. Decker*, 48 Me. 255; *Linscott v. Fuller*, 57 Me. 406. Inherently the action is personal, though the statute still leaves it in the same category as to venue with local actions. Its inherent character also determines the jurisdiction of the court as to subject-matter; its treatment as a local action, under the statute, determines the territorial jurisdiction, the venue.

[6, 7] Territorial jurisdiction, or venue, may be waived, at least in personal actions. In *Sentenis v. Ladew*, 140 N. Y. 463, 35 N. E. 650, 37 Am. St. Rep. 569, the plaintiffs impleaded the defendants in the Supreme Court for a trespass upon real property in the state of Tennessee. Plaintiffs defaulted, and there was judgment dismissing their complaint, with costs. Plaintiffs subsequently moved to set the judgment aside upon the ground that the court had no jurisdiction of the subject-matter of the suit, and could not, therefore, enter a valid judgment for the costs. The court recognized the general rule of law that actions for injuries to realty must be brought in the *forum rei sitæ*. But it said: "A party may waive a rule of the law or a statute, or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public policy or morals are involved, and, having once done so, he cannot subsequently invoke its protection." The judgment was upheld. In *Little v. Chicago, etc., Ry. Co.*, 65 Minn. 48, 67 N. W. 846, 33 L. R. A. 423, 60

Am. St. Rep. 421, the action for trespass in another state was upheld notwithstanding the defendant's insistence to the contrary at the threshold of the case. But as to such a case the authorities are in conflict. *Howard v. Ingersoll*, 23 Ala. 673; *Allin v. Connecticut River Lumber Co.*, 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416. This conflict in the cases does not involve the material point in the case at hand, for here an Alabama court was disposing of an asserted cause of action which arose in this state, if at all.

[8-11] Consent cannot confer jurisdiction of the subject-matter, for that is derived from the law. But when a court has jurisdiction of the subject-matter, parties may confer jurisdiction of their persons by submitting themselves to its decisions. As was observed by Brickell, C. J., in *Ex parte Rice*, 102 Ala. 671, 15 South. 450, "there is a wide difference between conferring jurisdiction by consent, and consenting to something within the power of the court, deemed promotive of the convenience of the parties." And it was said to be a fixed rule of all courts that, where a party having cause to set aside any process or proceeding neglects to assert it within a reasonable time, the objection is thereby waived. The language of the statute fixing the venue of actions at law (Code, § 6110) indicates that it was framed in recognition of the view here expressed, for it makes error in laying the venue a matter for plea in abatement, thereby excluding the idea that it becomes the duty of the court in such case to repudiate the cause *ex mero* as is its duty whenever it appears that its judgment is asked in a case it has no power to decide under any circumstances. No plea can be necessary in order to prevent the court from proceeding to the rendition of a void judgment.

[12] It has often been held by this court that the statutory provisions fixing the local jurisdiction in both law and equity courts might be waived by a failure to make timely objection. In *Freeman v. McBroom*, 11 Ala. 943, the defendants had answered without objecting that the bill was filed in an improper chancery district; but on that fact the chancellor based his decree that the court could not exercise jurisdiction in the cause. The decree was reversed; this court saying: "The objection at most is only in abatement of the suit, without denying to the complainant a right to the redress which he seeks. It applies to the locality of the jurisdiction whose powers are invoked, and not to the case itself, as one to which chancery should lend its aid. * * * It has frequently been held, in suits at law, that when the court has no jurisdiction of the subject-matter in dispute, such want of jurisdiction cannot be waived by appearance, plea, consent, or in any other manner, and a judgment rendered in such case in favor of the plaintiff

will be void. Yet where the court has jurisdiction of the subject-matter, but not of the person, such want of jurisdiction of the person may be waived by consent, or by plea to the merits, and cannot afterwards be asserted." This was a case in chancery; but like distinctions prevail in courts of law and equity, and there can be no sufficient reason why the statute fixing the venue of equity cases and requiring bills to be filed in the district in which the defendants or a material defendant resides, etc. (Code § 3093), should be construed to be a venue statute merely, and a different construction placed upon section 6110 fixing the venue of action in courts of law. We cite some cases at law and in equity: *Freeman v. McBroom*, 11 Ala. 943; *Branch Bank v. Rutledge*, 13 Ala. 196; *Johnston v. Shaw*, 31 Ala. 592; *Thompson v. Clopton*, 31 Ala. 647; *Noles v. Marable*, 50 Ala. 366; *Glaze v. Blake*, 56 Ala. 387; *Home Protection Co. v. Richards*, 74 Ala. 466. This is the rule of the courts generally. "It may be stated as a general rule that the bringing of an action in an improper county is not a jurisdictional defect, where the court has general jurisdiction of the subject-matter, and the statutes fixing the venue in certain actions confer a mere personal privilege which may be waived by a failure to claim it in a proper manner and at the proper time." 22 *Encyc. of Pl. & Pr.* 815, 816, and notes, where many cases, including some of our own to which we have referred, are cited.

[13] We are therefore of opinion that the courts of Montgomery county having jurisdiction of the subject-matter of that class of cases in which redress is sought for trespass to realty, the fact that the trespass in the particular case was committed in another county is made by the statute the basis of a personal privilege to have the suit brought in the county where the trespass occurred, which must be pleaded, and may be waived. The plea interposed raised a question as to the manner of acquiring the right to exercise jurisdiction, rather than a question as to the court's jurisdiction of the subject-matter of the controversy.

[14] Defendant (appellee), having been summoned to answer before the justice of the peace, failed to plead his privilege at the return term of the summons. There was one continuance at the instance of the plaintiffs, and another by consent of the parties. This, under the authority of our cases, was a waiver of the plea in abatement. *Noles v. Marable*, supra; *Beck v. Glenn*, 69 Ala. 121. And the right to plead in abatement, having been once abandoned in the justice's court, cannot be revived by an appeal to the circuit court. On such appeal the case must be tried according to equity and justice, without regard to any defect in the summons,

or other process, or proceedings before the justice. Code, § 4720; *Thompson v. Clopton*; *Noles v. Marable*, supra. It may be that the justice of the peace had a discretion to allow the plea under the rule laid down in *Vaughan v. Robinson*, 22 Ala. 519, and *Hawkins v. Armour Packing Co.*, 105 Ala. 545, 17 South. 16; but that discretion, having been exercised against the defendant, could not be made the subject of review in the circuit court where the case stood for trial *de novo*. The plaintiffs, on the faith of the justice's ruling, had tried their case on the merits, and had gone to the circuit court prepared presumably to try their case again on the same issues. They had suffered delay, and it may be presumed had incurred costs in preparing for these different trials. These consequences must be charged, not to the ruling of the justice of the peace, for that cannot be said to have been erroneous, but to the defendant's original delay in filing his plea or making his dilatory defense known to the justice and the plaintiffs. At no point along the line does it appear that plaintiffs were in default. Under the circumstances, we think it must be held that the circuit court erroneously allowed the plea in abatement.

Reversed and remanded. All of the Justices concur, except DOWDELL, C. J., not sitting.

HAFFER v. COLE.

(Supreme Court of Alabama. Feb. 8, 1912.)

1. SALES (§ 263*)—IMPLIED WARRANTY OF TITLE.

Where the seller of goods is in possession, the law implies a warranty of the title.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 746-763; Dec. Dig. § 263.*]

2. SALES (§ 120*)—RESCISSION BY BUYER—BREACH OF WARRANTY.

The buyer cannot, in the absence of fraud, or an agreement giving him the right, rescind an executed contract of sale for a mere breach of warranty; his remedy being on the warranty.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 294; Dec. Dig. § 120.*]

3. SALES (§ 38*)—GROUNDS FOR RESCISSION—FRAUD.

A material false statement, relied upon by the other party to a contract of sale in ignorance of its falsity, and which materially influences him to enter into the contract, constitutes a fraud which will authorize a rescission.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 65-77, 85; Dec. Dig. § 38.*]

4. FRAUD (§ 13*)—FRAUDULENT MISREPRESENTATIONS—GOOD FAITH.

Under Code 1907, § 4298, providing that misrepresentation of a material fact, made willfully to deceive, or recklessly, without knowledge, and acted upon by the opposite party, or if made by mistake, and innocently, and so acted upon, constitutes legal fraud, the

good faith of a party in making such a misrepresentation is immaterial.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 3-5; Dec. Dig. § 13.*]

5. SALES (§ 260*)—WARRANTY NOT CONTAINED IN WRITTEN CONTRACT.

A misrepresentation by the seller of a material fact need not be a part of the contract in order to authorize a rescission; and, though the contract is in writing, a verbal false statement with respect to it may be proved for that purpose.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 721; Dec. Dig. § 260.*]

6. SALES (§ 262½*)—IMPLIED WARRANTY—KNOWLEDGE OF BUYER.

An implied warranty does not arise where the defect complained of is present and visible to the senses, or to ordinary observation.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 740-748; Dec. Dig. § 262½.*]

7. SALES (§ 38*)—MISREPRESENTATION—OBVIOUS DEFECTS.

Where the buyer relies on a false representation by the seller, upon which he has a right to rely, it is immaterial that the defect is patent to ordinary observation.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65-77, 85; Dec. Dig. § 38.*]

8. CONTRACTS (§ 266*)—RESCISSION—CONDITIONS PRECEDENT—RESTORATION OF BENEFIT.

A party rescinding must, if practicable, restore, or offer to restore, to the other party, what he has received from him by virtue of the contract, but not where it has become impossible to make restoration by reason of the conduct or default of the other party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1186; Dec. Dig. § 266.*]

9. SALES (§ 283*)—WARRANTY OF TITLE—BREACH—SUPERIOR TITLE.

A buyer of personal property has the right to yield its possession to the true and hostile owner upon his demand, and he forfeits thereby no rights of his own against the seller growing out of the failure of the seller's title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 799-802; Dec. Dig. § 283.*]

10. SALES (§ 439*)—WARRANTY OF TITLE—BURDEN OF PROOF—FAILURE OF TITLE.

Where a buyer of personal property has yielded it on demand to a person asserting a superior title, without awaiting an action at law and a hostile judgment, he assumes, as against the seller, the burden of proving that he yielded to a paramount title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1258-1260; Dec. Dig. § 439.*]

11. SALES (§ 118*)—RESCISSION BY BUYER—DEFECT IN TITLE OF SELLER.

The buyer of property under false representations as to the seller's title need not buy up or extinguish hostile claims in derogation of the title, and his failure to do so, whereby the property is lost, does not affect his right to rescind for fraud.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 292; Dec. Dig. § 118.*]

12. SALES (§ 283*)—WARRANTIES—SELLER'S TITLE—HOSTILE CLAIMS.

A buyer of property under a warranty of the seller's title is not bound to buy up or extinguish hostile claims in derogation of the title, and his failure to do so, whereby the property is lost, does not affect his right to recover for the breach of warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 799-802; Dec. Dig. § 283.*]

13. SALES (§ 113*)—RESCISSION—INSOLVENCY.

The right to a rescission of a contract of sale on account of fraud does not depend on insolvency of the other party, nor upon the inadequacy of an action at law for damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 286-294; Dec. Dig. § 113.*]

14. SALES (§ 130*)—EQUITY JURISDICTION—EQUITABLE RELIEF.

Courts of equity do not take jurisdiction to declare a rescission of a contract of sale, but only to administer some form of equitable relief not available in other courts, or where, by reason of the insolvency of the party in fault, a judgment at law might fail to place him in statu quo; and the right to a surrender and cancellation of written instruments, including a deed, or to a reconveyance of the land, is sufficient ground for equity jurisdiction.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 322-324; Dec. Dig. § 130.*]

15. SALES (§ 130*)—ACTION TO RESCIND—PLEADING—ALLEGATION OF DECEIT.

A complaint in an action to rescind a contract for the seller's fraudulent representations as to his title, through which the property has been taken from the buyer, and to compel surrender of a deed executed to the seller, or a reconveyance of the land, which does not allege that complainant was deceived or misled by the seller's false representations with respect to title, is bad on demurrer.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 130.*]

16. VENDOR AND PURCHASER (§ 104*)—ACTION FOR RESCISSION—EQUITABLE RELIEF—PARTIES.

In a bill to rescind an executed contract of sale, on the ground of the seller's false representations as to title, and to compel a surrender and cancellation of the deed by which complainant and his wife conveyed to the seller land belonging to the wife, or for the reconveyance of land, with a general prayer for relief, the court may decree such relief, since the wife is not a necessary party to the bill.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 104.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by J. L. Cole against Savilla F. Hafer. Demurrer to bill overruled, and defendant appeals. Reversed, rendered, and remanded.

Frank S. White & Sons and Carmichael & Wynn, for appellant. L. J. Haley, Jr., for appellee.

SOMERVILLE, J. The bill of complaint, as amended, shows that the respondent, Savilla F. Hafer, in August, 1910, sold and conveyed to the complainant an automobile for the price of \$900, and received as a cash payment \$75 in money, and also an automobile at the agreed value of \$375. Afterwards complainant and his wife conveyed to respondent a lot of land at the agreed value of \$400 as a payment on the balance due her; and for the remaining balance of principal and interest complainant, on November 30, 1910, executed his note for \$60, payable six months after date. The contract of sale was in writing, and contains no war-

ranty of title, nor any representations as to the state of the title; but the bill avers that at the time the contract was made respondent represented that she was the owner of the automobile, and that it was fully paid for by her. At the time of the sale the title was in fact in Mrs. Hafer's vendors, who had sold to her conditionally upon the payment of all the purchase money; her contract with them being evidenced by a written instrument duly filed for record on April 18, 1910, and a balance of \$100 being due thereon. On January 1, 1911, complainant was informed of this hostile title. On January 6, 1911, one Lehman, who was the assignee of all the rights of Mrs. Hafer's said vendors, reclaimed and took said automobile from the possession of complainant under said vendor's contract, and on January 9, 1911, complainant informed respondent of the taking of the machine by Lehman, as the assignee of her vendors, and that he, complainant, had elected to rescind his contract of purchase, and demanded back from her his own automobile, the repayment of the money she had received from him, the reconveyance to him, or his wife, of the lot of land, and the surrender of his \$60 note.

The bill charges specifically that respondent's representations as to her ownership were untrue; that at the date of its filing Lehman was the owner of the automobile; and that in selling it to complainant under the conditions recited respondent practiced a fraud on him. It is alleged, also, that by reason of Lehman's title, possession, and right of possession complainant is unable to restore said automobile to respondent.

A demurrer was interposed to the amended bill, the grounds of which may be summarized as follows: (1) No facts are alleged to show any fraud; the averment thereof being a mere conclusion. (2) Complainant did not offer to return the automobile to respondent at the time of his alleged rescission, and does not offer to do so in the bill; and does not offer to place her in statu quo, or show that it can be done. (3) Complainant may have unnecessarily or improperly allowed the automobile to be taken from him. (4) That the lot conveyed to respondent was the property of complainant's wife, as to which and whom relief cannot be properly had unless she is made a party to the bill. (5) Complainant has an adequate remedy at law. (6) Respondent may have nevertheless acted in good faith. (7) Complainant may nevertheless have known of the facts set up as a ground for rescission and relief; the contrary not being shown.

The chancellor overruled the demurrer, and the appeal is from that decree.

[1] Where the vendor of chattels is in possession, and sells in his own right, the law implies a warranty of the title, for the breach of which an action lies in favor of the vendee. *Williamson v. Sammons*, 34 Ala. 691.

[2] By the weight of authority, the vendee cannot, in the absence of fraud or an agreement giving him the right, rescind an executed contract of sale for a mere breach of warranty; his remedy in such cases being on the warranty. 35 Cyc. 138; *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393. But the theory on which complainant claims rescission and seeks relief is not for the breach of an implied warranty, but for false representations by which respondent perpetrated a fraud upon him. In this aspect of the case, the following principles are well settled by the authorities, or are patently correct:

[3] (1) A material false statement, relied upon by the other party in ignorance of its falsity, and which materially influences him to enter into the contract, constitutes a fraud which will authorize a rescission. *Sledge v. Scott*, 56 Ala. 202; *Perry v. Johnston*, 59 Ala. 648; *Davis v. Betz*, 66 Ala. 206; *Rice v. Gilbreath*, 119 Ala. 424, 24 South. 421; *Brewer v. Arantz*, 124 Ala. 127, 26 South. 922; *Moore v. Barber*, 118 Ala. 563, 23 South. 798.

[4] (2) The good faith of the party in making such statement is immaterial. *Perry v. Johnston* and *Davis v. Betz*, supra; Code, § 4298.

[5] (3) Such statement need not be a part of the contract, so as to become a warranty, in order to authorize a rescission; and, though the contract is in writing, a verbal false statement with respect to it may be proved for that purpose. 35 Cyc. 73 (6); *Cozzins v. Whitaker*, 3 Stew. & P. 322.

[6, 7] (4) An implied warranty gives no right of action for a breach, where the defect complained of was present and visible to the senses, or open to ordinary observation. But this rule has no application where a party relies on a false representation by the vendor with respect thereto, upon which he has a right to rely. *Burroughs v. P. G. Co.*, 81 Ala. 255, 1 South. 212; *Woodbury v. State*, 69 Ala. 242, 44 Am. Rep. 515; *Henry v. Allen*, 93 Ala. 197, 9 South. 579; *Baker v. Maxwell*, 99 Ala. 538, 14 South. 468; 35 Cyc. 74 (c), and cases cited.

[8] (5) As a condition precedent to the exercise of the right of rescission, the party complaining must, if practicable, restore, or offer to restore, to the other party what he has received from him by virtue of the contract. *Cozzins v. Whitaker*, 3 Stew. & P. 322; *Jemison v. Woodruff*, 34 Ala. 143; *Young v. Arntze*, 86 Ala. 116, 5 South. 253; *Rice v. Gilbreath*, 119 Ala. 424, 24 South. 421. This rule obviously has no application, however, where it has become impossible for such party to make such restoration by reason of the conduct or default of such other party. *Johnson v. Oehmlig*, 95 Ala. 189, 190, 10 South. 430, 36 Am. St. Rep. 204.

[9, 10] (6) It is not merely the right, but it may be also the duty, of the purchaser of property, whether real or personal, to yield

its possession to the true and hostile owner when he demands it; and although, when he so yields it without awaiting an action at law and a hostile judgment, he assumes the burden of proving that he yielded to a paramount title, he forfeits thereby no rights of his own against his vendor growing out of the failure of the title. See *Copeland v. McAdory*, 100 Ala. 553, 13 South. 545; 35 Cyc. 416, 5.

[11, 12] (7) The purchaser of property, whether under false representations as to the vendor's title, or a mere warranty thereof, is under no duty to the vendor to buy up or extinguish hostile claims in derogation or impairment of the title acquired by him from such vendor; and his failure to do so, whereby the property is lost, does not affect his right to rescind the contract for fraud, or to recover for the breach of warranty.

[13] (8) The right to a rescission on account of fraud does not depend upon the insolvency of the other party, nor upon the inadequacy of an action at law for damages. *Baker v. Maxwell*, 99 Ala. 558, 14 South. 468.

[14] (9) Courts of equity do not take jurisdiction merely for the purpose of declaring a rescission, but only for the purpose of administering some form of equitable relief or protection not available in other forums, or where, by reason of the insolvency of the offending party, a judgment at law might fail to compensate the injured party, or to place him in statu quo. *Merritt v. Ehrman*, 116 Ala. 278, 22 South. 514. The equity of the instant case lies in the right to the surrender and cancellation of written instruments, including a deed which is not void, or to a reconveyance of the land. The application of these principles to the pleadings here exhibited will condemn as without merit all of the grounds of demurrer to the amended bill except the eleventh, twelfth, and nineteenth.

[15] The nineteenth ground was well taken, in that the bill does not allege that complainant was deceived or misled by respondent's false representations with respect to her title; for non constat but he may have known of the true state of the title, and, if so, even false representations would not authorize a rescission for fraud. As to this essential factor in his case, it is complainant's duty to both allege and prove it, and as to this ground the demurrer should have been sustained. *Insurance Co. v. Kirkpatrick*, 111 Ala. 456, 20 South. 651.

[16] The eleventh and twelfth grounds attack the bill for nonjoinder of an alleged necessary party; the contention being that, since the bill shows that complainant's wife, and not complainant, is the owner of the lot conveyed to respondent, the court can take no action with respect thereto, and especially cannot appropriately order its re-

conveyance, unless Mrs. Cole is before the court as a party litigant. Conceding that the bill shows that Mrs. Cole is the owner of the lot, and that a reconveyance of the property cannot be effectually decreed unless she is made a party, nevertheless, under the averments of the bill, and by virtue of the general prayer for relief, the court might decree the surrender and cancellation of the deed of conveyance, thereby restoring the land to its original status and ownership. And for this purpose Mrs. Cole, who is not interested in the original contract of sale, cannot be deemed a necessary party. In this respect, therefore, these grounds of demurrer were not well taken, and, being interposed to the whole bill, were properly overruled.

For the error pointed out the decree of the chancellor will be reversed, and a decree here entered sustaining respondent's demurrer as to the nineteenth ground only.

Reversed, rendered, and remanded. All the Justices concur.

ALEXANDER v. GIBSON et al.

(Supreme Court of Alabama. Feb. 8, 1912.)

WILLS (§ 282*)—WILL CONTEST—UNDUE INFLUENCE—SUFFICIENCY OF ALLEGATION.

The complaint alleged that, when the will in controversy was executed, testatrix was under the control of respondents, the beneficiaries named, and that the will was the result of undue influence exerted by such persons, or some of them, over testatrix's mind; that she was a very old woman, feeble physically and mentally, and lived with the father and grandfather of the beneficiaries; that respondent executor was her family physician; that his wife was the daughter of the father of the beneficiaries; that fiduciary relations existed between the beneficiaries, the executor, and testatrix; and that by some means not now known to complainant, and because of testatrix's feeble condition and the confidential relations referred to respondents, or some of them, gained control over testatrix's mind and induced her to execute the will, which she would not otherwise have done. *Held*, that the complaint sufficiently alleged undue influence; it not being essential that it allege the acts of undue influence in detail.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 640; Dec. Dig. § 282.*]

Appeal from Chancery Court, Lawrence County; W. H. Simpson, Chancellor.

Will contest by W. R. Alexander against F. D. Gibson and others. From a decree sustaining a demurrer to the bill, complainant appeals. Reversed, rendered, and remanded.

The sixth and seventh paragraphs of the bill as originally filed are as follows:

"(6) Complainant avers that at the time of the making of the said will the said Mary B. Alexander was under the domination and control of the respondents herein, N. D. Deleshaw, Sallie Deleshaw, and the beneficiaries named in said alleged will, or some

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

one or more of them, and said alleged will is the result of undue influence exercised by said above-named parties, or some one or more of them, over the mind of said Mary B. Alexander, and was not the product and result of the exercise of her own free volition.

"(7) Complainant avers that said will was procured by fraud practiced upon the said Mary B. Alexander by the respondents in this bill, together with N. D. Deleshaw and his wife, Sallie Deleshaw, and the beneficiaries named in said will, or some one or more of them, and said will is the result and product of said fraud practiced upon the said Mary B. Alexander by the above-named persons, or some one or more of them, and it was not her own free, voluntary act."

By amendment the following was added to paragraph 6:

"The said alleged testator was, at the time it is alleged she executed the said alleged will, a very old woman, and very feeble, both physically and mentally. She was at that time at the home of N. D. Deleshaw, who was her brother-in-law, and who is the father and grandfather of the beneficiaries named in said will. The said alleged testator had made her home with the said Deleshaw and his wife, who was a sister of testatrix, for many years prior to her death. During some years prior to the alleged execution of said alleged will, Mary B. Alexander has been physically infirm, and often-times sick, and in need of the care of a physician, and that respondent F. E. Gibson, who is one of the alleged executors of the said alleged will, for some years prior to the time that it is alleged she executed said will, was her regular and attending physician. Said Gibson, was the only physician in charge of the treatment of the said testatrix for some years prior to the alleged execution of said alleged will, and when said alleged will was executed the wife of said Gibson, who was the daughter of said N. D. and Sallie Deleshaw, was made a beneficiary thereunder, and said Gibson was made executor thereof. For some time prior to the time it is alleged that the testatrix executed said will, H. L. Deleshaw, who is the son of N. D. Deleshaw, and named in said will as one of the beneficiaries thereunder, and also as one of the executors thereof, made his home in the home of the said N. D. Deleshaw, and so resided there to within a few months of the time of the alleged execution of said will. And when he ceased to make his home there, he moved out only a few hundred yards away, and he was frequently and often back in the home of said N. D. Deleshaw, and with the said testatrix up to the time of the said alleged execution of the said alleged will."

The other beneficiaries named in the will are also alleged to have had their home where the testatrix lived up to within a few months before the making of the said alleged will. It is then alleged that, on ac-

count of the situation and circumstances of said testatrix at the time it is alleged to have been executed, there were confidential relations existing between the beneficiaries and executors named in the will and the testatrix, and that by some means not now known to complainant, and on account of the weak and feeble condition of the said testatrix, and the confidential relations existing between her and the above-named parties, they, or some of them, gained ascendancy and domination and control over the mind of the said Mary B. Alexander, and induced her to execute said alleged will, which she would not have otherwise done.

Paragraph 7 was amended by adding thereto said fraud constituted in their gaining dominion over her as alleged in paragraph 6, and procuring the execution of said alleged will against her freehold agent.

Chenault & Chenault and Chenault & Downing, for appellant. Callahan & Harris and W. T. Lowe, for appellees.

SOMERVILLE, J. The bill was filed by appellant for the purpose of contesting the validity of a will which had been regularly probated according to law. The grounds of contest are testamentary incapacity and undue influence. The chancellor sustained demurrers to the sixth and seventh paragraphs of the bill, both separately and as a whole, and the appeal is from that decree.

As last amended, these two paragraphs are manifestly intended to *conjointly* state the single charge of undue influence, and the sufficiency or insufficiency of the allegations in support of this charge cannot be tested by reference to either one of these paragraphs without regard to the other. If, considered together, their allegations are sufficient, all the demurrers should have been overruled.

In *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459, it was said, per Brickell, C. J.: "Nor are the pleas objectional on the ground that they state mere legal conclusions, and do not aver facts constituting undue influence. The third plea charges that the deceased at the time of making the will was under the domination and control of certain named members of the Coghill family, or some of them, and that the will is the result and product of the undue influence exercised by them over the mind of the deceased, and was not the result of the exercise of her free volition. This must be treated as equivalent to an averment that the persons named, or some of them, acquired a dominating influence over the mind of the deceased, which destroyed her free agency, and constrained her to execute the instrument against her will; and, thus treated, it is sufficient. To require the contestant to state in the plea the means by which the influence was acquired, and the manner in which it was exercised, would be to require that which in the great majority of cases is impossible, since the

knowledge of these facts rests entirely in those who are most interested in withholding it."

In *Letohatchie Church v. Bullock*, 133 Ala. 548, 552, 32 South. 58, 59, this same ruling was applied to the impeachment of a deed for undue influence, and it was said, per McClellan, C. J.: "We have never understood it to be necessary to allege with particularity the quo modo the result complained of was accomplished, but only that it was accomplished by undue influence exerted by named persons. * * * Hence it is that the averment should be rather of the result than of the particular and special acts and modes of causation." To the same effect are *McLeod v. McLeod*, 137 Ala. 267, 34 South. 228, and *Phillips v. Bradford*, 147 Ala. 352, 41 South. 657.

In *Barksdale v. Davis*, 114 Ala. 623, 22 South. 17, the distinction between *fraud proper* and undue influence, as to the requirements in pleading them, seems to have been overlooked, and it was held that a bill contesting a will on these grounds "should set forth the facts constituting the fraud or undue influence."

In *Moore v. Heineke*, 119 Ala. 627, 635, 24 South. 374, 377, there was contest of a will in the probate court, on one ground, among others, that the execution of the will was induced by a named person, "by and through fraud and undue influence." It is obvious that a demurrer to this ground for insufficiency in the averment of *fraud* was well founded, and the ruling might well have been thus explained. However, the opinion cites the ruling in the *Barksdale* Case in support of the ruling sustaining the demurrer.

In so far as the cases of *Barksdale v. Davis* and *Moore v. Heineke*, *supra*, require any detailed statement of the facts relied on to show *undue influence*, they are in plain conflict with the settled rule of our other cases, and to that extent and on that point they must be overruled.

The allegations of the bill in the present case go further even than the rule requires, and respondents' demurrers should have been overruled. The decree of the chancellor will be reversed, and a decree here entered accordingly.

Reversed, rendered, and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

GEO. W. MULLER MFG. CO. v. FIRST NAT. BANK OF DOTHAN.

(Supreme Court of Alabama. Feb. 8, 1912.)

1. CORPORATIONS (§ 661*)—DOING BUSINESS WITHIN STATE—COMPLIANCE WITH STATE LAW.

A foreign corporation is absolutely prohibited from doing a single act within the state

if done in the exercise of its corporate functions, and cannot sue in the state, unless it has complied with Code 1907, §§ 3642, 3644, prescribing the conditions on which foreign corporations may do business within the state.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2563; Dec. Dig. § 661.*]

2. CORPORATIONS (§ 642*)—FOREIGN CORPORATIONS—"DOING BUSINESS" WITHIN STATE.

Where a foreign corporation entered into a contract with defendant bank to furnish materials and construct certain fixtures in defendant's bank building in Alabama, involving the construction of brick walls, putting on of finished plaster, and the furnishing and construction of different articles making up the furniture and fixtures of the bank, such work constituted doing business within the state, and the corporation not having complied with Code 1907, §§ 3642, 3644, regulating foreign corporations, it could not maintain a suit to enforce a lien therefor.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2155-2160; vol. 8, pp. 7640-7641.]

Appeal from Chancery Court, Houston County; L. D. Gardner, Chancellor.

Bill by the Geo. W. Muller Manufacturing Company against the First National Bank of Dothan to enforce a lien for supplies and labor in a building. Decree for respondent, and complainant appeals. Affirmed.

The bill alleges that the complainant is a corporation, organized under the laws of the state of Georgia and doing business in the city of Atlanta, and that the respondent is a corporation, organized under the laws of Alabama and doing business in Dothan, Ala. It is alleged that a certain contract was entered into between the said corporations, wherein complainant was employed by respondent to furnish certain marble trimmings and other fixtures for the purpose of erecting in the interior of the bank building a set of bank fixtures, counters, offices, cages, and trimmings, at and for a certain price; that this contract was afterwards amended and modified by mutual agreement in writing; and that during the progress of the work certain parol agreements, altering or amending the contract, were entered upon. The contract, together with the written amendments or alterations, was set out as an exhibit to the bill and the parol agreements were made the subjects of certain paragraphs. It is then alleged that certain payments had been made on the contracts, and that there remains due for the building, fixtures, and improvements, and materials used therein, and for the work in improving and beautifying the same, the net amount of \$8,228.87. Then follow averments as to filing of the lien in the probate office, etc., which is also made an exhibit to the bill. The schedule of the work to be furnished was

also attached, and showed the building of brick walls, the putting on of finished plaster, and the furnishing of a great many different articles going to make up the fixtures and furniture of a bank, and the putting of them into place. The demurrers raise the question discussed in the opinion, together with the right of the bank to make such a contract.

W. L. Lee and A. E. Pace, for appellant.
Espy & Farmer, for appellee.

ANDERSON, J. [1] A foreign corporation which has not complied with the requirements of sections 3642 and 3644 of the Code of 1907 is prohibited from doing a single act of business in this state, if done in the exercise of its corporate function, and said corporation cannot sue in this state until it has put itself in a position to be sued therein by complying with said sections of the Code. *Ala. Western Ry. v. Talley-Bates & Co.*, 162 Ala. 396, 50 South. 341; *Sullivan v. Timber Co.*, 103 Ala. 371, 15 South. 941, 25 L. R. A. 543; *Farrior v. New Eng. Mtg. Co.*, 88 Ala. 275, 7 South. 200; *American Amusement Co. v. East Lake Co.*, 56 South. 961.

[2] If a bill filed by a foreign corporation shows upon its face that it did business in this state, and upon which the relief sought is predicated, it should aver a compliance with the Constitution and statutes of this state before entering upon or engaging in said business, and which is a condition precedent to relief, and the bill is demurrable if it omits this essential averment. *Christian v. Am. Freehold Mtg. Co.*, 89 Ala. 198, 7 South. 427; *Farrior v. New Eng. Mtg. Co.*, supra. Indeed, counsel for appellant concede the correctness of this rule, but contend that it has no application to the case at bar, for the reason that the bill does not show such a doing of business as is contemplated by the statute—that there was merely a sale of material to be delivered to respondent and placed in its banking house by the complainant. The contract shows more than an ordinary sale, and in its entirety covers the furnishing of material and the erection of same in a specified manner, as well as many other acts, such as the construction of a brick wall, wainscoting, tinting, and the doing of divers things, in addition to supplying the material, and therefore includes the doing of business in this state as previously defined by this court. *American Amusement Co. v. East Lake Co.*, supra; *Beard's Case*, 71 Ala. 60.

These statutes were enacted to give force and effect to section 232 of the Constitution of 1901, and were intended as a police protection to the property interests of the citizens of the state, and the enforcement of same by the courts of the land is imperative, notwithstanding the result, in some instances,

may appear horrible and be abhorrent to the judicial conscience.

The decree of the chancery court must be affirmed.

Affirmed. All the Justices concur.

EMPIRE REALTY CO. et al. v. HARTON.

(Supreme Court of Alabama. Dec. 19, 1911.
Rehearing Denied Feb. 15, 1912.)

1. CORPORATIONS (§ 207*)—STOCKHOLDERS—SUING ON BEHALF OF CORPORATION.

One to maintain a suit in behalf of a corporation as a stockholder therein must be such a stockholder at the time.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 797; Dec. Dig. § 207.*]

2. CORPORATIONS (§ 170*)—STOCKHOLDERS—STATUS AS AFFECTED BY FRAUD.

One cannot by wrongful, legally fraudulent conduct of another be deprived of his status of stockholder, with right to sue on behalf of the corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 170.*]

3. CORPORATIONS (§ 207*)—STOCKHOLDERS—STATUS AS AFFECTED BY EXECUTION SALE AT INADEQUATE PRICE.

Mere inadequacy of price at which stock is sold on execution, at most, renders the sale only voidable; so that, unless it is avoided, the execution debtor cannot maintain a suit on behalf of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 797-805; Dec. Dig. § 207.*]

4. PLEADING (§ 8*)—CONCLUSIONS—FRAUD.

The bill to set aside a sale on execution of complainant's stock not showing that defendants did not have the right to direct issuance of the execution on the judgment against complainant, and have it satisfied by levy on and sale of the stock, does not show fraud by a mere allegation of fraudulent intent.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 28½; Dec. Dig. § 8;* Fraud, Cent. Dig. § 37.]

5. EXECUTION (§ 256*)—RELIEF AGAINST SALE.

While by motion seasonably made in the court from which execution issues the sale thereon may be vacated for gross inadequacy of price, such relief cannot be had in equity, in the absence of fraud or collusion in the sale, or inability of the court of law to afford adequate relief.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 734; Dec. Dig. § 256.*]

6. EQUITY (§ 148*)—BILL—MULTIFARIOUSNESS.

The bill to avoid the execution sale of complainant's stock in a corporation and to have wrongs of the corporation redressed is multifarious; the action of defendants in having complainant's stock sold not being related, by averments of fact, to the fraudulent purpose and intent against the rights and interests of the corporation, so as to make them elements of a single wrongful purpose.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by H. M. Harton against the Empire Realty Company and others to enforce a re-

sulting or constructive trust in favor of the Ensley Realty Company, and to declare certain sales of stock therein fraudulent and void. From a decree overruling demurrers to the bill, respondents appeal. Reversed, rendered, and remanded.

The demurrers referred to are as follows: (5) "Complainant shows no right to file this suit in his own name as a stockholder of the Ensley Realty Company." (9a) "Said bill is multifarious." (9d) "It is not averred or shown that the Ensley Realty Company has not received its full rights in the premises."

Campbell & Johnston, for appellants. S. C. M. Amason, for appellee.

McCLELLAN, J. [1] This bill, exhibited by H. M. Harton, purports to be one by a stockholder in the Ensley Realty Company, in behalf of that corporation, and seeks the declaration and enforcement of a "resulting or constructive trust" in its favor in property alleged to have been purchased by the use of assets of the Ensley Realty Company. It is the successor of the bill considered, and stricken on demurrer, in the cause of Harton v. Johnston et al., 166 Ala. 317, 51 South. 992. Abstractly speaking, it is, of course, a *sine qua non* to the maintenance of such a bill that the complainant be at the time a stockholder in the corporation in behalf of which he would proceed. 10 Cyc. p. 974; Cook on Corp. § 735; Inman v. N. Y. Water Co. (C. C.) 131 Fed. 999; Hodge v. U. S. Steel Corp., 64 N. J. Eq. 90, 53 Atl. 601; Hanna v. People's Bank, 76 App. Div. 224, 78 N. Y. Supp. 516; Tutwiler v. Tuskaloosa Co., 89 Ala. 391, 7 South. 398.

[2] Whether a complainant is a stockholder, invested, under proper conditions, with the right to implead in behalf of the corporation, presents, of course, a different inquiry. Once a stockholder, it is clear that that character, and the rights incident and pertaining thereto, cannot be divested by wrongful, legally fraudulent, conduct or action. It is but the statement of a truism to say that no right can be lost or acquired by such conduct alone.

[3] The complainant was a stockholder in the Ensley Realty Company. Prior to the filing of this bill, all the shares of stock in the corporation in which complainant had any interest were levied upon and sold under an execution issuing out of the city court of Birmingham. No irregularity in the proceeding appears. The judgment plaintiff was T. B. Lyons; and from an exhibit to the amended bill, interpreting it against the pleader, it appears that he had assigned the judgments upon which the executions issued. To whom is not, with certainty, shown. It is averred in the amended bill that Johnston and Enslen, against whom wrongful conduct in respect of the rights and properties of the Ensley Realty Company is charged, procured

the issuance of the executions mentioned, and so with the purpose and intent of forestalling and preventing complainant from proceeding to the enforcement and protection of the corporate rights of the Ensley Realty Company, the consequence being, if unavoids, to divest complainant of his character as a stockholder therein. To be relieved of this condition, the amended bill seeks the setting aside and vacation of the sales under the executions; and, along with the ground implied in the stated charge of fraudulent purpose on the part of Johnston and Enslen, it is alleged that the purchase by them of the stock was at a grossly inadequate price, specifying that paid on the one hand, and the value of the stock, on the other, and that the complainant was without means to pay the judgment against him and without ability to secure the means to do so or to avert the sale.

As amended the bill offers to have Johnston and Enslen, if they are the owners of the judgments, paid the judgments and interest and other lawful charges incident thereto, out of dividends, accrued or to accrue, on or to said stock. Unless the sale is avoided, the complainant was not a stockholder when his bill was filed; and hence cannot maintain the cause. Granting the most to complainant, under his amended bill, the grounds upon which he would vacate the sale render it voidable only, not void; and, in consequence, the title to the stock vested in the purchasers, subject to be divested if the sale is vacated. Howard v. Corey, 126 Ala. 283, 28 South. 682.

[4] Under the allegations of the amended bill, in respect of the fraudulent intent with which Johnston and Enslen caused the issue of the executions and the sales of the stock in question, there was some doubt, at first, whether the demurrer, objecting merely that it affirmatively appeared complainant was not a stockholder, and that no fraud was shown, did not admit the general averment of fraudulent intent, and hence deprived that ground of any point; for clearly, taking the averments as true on this hearing, these parties could not fraudulently divest the complainant of his character and rights as a stockholder and thereby deprive him of the standing in court he assumes in this bill. They could not prevent the inquiry sought by reliance upon their fraudulent conduct to create an obstacle thereto. Ernst v. Elmira Imp. Co., 24 Misc. Rep. 583, 54 N. Y. Supp. 116. If the facts as to the sales of the stock averred do not in themselves, or by necessary inferences, show fraud therein, the general allegation—a conclusion of the pleader—that fraud inhered therein does not answer the purpose of good pleading in such matters. 1 Daniell's Ch. Prac, pp. 321, 336, 537. And a conclusion of fraud, not justified by the facts set forth, is not confessed by demurrer, for that pleading alone con-

fesses facts well pleaded. *Flewellen v. Crane*, 58 Ala. 627; among others delivered here. The conclusion averred as stated is hence dismissed from consideration. To the facts set forth must reference be had to determine whether the execution sales may be avoided; for, if not so, the complainant was not a stockholder when he filed this bill.

There is no averment in the amended bill that excludes the possession by Johnston and Enslen of the absolute right to direct the issuance of the executions, and to invite their satisfaction by appropriate levy and sale. If this right they had, no fraudulent intent or act could be predicated of it simply because the levy was made upon the stock in question and its sale regularly effected. There is no irregularity in the sale shown. No act of theirs calculated to depress the bidding at the sale is charged. Notice of the levy and sale seems to have been given. The complainant undertook by motion to have the execution quashed by the city court before the sale was had. The court declined to interfere. So on this phase of this particular feature of the amended bill the major question pertinent to this inquiry is: Will a court of equity vacate a sale under execution for gross inadequacy of the price bid, alone?

[5] Upon motion, seasonably made, in the court of law whence emanates the execution, a sale will be vacated for such gross inadequacy of price as will create the presumption of fraud. *O'Bryan Bros. v. Davis*, 103 Ala. 429, 15 South. 860; *Lockett v. Hurt*, 57 Ala. 198. Greater reasons invite such action where the subject of sale is chattels. Author, *supra*. Unless there is some element of fraud or collusion in the sale itself, or inability of the court of law to afford adequate relief by the vacation of a sale under execution, equity cannot be invoked, for the court of law furnishes a complete remedy. *Clark v. Allen*, 87 Ala. 198, 6 South. 272. In the concrete, *Ray v. Womble*, 56 Ala. 32, and *Lockett v. Hurt*, *supra*, both present instances where the remedy at law was not adequate, the sale attacked having led to the creation, it was averred, of a cloud on the title to real estate, for the removal of which the law courts are without power. In other words, equity's jurisdiction was invoked upon well-recognized ground for its interference, and in the former case, independent of any factor of inadequacy of price. Reading the averments of the amended bill as having the legal effect indicated, the complainant should have seasonably sought the vacation of the sale in the court of law; his remedy there having been adequate and complete.

[8] It was evidently the idea of the pleader that the allegation of improper motive

entertained by Johnston and Enslen for the issuance of the execution for its levy upon the stock and for its sale was articulate with the previous fraudulent intent charged. This conception cannot be approved, for the reason, already indicated, that there is nothing of fact averred in the amended bill upon which to predicate such view. To repeat, aside from the general allegation of improper purpose and intent in the levy upon and sale of the stock, there are no facts set down which, in themselves or by necessary inference impeach the conduct of Johnston and Enslen in respect of the execution and the sale thereunder. It may be granted that the effectuation of the sale of the stock, thereby denuding complainant of his relation of stockholder to the Ensley Realty Company, would, as a consequence, forestall the assertion of the rights of the Ensley Realty Company against Johnston and Enslen and the Empire Realty Company, if not others, yet it does not follow therefrom that the judicial sale may be avoided without some averred violating fact or act which will invite equity's interference.

If the action of Johnston and Enslen in having the execution issued, levied, and the stock sold was related by the averment of facts to the fraudulent purpose and intent against the rights and interests of the Ensley Realty Company, the pleader ascribes in this particular in most general terms to them, then the acts and purposes of Johnston and Enslen in respect of the execution and sale and their previously alleged wrongful conduct in respect of the rights and interests of the Ensley Realty Company might be taken as elements of the single wrongful purpose with which the pleader probably intended to charge them. This state of averment is not shown by the amended bill; so the relief sought in the aspect of the amended bill, whereby the avoidance of the sale is prayed, and, in the other aspect, whereby redress of corporate wrongs is asked, are distinct, independent reliefs—the former individual to the complainant and the latter corporate alone—and the bill is for that reason multifarious.

The following grounds of R. D. Johnston's demurrer, and the like grounds set down in the demurrers of other respondents, were, in our opinion, well taken: 3, 9a, and 9d. The court erred in overruling the demurrers taking the objections indicated.

The decree is reversed, and one will be here rendered sustaining the demurrers on the grounds noted above.

Reversed, rendered, and remanded. All the Justices concur, save DOWDELL, C. J., not sitting.

JOHN DEERE PLOW CO. v. CITY HARDWARE CO.

(Supreme Court of Alabama. Feb. 8, 1912.)

1. SALES (§ 54*)—CONSTRUING PROVISIONS TOGETHER.

All the provisions of a contract of sale must be construed together.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 152; Dec. Dig. § 54.*]

2. PLEADING (§ 214*)—DEMURRER—IDENTITY OF WRITTEN CONTRACT AND CONTRACT PLEADED.

On demurrer, the question whether a clause of a contract as pleaded is an exact copy of the clause in the contract cannot be inquired into.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

3. SALES (§ 467*)—CONSTRUCTION OF CONTRACT—TITLE AND POSSESSION.

A clause printed on the back of a contract of sale provided that the title and right of possession should remain in the seller, and a clause on the face of the contract provided for accounts and settlements and that all goods in the hands of the buyer and unsold on October 1, 1910, should belong to the seller to be settled for by the buyer's note or to be delivered to the seller at its option. *Held*, that the clause on the face of the contract modified the clause printed on the back and together constituted an agreement that the goods sold under the contract were to remain in the possession of the buyer until October 1, 1910, at which time the seller was to elect whether it would receive the buyer's note for them or have them shipped back to it, so that until that time the seller had no right to sue for their possession.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 467.*]

4. PLEADING (§ 196*)—DEMURRER TO REJOINER.

It is not ground for demurrer to a rejoinder that it contains the same defenses set up in the pleas.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 196.*]

5. SALES (§ 479*)—CONDITIONAL SALES—RECOVERY OF GOODS—PLEADING CONTRACT.

In detinue to recover goods delivered by plaintiff to defendant under a contract for the sale of the goods, but reserving title in plaintiff until payment, of the price, where defendant by its pleas admitted that the goods were sold under such contract, but set up certain provisions of the contract limiting the operation of the reservation of title, it was not necessary, in its rejoinder, to deny the contract or that the goods were sold thereunder.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 479.*]

Appeal from City Court of Talladega; G. K. Miller, Judge.

Detinue by the John Deere Plow Company against the City Hardware Company. Plaintiff's demurrer to defendant's second rejoinder overruled, and plaintiff appeals. Affirmed.

Lapsley & Arnold, for appellant. Knox, Acker, Dixon & Blackmon, for appellee.

SIMPSON, J. This is an action for detinue, by the appellant against the appellee, for the recovery of certain agricultural implements mentioned in the complaint.

The defendant filed a number of pleas, among other things describing the conditional contracts under which the goods were bought, and claiming that the defendant had complied with the conditions of said contracts, and that the articles named therein had become vested in the defendant, freed from the claim of title reserved therein by the plaintiff.

The plaintiff filed a number of replications, attaching thereto copies of the three contracts of sale, and claiming that the plaintiff is entitled to demand and recover the articles named therein under article 7, which is identical in all of the contracts, being among the conditions of sale printed on the back of the contract and in words and figures as follows, to wit: "It is also agreed that the title to, and ownership of and the right to the immediate and exclusive possession, upon demand either oral or written, to all goods which may be shipped as therein provided, or during the current season, shall remain in, and their proceeds in case of sale shall be the property of, said plow company, and subject to its order until full payment shall have been made for the same by the undersigned in money; but nothing in this clause will release the undersigned from making payment as herein agreed."

There were a number of rejoinders, but the only contention of the appellant is that the court erred in overruling plaintiff's demurrer to the second rejoinder, which rejoinder is in words and figures as follows, to wit: "For further rejoinder the defendant alleges that the plaintiff sold the chattels sued for to defendant under a contract providing that all such goods as should be sold for cash by defendant were to be paid for in cash on the first of each month following their sale, and that all such goods sold by defendant in any period between inventory dates were to be settled for by the note of defendant due at the regular maturity dates of the purchase price for said goods, and that all notes taken by defendant on such sales were to be indorsed by defendant and sent to the plaintiff as collateral, and that said notes were to be recorded by the plaintiff and returned to the defendant for collection, and that the plaintiff would, at the end of each such period, check up all cash remitted and credit the defendant with certain cash discounts, and that all such goods in the hands of defendant furnished under said contract on hand and unsold on October 1, 1910, that were in merchantable condition should belong to the plaintiff, and were, at plaintiff's option, to be settled for by the defendant's note due one year later than the terms of such contract, or should be delivered to the plaintiff f. o. b. cars Anniston, Ala.; and defendant alleges that this suit was brought prior to the 1st day of October.

1910, and before, by the terms of said contract of sale, said goods which were so sold defendant by plaintiff should become the property of or belong to the plaintiff."

The brief of appellant admits that said rejoinder correctly sets out one of the provisions of one of the contracts of sale attached as Exhibit D to the replications; and states that "the essential question sought to be presented by plaintiff's demurrer to defendant's rejoinder No. 2 is the construction of clause 7 which is contained in all of the contracts on which plaintiff bases his right of recovery."

[1-3] This seems to be a correct statement of the gist of the controversy, and it must be admitted that, according to a literal interpretation of said clause 7, standing alone, it would seem that the plaintiff reserved the right to demand and recover the goods at any time, without regard to whether the defendant was complying with its part of the contract or not, but it must be connected with the other provisions of the contract, which is a contract of sale, and it is evidently a reservation for the security of the plaintiff against any failure of the defendant to comply, on its part, with the stipulations of the contract; and, considering the fact that this clause is printed upon the back of the contract, and the clause set out in said rejoinder No. 2 is written upon the face of one of the contracts, said last-named clause must be considered as a modification of clause 7 as to the goods purchased under said contract. This is evident, not only because all clauses of a contract must be construed together, but because of the fact that the parties wrote this clause in the face of the contract, while the other is evidently a part of a printed form, indorsed on the back. Without inquiring whether or not said clause is an exact copy of a clause in the contract of sale (which cannot be inquired into on demurrer), the provisions, as set out, show that the agreement between the parties was that the goods sold under that contract were to remain in the possession of the defendant until October 1, 1910, at which time the plaintiff was to elect whether it would receive a 12 months' note for the same, or have them shipped back to it.

[4] There is a great deal of unnecessary and prolix pleading in this case, and the demurrers to this rejoinder are, in the main, mere general demurrers. In so far as they allege that the rejoinder contains the same defense set up in the pleas, it is not subject to the demurrer. *Hightower v. Ogle-tree*, 114 Ala. 94, 21 South. 934; *Pope v. Glenn Falls Ins. Co.*, 136 Ala. 670-675, 84 South. 29; *Continental Fire Ins. Co. v. Brooks*, 131 Ala. 614, 30 South. 876.

[5] It was not necessary to deny the contracts or that the goods were sold thereunder, for the reason that the defendant was

claiming that they were sold under said contracts, had so claimed in its pleas, and was by this rejoinder merely specially setting up one of the provisions of said contract as the ground of defense. The construction given to the contract shows that it does allege certain terms of the contract which do operate as a waiver of the right to sue during the operation of the special provisions.

So, without deciding whether said rejoinder might not have been subject to other possible causes of demurrer, it is not subject to the causes alleged and insisted upon.

The judgment of the court is affirmed.

Affirmed. All the Justices concur.

175 Ala 469
CULVER et al. v. CARROLL

(Supreme Court of Alabama. Nov. 16, 1911.

On Rehearing, Feb. 15, 1912.)

1. DEEDS (§ 54*)—DELIVERY—NECESSITY.

Delivery is indispensable to the validity of a deed, whether it be a conveyance upon valuable consideration or a voluntary conveyance in consideration of love and affection.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 116; Dec. Dig. § 54.*]

2. DEEDS (§ 58*)—DELIVERY—LIFE OF GRAN-TOR.

While the delivery of a deed which will make it valid must be in the lifetime of the grantor, an inchoate delivery to a third person as depository, with instructions to deliver to the grantee upon the grantor's death, makes the depository a trustee, and delivery by him to the grantee will relate back to the prior delivery for the purpose of passing title.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 130-135; Dec. Dig. § 58.*]

3. DEEDS (§ 58*)—DELIVERY—LIFE OF GRAN-TOR.

A delivery of a deed, subject to recall by the grantor before delivery to the grantee, is not effective to pass title.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 130-135; Dec. Dig. § 58.*]

On Rehearing.

4. DEEDS (§ 66*)—DELIVERY—QUESTION FOR JURY.

The question whether a grantor in a deed executed his intention to pass title by a sufficient delivery is one of fact and is generally for the jury.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 127, 633; Dec. Dig. § 66.*]

5. DEEDS (§ 58*)—DELIVERY—RIGHT TO RE-VOKE.

A right to revoke a delivery of a deed by the grantor to a person other than the grantee or his agent, which will render the delivery ineffectual to pass title, need not be expressly reserved; it being sufficient that the grantor's act did not, as a matter of law, place the deed beyond his control.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 130-135; Dec. Dig. § 58.*]

6. DEEDS (§ 58*)—DELIVERY—RIGHT TO RE-VOKE.

There is no presumption that a handing of a deed to a person other than the grantee or his agent was with the intention to pass title to the grantee, and, in order to make such act a delivery, the intention of the grantor

must have been expressed in an unmistakable manner at the time of execution or subsequently while the deed was in his possession.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 130-135; Dec. Dig. § 58.*]

7. DEEDS (§ 58*)—DELIVERY—RIGHT TO REVOKE.

The mere leaving of a deed with the agent or attorney of a grantor is wholly insufficient to show an intention to divest the title and will not constitute a delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 130-135; Dec. Dig. § 58.*]

8. DEEDS (§ 58*)—DELIVERY—ESTABLISHMENT.

That a deed named the wife of the grantor as grantee and embraced all the property of the grantor, was in the handwriting of a resident lawyer and notary public, recited a consideration of love and affection, and directed that the wife pay the just debts of the grantor, and that upon the same day the grantor committed suicide, are not circumstances showing acts or declarations of the grantor at the making of the deed or its delivery and are insufficient to show that the grantor delivered the deed to a third person for his wife.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 58.*]

9. DEEDS (§ 58*)—DELIVERY—ESTABLISHMENT.

The mere handing of a deed to a stranger with a request to "keep it," without mentioning what the paper was or the grantee's name, is insufficient as a delivery to the grantor's wife, the grantee therein.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 58.*]

Dowdell, C. J., and Mayfield and Sayre, JJ., dissenting.

Appeal from Circuit Court, Pike County; H. A. Pearce, Judge.

Ejectment by L. A. Culver and others against J. S. Carroll. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

Norman & Son, for appellants. Foster, Samford & Carroll, for appellee.

SOMERVILLE, J. The action is one of ejectment brought to recover a tract of land described in a deed executed by L. A. Culver, deceased, to his wife, Julia F. Culver. The conveyance is dated December 22, 1891, is duly signed and acknowledged, and based on a consideration of natural love and affection. The lower court permitted the deed to go to the jury as part of the evidence in the case, to which exception was taken by appellant's counsel, and error is assigned based on this ruling. The question raised for decision is whether the deed was ever delivered to the grantee, Mrs. Culver, during the lifetime of the grantor so as to have become effective. The paper was left by the grantor with the witness Kelsoe and one Sykes, now deceased, before the death of the former, who committed suicide very soon after. All the evidence on the question of delivery was given by Kelsoe, who stated that he could not say what Culver had said when he hand-

ed the deed over to them, and it was put in a safe. The witness observed: "I don't know whether he said, 'Take the deed and keep it for me'; or, 'Take it and keep it.' I would not be positive it was either one, but it was something similar. I just inferred from it he wanted the paper preserved." On cross-examination the witness further said: "I cannot be positive what he said. He may have said something else. I cannot be positive what he said."

[1, 2] The rule is well settled in every jurisdiction that delivery is an indispensable requisite to the validity of a deed whether it be a conveyance upon valuable consideration, or a voluntary conveyance in consideration of love and affection. And it is necessary that the delivery should be made in the lifetime of the grantor, for "there can be no delivery by a dead hand." A delivery after the grantor's death is no delivery. *Jones v. Jones*, 6 Conn. 111, 16 Am. Dec. 39, and note; *Jackson v. Leek*, 12 Wend. (N. Y.) 107. Yet there may be an inchoate delivery in the grantor's lifetime which may become absolute on his death. *Foster v. Mansfield*, 3 Metc. (Mass.) 412, 37 Am. Dec. 154. Cases of this kind sometimes present considerable difficulty.

Deeds are sometimes delivered by a grantor to a third person as a depositary, with instructions to deliver to the grantee on the contingency of the grantor's death. And it is commonly held that when this instruction is carried out such delivery will relate back to the prior delivery for the purpose of passing the grantor's title. The intention of the party is the substantive thing. The first depositary is a trustee holding the deed for the benefit of the grantee. *Elsberry v. Boykin*, 65 Ala. 340; *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66; *Taft v. Taft*, 59 Mich. 185, 28 N. W. 426, 60 Am. Rep. 291; *Sears v. Scranton Trust Co.*, 228 Pa. 126, 77 Atl. 423, 20 Ann. Cas. 1148-1150; 9 Am. & Eng. Ency. Law, 157.

[3] If the deed is subject to be recalled by the grantor before delivery to the grantee, there is no effectual delivery by the maker. *Prutsmann v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Davis v. Cross*, 14 Lea (Tenn.) 637, 52 Am. Rep. 177.

Under the above principles and those settled by our own authorities, we are of the opinion that the court erred in not excluding the deed from the jury as requested by the appellants. *Fitzpatrick v. Brigman*, 130 Ala. 453, 30 South. 500; *Id.*, 133 Ala. 242, 31 South. 940; *Tarwater v. Going*, 140 Ala. 273, 37 South. 330.

The present case cannot be distinguished in legal effect from *Fitzpatrick v. Brigman*, 130 Ala. 450, 30 South. 500, and neither is in conflict with *Fitzpatrick v. Brigman*, 133 Ala. 242, 31 South. 940, where additional contemporaneous acts shown by the evidence point-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

ed very strongly to the grantor's intention to vest title in the grantee.

It is unnecessary to pass on the other assignments of error if the deed be excluded from evidence.

Reversed and remanded. All of the Justices concur.

On Rehearing.

The real question involved in this case is not whether the grantor Culver entertained a general intention that the subject-matter of the deed should at some time and in some way pass to the grantee named; for that intention would always be quite plainly evidenced by the mere fact of preparing and signing the deed.

[4] The true inquiry is, as settled by the authorities: Did he execute that intention by a sufficient delivery of the deed in his lifetime, intending by that act to *then* pass the title? It is, of course, conceded that the question of delivery is a question of fact, resting in the intention of the grantor, and, like other questions of fact, is generally to be submitted to and determined by the jury. Gregory v. Walker, 38 Ala. 26; Alexander v. Alexander, 71 Ala. 296; Cherry v. Herring, 83 Ala. 458, 3 South. 667; Fitzpatrick v. Brigman, 133 Ala. 242, 31 South. 940; Napier v. Elliott, 162 Ala. 129, 50 South. 149; Rickert v. Touart, 56 South. 708. But the point of difficulty is in determining what act or acts on the part of the grantor will be sufficient to generate as a jury question the issue of delivery *vel non* in the first instance; and, with respect to the alleged act of delivery, what circumstances are relevant and competent to be considered.

In *Elsberry v. Boykin*, 65 Ala. 340, it was said: "The fact (of delivery) rests in intention, and is to be collected from all the acts and declarations of the parties having relation to it." And this language has been several times repeated by this court. *Napier v. Elliott*, 146 Ala. 213, 40 South. 752, 119 Am. St. Rep. 17; *Id.*, 162 Ala. 129, 50 South. 148; *Gulf, etc., Co. v. Crenshaw*, 109 Ala. 606, 53 South. 812.

[5-7] In *Fitzpatrick v. Brigman*, 130 Ala. 450, 30 South. 500, the subject of delivery is fully discussed, and the principles which determine the sufficiency of a delivery, when made to a person other than the grantee or his agent, are clearly and precisely stated by Tyson, J., as follows: "(1) The delivery must be so effectual as to deprive the grantor of the right to revoke it, for so long as he reserves to himself the locus penitentiae, there is no delivery—no present intention to divest himself of the title to the property. (2) The grantor need not expressly reserve to himself this right to repent, but if his act upon which a delivery is predicated does not place the deed beyond his control, *as matter of law*, then his right of revocation is not gone. (3) The law does not presume, when a deed is handed to a third person,

that it has been with the intention to pass title to the grantee. In order to make such an act a delivery to the grantee, the intention of the grantor must be expressed *at the time* in an unmistakable manner." (4) Although an alleged grantor has signed and acknowledged a deed and left it with his agent or attorney, if he then said nothing to indicate an intention that the deed should be considered as executed, and did no act other than leave it with his agent, "this act was utterly insufficient as expressing a present intention to divest himself of the title to the property described in the deed." With respect, also, to the sources from which intention to deliver may be sought, in the absence of a manual delivery to the grantee, it is specifically declared that "the grantor must have, by some word expressed or act done, clearly indicated his intention, *at the time of its signing by him or subsequently while the deed is in his possession*, that the deed shall be considered as executed." Although this was an action of ejectment, tried before a jury, it was held as matter of law that the deed was not admissible.

On a second appeal (*Fitzpatrick v. Brigman*, 133 Ala. 242, 31 South. 940) the principles stated on the former appeal were approved; but, additional evidence bearing upon the grantor's intention in leaving the deed with his attorney having been introduced, it was ruled that the question of intention became an issue for the jury. To quote from the opinion of Dowdell, J.: "What is necessary to constitute a delivery was fully discussed on the former appeal, and we content ourselves with what was then said as being sufficient for present purposes. What was Price's intention is a question of fact to be determined by the jury from *the attendant circumstances at the time*. And to this end it was competent on the trial to adduce evidence of the transaction between Price and Buck, and what was said and done *at the time* by both of said parties, as well as by Selheimer (the depositary) who acted as attorney for Price." (*Italics ours.*) It is worthy of note that, on the facts reported, the delivery to Selheimer might well have been treated as a *constructive delivery* to the grantee on the principles stated in *Devlin on Deeds* (3d Ed.) § 278.

In the later case of *Tarwater v. Going*, 140 Ala. 273, 37 South. 330, it was said, by Sharpe, J., that "delivery is essential to the complete execution of a deed, and a mere deposit of a writing, complete in other respects as a deed, with a person other than the one named as grantee, or his agent, when unaccompanied with any intention of passing title, is not a delivery such as is necessary to constitute a deed."

Perhaps the clearest and completest statement of the law on this subject is the following, by Dowling, J., in *Osborne v. Eslinger*, 155 Ind. 351, 360, 58 N. E. 439, 442, 80 Am. St. Rep. 240, 247: "Where the claim of

title rests upon the delivery of the deed to a third person, the deed must have been properly signed by the grantor, and delivered by him, or by his direction, unconditionally, to a third person for the use of the grantee, to be delivered by such person to the grantee, either presently, or at some future day, or upon some inevitable contingency, the grantor parting, and intending to part, with all dominion and control over it, and absolutely surrendering his possession and authority over the instrument, so that it would be the duty of the custodian or trustee for the grantee, on his behalf, and as his agent and trustee, to refuse to return the deed to the grantor, for any purpose, if demand should be made upon him. And there should be evidence beyond such delivery of the intent of the grantor to part with his title, and the control of the deed, and that such delivery is for the use of the grantee. If the deed is placed in the hands of a third person, as the agent, friend, or bailee of the grantor, for safe-keeping only, and not for delivery to the grantee; if the fact that the instrument is a deed is not made known to such third person, either at the time it is handed over, or at any time before the death of the grantor; if the name of the grantee, or other description of him, is not given; and if there is no evidence beyond the mere fact of such delivery of the intent of the grantor to part with his control over the instrument and his title to the land—then such transfer of the mere possession of the instrument does not constitute a delivery, and the instrument fails for want of execution." This language is incorporated in his text by Mr. Devlin, than whom there is no abler writer on the law of deeds, with the approving observation that "the rule was correctly and succinctly stated." Devlin on Deeds (3d Ed.) p. 435. Again, the same writer says (page 467), quoting from the opinion of Eastman, J., in the leading case of Cook v. Brown, 34 N. H. 460: "To make the delivery good and effectual, the power of dominion over the deed must be parted with. Until then, the instrument passes nothing; it is merely ambulatory and gives no title. It is nothing more than a will defectively executed, and is void under the statute. * * * There must be a time when the grantor parts with his dominion over the deed, else it can never have been delivered. So long as it is in the hands of a depository, subject to be recalled by the grantor at any time, the grantee has no right to it and can acquire none; and if the grantor dies without parting with his control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it." See, also, Brown v. Brown, 66 Me. 316, 321; Tiedeman on Real Property (2d Ed.) § 813; 8 Wash. on Real Property (5th Ed.) p. 314; monographic note to Brown v. Westerfield (Neb.) 53 Am. St. Rep. 537-556.

Turning now to the instant case, it is in-

sisted that we have erred in our conclusion in that we have failed to consider *all* the facts in the case, which, it is urged, bring the case within the rule of decision in Fitzpatrick v. Brigman, 133 Ala. 242, 31 South. 940, and make the question of delivery one of fact for the jury.

[8] The facts which counsel conceives to be competent for this purpose are (quoting from his brief): "That the deed was made to his wife, as grantee, and embraced all the property of Culver, the grantor; that it was in the handwriting of a resident lawyer and notary public in the town of Troy; that it recited a consideration of love and affection, and a further direction that his wife pay his just debts, and that followed very soon after and on the same day by his suicide, voluntarily shooting himself with a pistol."

That these general circumstances may fairly and satisfactorily show that Culver intended, in case he should carry out his apparently contemplated suicide, that the deed should find its way to the grantee and become operative *after his death*, we freely concede. But this is not the intent with which we are here concerned, nor is it capable of being given any effect unless evidenced by an instrument which conforms to the law of wills.

It is, we think, perfectly clear that the facts relied on by counsel are not acts or declarations of the grantor made at the time with respect to the making of the deed or its delivery. They are not circumstances nor occurrences attendant upon the making or delivery of the deed, and form no part of the *res gestæ* of the transaction. Indeed, they are no more than the merely subjective recitals of the deed, coupled with the single fact of the grantor's suicide about six hours after its deposit with a stranger.

[9] While the witness Kelsoe was not positive as to exactly what Culver said, the effect of his testimony was to show that the deposit of the deed was made with the request to *keep it*, and there is no room for inference that anything beyond this was said. Culver did not say what the paper was, and did not even mention the grantee's name. He merely handed a paper to Sykes, a saloonkeeper, who was a stranger and in no sort of relation whatever to the grantee; and his injunction to keep it was in no possible sense an authorization to deliver it to the grantee, or to any one else.

There was absolutely nothing in the transaction pointing to a renunciation of Culver's control over the deed. And, had he repented of his suicidal purpose, and gone back to Sykes at any time afterward and demanded the return to him of the paper, the obligation of Sykes to so return it is too plain for controversy.

We are satisfied that the principles announced in the first Fitzpatrick Case, *supra*, are fatal to the admissibility of the deed offered here; and satisfied, also, that there is nothing in the evidence here offered that

can suffice to bring this case within the decision in the second Fitzpatrick Case, *supra*.

We are not unmindful of the possible, nay probable, injustice that may be entailed upon innocent parties by our conclusion, for which we can experience only a profound regret. In this connection, however, we quote the just observations of Virgin, J., in *Brown v. Brown*, 66 Me. 320: "The intention of an owner of property in his attempted act of transferring it is not necessarily and always supreme. The law has prescribed certain plain rules to be observed in the execution of such important instruments as those by which the title to real property is transferred; and whatever courts may sometimes have done in their zeal to carry into effect the intention of parties, the law itself does not permit its salutary rules to be broken or bent to meet the exigencies of ignorance or negligence; deeming it better, on the whole, that the intention of a party in disposing of his property should occasionally fail, than that its important and firmly established rules made and applied for the benefit of all be overridden."

MAYFIELD, J. (dissenting). I cannot concur in a reversal of this case. The reversal is based solely upon the ground that the deed in question was not delivered, and that the trial court erred in admitting it in evidence.

If the delivery of a deed was purely a question of law, the opinion in this case is almost, if not quite, conclusive, to the effect that it was not delivered. But unfortunately for the decision in this case, delivery is a question of fact and not of law. This court, in this case, decides as a matter of law that there was no delivery of the deed in question, while the facts in the record show that there was a delivery.

The undisputed facts are that the grantor signed, acknowledged, and delivered the deed to a third party; that within a few hours thereafter the grantor committed suicide; that a few hours after the suicide, this third party, to whom the deed was delivered by the grantor, told the grantee that the grantor had left with him a deed or paper for the grantee; and that, a few days thereafter, this same third party brought the deed to the grantee and made a manual delivery thereof. This deed was soon thereafter recorded, and the grantee, or those to whom she conveyed, have been in possession of the deed ever since. No one seems to have doubted the delivery of this deed until this suit was brought—more than 10 years after its delivery, and after the death of the grantor, and after the death of the third party to whom the grantor delivered it, and who delivered it to the grantee.

How the mere fact that it is now impossible to prove what was said by the grantor when he delivered this deed to the third party, who thereafter delivered it to the grantee,

renders this deed void, and shows that there was no delivery in law, though there was in fact, is more than I can understand. This court bases its decision solely upon the fact that a witness was found, who was present when the grantor delivered the deed to the third party, who thereafter delivered it to the grantee, and this witness was unable to remember what the grantor or the third party said, one to the other, when the delivery was made. The most and best that can be made of the testimony of this witness is that he does not now remember what was said or done, further than that the delivery was made and that the deed was placed in the safe of the third party, who thereafter delivered it to the grantee. The witness does not remember whether the grantee handed the deed to the witness and the witness handed it to the owner of the safe, or whether the grantor handed it to the owner of the safe, and the latter handed it to the witness, with instructions to place it in the safe. It is certain, however, that the owner of the safe, who was the witness' employer, was the custodian of the deed, and that he told the grantee, a few hours after it was left with him by the grantor, that he had it for her, and thereafter delivered it to her, and that she and those who claim under her have had it ever since.

It is true that death has now closed the lips of the grantor and the depository, but the undisputed facts still live and continue to declare and proclaim the delivery of this deed, in unmistakable language. It is a striking case of *res ipsa loquitur*.

The grantor had made up his mind to end his own life, but desired to keep it a secret from the one he loved best on earth, and whom, he knew, it would grieve most. To this end he makes a deed, conveying to this person, his beloved wife, all his earthly possessions or the chief part thereof, and signs and acknowledges it; and, not wishing to alarm her or put her on notice of his intention, instead of delivering the deed in person to her, he delivers it to a friend (with what instructions we know not, because both are now dead). He then ends his own life. Within a few hours thereafter, this friend, to whom he delivered the deed, informs the bereaved wife of the fact of the delivery to him, by her husband, of this deed; and as soon as the funeral is over and the husband is buried, he brings the deed to the house of the grantee and delivers it to her in person; she has it recorded, holds the property under it, sells the same, and delivers the deed to her grantees as a muniment of title, and, years and years thereafter, her grantees are sued for the lands conveyed thereby, the suitors relying solely upon the fact that there was no delivery of this deed by the grantor to the grantee; and this court holds that, because this grantee, or those who claim under her, cannot prove what was said by the gran-

tor to the third party, when the delivery was made, there was no delivery to the grantee.

I do not believe that any one can read this record, and have any doubt as to the fact that the grantor intended that this deed should be delivered by this depositary to his wife, the grantee. No reason or intimation in the world is shown for any other intention on his part. If he had had any other intention, would the depositary have disregarded those instructions and delivered the deed, as he did, to the grantee? No reason on earth is shown or intimated for his disregarding the instructions, desire, or intentions of his dead friend.

The effect of the ruling of the court in this case is to wholly destroy a record title to this land in question, for no other reason than that the grantee is not able to prove what the grantor said to the depositary, when he delivered this deed. The majority hold that if the grantee could now prove that the grantor, when he delivered the deed to the depositary, said, "Deliver this to my wife before or after I am dead," this would establish a good delivery; but that, because this proof cannot be made, the proof of delivery wholly fails.

I cannot agree to this conclusion. I do not think it is the law, or that it ought to be the law. To so hold tends to destroy all titles after the deaths of the parties to the delivery. After all the parties to a delivery are dead, I doubt that there could be proved, in one case out of ten, all the facts and circumstances, including the conversation, attending the delivery.

The court, by this decision, strikes down a perfect written and recorded title to land, by resort solely to a legal fiction. Such fictions are the creations of the courts, to promote justice, not to defeat it, as is unquestionably done in this case. To apply this fiction to this case, and thus defeat this grantee's title, is worse than the result of any technicality ever resorted to, in the days of feudalism, to preserve the titles of lands in the families of the lords and nobles. It is worse than livery of seisin, which was abolished long, long, ago, because not founded on reason.

This deed requested that, in consideration of the conveyance, the grantee should pay the debts of the grantor. These debts may have amounted to more than the value of the land. If this deed is stricken down, the wife not only loses all that she has paid out at the request of her dead husband, but is made liable to her grantees, on her warranty, for the value of the land. She was innocent of any wrong and, as she honestly believed, was carrying out the almost dying request of her husband. She loses her homestead, dower, and quarantine rights in this land, and loses twice its value—all because she cannot prove

what her husband said to the depositary when he delivered the deed to him.

If I thought this was the law, I would consent to it, as hard as it is, but, believing, as I do, that it is not the law, I cannot consent to such a conclusion.

I am convinced that the delivery of the deed in question was a question of fact, and not one of law; and that the jury decided it correctly; and that the trial court, or this court, invades the province of the jury in taking the question from them.

DOWDELL, C. J., and SAYRE, J., concur.

DRAPER v. STATE ex rel. PATILLO.

(Supreme Court of Alabama. Dec. 22, 1911.
Rehearing Denied Feb. 17, 1912.)

MUNICIPAL CORPORATIONS (§ 146*)—OFFICERS—"APPOINTMENT"—ACTS CONSTITUTING.

The appointment by the Governor of a commissioner of a city to fill a vacancy is not an "appointment" to a state office, within Code 1907, § 1474, requiring a commission to officers appointed to fill vacancies; and the act of the Governor in advising one by letter of his appointment as commissioner of the city, and the indorsement on the communication from the judge of probate, officially advising the Governor of the qualification of the appointee, of a direction to send a commission to the appointee, and the recital of the appointment for a specified term, followed by the words, "By order of the Governor: Private Secretary," constituted a complete appointment without a commission, and the Governor could not thereafter cancel the appointment.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 146.*

For other definitions, see Words and Phrases, vol. 1, pp. 458-461.]

Simpson and Anderson, JJ., dissenting.

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Quo warranto by the State, on the relation of Pierce Patillo, against James L. Draper, to determine the right to the office of City Commissioner of Hartselle, Ala. There was a decree for relator, and defendant appeals. Affirmed.

It is made to appear from the application: That petitioner was an applicant for the office of commissioner of Hartselle, and that on the 23d day of August, 1911, the Governor of the state caused to be addressed to relator a letter or printed communication advising him of his appointment as commissioner for a term of three years. This letter is made an exhibit. Relator then qualified by filing his bond and oath of office with the judge of probate of Morgan county as required by law, and the judge of probate thereupon officially advised the Governor of the appointment and the fact that petitioner had qualified. That the Governor, on receipt of this communication, indorsed or caused

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to be indorsed on the back of said communication the following: "Send Com. to P. Patillo, Hartselle, Ala."—and caused said official communication, with indorsement thereon, to be placed in an official wrapper in the office of said Governor, which official wrapper bore the following indorsement: "Authorized or indorsed thereon by the Governor as follows: Morgan County. Application of P. Patillo; P. O., Hartselle. For appointment to office of city commissioner for three years' term. Precinct ——. Appointed 8/23/1911. By order of the Governor: John D. McNeel, Private Secretary. Notified ——. Qualified 8/26/11. Fee paid 8/26/11." That an attempted cancellation has been made of the date of qualification and the date of payment of fee by lines drawn through said date. It is further alleged that there is a record kept in the office of the Governor, known as the record of the recording secretary, in which is entered the names and other data of executive appointments of the Governor, and that on said record appears and did appear the following, made and entered prior to September 9, 1911: "Morgan County Executive Appointments. Name, Patillo, P.; address, Hartselle; office, commissioner; date appointed, 8/23/11; remarks, three-year term." Here follow similar entries as to other commissioners. And relator shows that across the face of such entries have been drawn pencil marks, and across the face thereof has been written the legend "Canceled," by whom relator is not informed or advised. The other parts of the petition set up the pretended appointment of those who assumed to be acting as commissioners, made some time after the matters above set forth, and show that the town of Hartselle, some time before any appointments were made, had in the proper manner elected to have a commission form of government and that the same belonged to class D of cities in Alabama. Petition further sets out the acts and doings of those alleged to have usurped the office, etc.

Tidwell & Sample, for appellant. E. W. Godbey, for appellee.

ANDERSON, J. While there appears to be some conflict in the authorities as to what constitutes an appointment to office, the definition of "what constitutes appointment," and to which we adhere, is: Where the power of appointment is absolute, and the appointee has been determined upon, no further consent or approval is necessary, and the formal evidence of the appointment, the commission, may issue at once. Where, however, the assent or confirmation of some other officer or body is required, the commission can issue or the appointment be complete only when such assent or confirmation is obtained. *People v. Bissell*, 49 Cal. 407. In either case the appointment becomes complete when the last act required of the ap-

pointing power is performed. *State v. Barbour*, 53 Conn. 78, 22 Atl. 686, 55 Am. Rep. 65. In cases where a commission is required, the appointment is complete when the commission is signed by the executive, and sealed if necessary, and is ready to be delivered or transmitted to the appointee. *Mechem on Public Officers*, § 114. There seems to be a distinction as to when the appointment becomes complete, in cases where the commission is to be signed by the appointing power and when signed and issued by another. If the commission is to be signed by the appointing power, the issuance of same is essential to a completion of the appointment. *Conger v. Gilmer*, 32 Cal. 75. If, however, such formal act is to be performed by some other than the appointing power, it constitutes no part of the appointing power. Section 1470 of the Code of 1907 requires commissions to offices to be signed by the Governor and countersigned by the Secretary of State, unless it be the commission to the Secretary of State, which must be signed by the Governor alone. Section 1469 provides what officers must have commissions, and does not include city commissioners or other officers not mentioned; but section 1474, in providing for filling vacancies in all state offices, requires that the appointee must be commissioned. Therefore there is a field of operation for both statutes; section 1469 requiring commissions for all offices therein named, whether elected or appointed, and section 1474 requiring a commission to all offices appointed by the Governor to fill vacancies, whether among the officers named in section 1469 or not. Indeed, it seems to be the policy of our legislative system that a commission is essential to the exercise of the duties of a commissioned officer, as section 7447 of the Code makes it an offense for an officer required to have a commission to exercise the duties of the office without first having obtained the commission. This is an old section of the Code, and was amended, by implication, by new section 1472 of the Code, in so far as it might apply to elective officers who had provided themselves with a legal certificate of their election. As to all others, it is still in force, and indicates that all appointments should be made by the issuance of a commission, and which is essential to the exercise of the duties of the office. "The power to appoint to fill vacancies may exist in two classes of cases: (1) Vacancies in offices originally filled by appointment; and (2) vacancies in offices originally filled by election. A vacancy exists when there is no person lawfully authorized to assume and exercise at present the duties of the office." *Mechem on Public Officers*, § 125. Mr. Mechem also says, in speaking of a newly created office, in section 132 of his work: "Whether a newly created office, which has never had an incumbent, and which no one is now legally authorized and qualified to

assume, can be deemed vacant, so as to authorize an appointment to fill it, is a question upon which the authorities are not in harmony; but the weight of authority seems to be that it is to be deemed vacant." Thus it is said in Indiana: "There is no technical or peculiar meaning to the word 'vacant,' as used in the Constitution. It means empty, unoccupied; as applied to an office, without an incumbent. There is no basis for the distinction urged that it applies only to offices vacated by death, resignation, or otherwise. An existing office, without an incumbent, is vacant, whether it be a new or an old one. A new house is as vacant as one tenanted for years which was abandoned yesterday. We must take the words in their plain usual sense." *Stocking v. State*, 7 Ind. 326; *State v. Irvin*, 5 Nev. 111; *People v. Mott*, 3 Cal. 502; *Rhodes v. Hampton*, 101 N. C. 629, 8 S. E. 219.

We now come to the last and most serious question in the case: Are the commissioners of the city or town of Hartselle state officers within the meaning of section 1474 of the Code of 1907? Judge Dillon, in his great work on Municipal Corporations, in drawing a distinction between state and municipal officers (volume 1 [5th Ed.] § 97), says: "Questions have arisen *under special constitutional provisions* respecting the authority of the Legislature over *municipal offices and officers*. And here it is important to bear in mind the before-mentioned distinction between *state officers*—that is, officers whose duties concern the state at large, or the general public, although exercised within defined territorial limits—and municipal officers, whose functions relate exclusively to local concerns of the particular municipality. The administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public concern; while the enforcement of municipal by-laws proper, the establishment of local gasworks, of local waterworks, the construction of local sewers, and the like, are matters which ordinarily pertain to the municipality, as distinguished from the state at large." This section was approved and quoted in the opinion of our own court in the case of *Montgomery v. State*, 107 Ala. 372, 18 South. 157. Said Campbell, C. J., in the case of *People v. Hurlbut*, 24 Mich. 83, 9 Am. Rep. 103: "The preservation of the peace has always been regarded, both in England and in America, as one of the most important prerogatives of the state. It is not the peace of the city or county, but the peace of the king or state, that is violated by crimes and disorders. The prosecution is on behalf of the state. The trial is before tribunals created and regulated by the state. The remission of punishment is by the Governor of the state."

Acts 1911, p. 591, providing for a commission form of government in cities having a

population of from 1,000 to 25,000 inhabitants, gives the commission authority and jurisdiction to preserve the peace and to enforce certain state statutes, as well as the by-laws and ordinances of the municipality. They shall have power to exercise the authority and jurisdiction, executive, legislative, and judicial, as was exercised by the then existing mayor, aldermen, and board of police commissioners, and all other boards except the boards of education. See section 6 of the act. Article 14 of the municipal law (page 596, vol. 1, Code of 1907), in providing for the enforcement of the law and the administration of justice, defines a "recorder" to be any person authorized therein to hold municipal court, and in the absence of any such recorder authorizes any councilman to preside over the court, and gives him the same power and authority therein granted to recorders. Section 1215, in defining the jurisdiction of recorders, also gives to the office the powers of an *ex officio* justice of the peace, except in civil matters, and also provides that in certain instances any councilman may act as recorder, with his full power and authority. The commissioners being state officers, to be first appointed by the Governor under the terms of the act, the manner of making said appointments was governed by section 1474 of the Code of 1907, and which requires that all appointees to fill vacancies must be commissioned, and the issuance of which, we think, was essential to a complete appointment. In the case of *Ex parte Wiley*, 54 Ala. 226, the court did not hold that a county solicitor was not a state officer in the general acceptance of the term, but simply held that there was a broad distinction between officers properly termed state officers and those termed county officers, and that a county solicitor was not a state officer, as used and contemplated in section 23 of article 4 of the Constitution of 1868, relating to the impeachment of state officers. It was not held or intimated that a county solicitor was not a state officer in the general acceptance of the term. The same writer subsequently said, in the case of *Winter v. Sayre*, 118 Ala. 31, 24 South. 94: "The Constitution and the Legislature create two classes of public offices and officers—offices and officers of the state, and county offices and officers." Of course, there is a distinction between the two classes; but neither of these cases hold that county officers are not state officers also, or that a county officer is to no intent and purpose a state officer. Says Judge Brickell: "Every public officer, judicial, ministerial, or executive, deriving place and authority from the Constitution and laws is an officer of this state, and not of any other sovereignty or jurisdiction. If the mere abstract force of words be consulted, the *intendant* or *mayor* * * * may be said to be 'judges of this state.'"

Thus it would seem that these commission-

ers are state officers, under the broad and general use of the words, notwithstanding there may be a marked distinction between them and what are termed state and county officers in their strict or proper use in a Constitution or law which deals separately and distinctly with state and county officers. On the other hand, it has been the legislative policy to require a commission as a condition precedent to the appointment by the Governor in filling all vacancies. The words "state and county officers," as used in section 1474, are intended to include all vacancies to state and county offices as used in a broad and general sense, and should not be confined to state and county officers in the restrictive sense, or to those officers as set out in section 1469 of the Code. Otherwise, section 1474 will read very differently from what it says, and would say all offices required to have a commission, or all officers mentioned in section 1469, instead of requiring that "all appointees must be commissioned," thus intending that a commission must issue as a condition precedent to the appointment to fill a vacancy. Nor is it reasonable to say that the statute requires a commission in some instances and not in others, for section 1474 contemplates that every appointment to be made by the Governor shall be completed by the issuance of a commission.

It may be conceded, however, for present purposes, that the office in question is strictly a municipal one, and not a state or county one, within the provision of section 1474 of the Code, yet it was made appointive at the outset, and while the act is silent as to how the Governor shall make the appointment, and does not in express terms require a commission, it must be concluded that the Legislature contemplated that the appointment should be made in the then existing form and manner, and under the terms of the law then existing and referable to appointments to be made by the Governor. In other words, until a recent date when officers of this character were made appointive by the Governor, he supplied vacancies by appointment only, and almost, if not entirely, to state and county offices, and which said appointments were completed by the issuance of a commission as required by the statute; and it must be assumed that the Legislature intended and contemplated, in the present act, that the authority to appoint would be exercised under existing rules and regulations. It was well known when this act was passed that appointments by the Governor to fill vacancies could be completed only by the issuance of a commission, and the Legislature must have intended that these new appointments should be made in the same manner. When words which have a known meaning and significance are used in a statute, it must be presumed that the Legislature used or adopted them in their

well-known meaning and sense; the contrary not appearing. The Legislature used the word "appoint," meaning that the vacancies would be filled in the same manner and with the same formality as then existing for appointing to vacancies; otherwise, they would have doubtless said the Governor should name the first commissioners, instead of "appoint." I do not think that the attempted appointment of the relator was complete, and that it was in fieri until the signing of a commission by the Governor, and it is my opinion that the respondent, who holds under a commission, is entitled to the office.

A majority of the court are of the opinion that the vacancy in question was not to a state office, and was not one which required a commission in order to complete the appointment to fill same—that the relator was legally and duly appointed, and which said appointment was beyond the control of the Governor. The case must therefore be affirmed.

Affirmed.

MCCLELLAN, MAYFIELD, SAYRE, and SOMERVILLE, JJ., concur. SIMPSON and ANDERSON, JJ., dissent. DOWDELL, C. J., not sitting.

SIMPSON, J. I concur in the result of the opinion of Justice ANDERSON. I do not think that the office in question is a state office; but I concur in what is said by ANDERSON, J., as to the presumption arising from the laws in existence as to how gubernatorial appointments are made. There is reason in the remark of the Supreme Court of Indiana "that it is probably the law that, where title to an office is solely derived from executive appointment, the commission of the executive is the only legal evidence of such title." *State v. Allen*, 21 Ind. 516, 83 Am. Dec. 370. I think that, at least, it may be said, whether a formal commission be required or not, there must be some distinct pronouncement by the Governor that the appointment is made. The direction by the Governor to the clerks in his office cannot amount to more than a direction about what *is to be done*, and, in the very nature of things, the matter must remain in fieri until the final declaration of the appointment is made, and, until that is done, be subject to recall by the Governor. The private secretary is the mouthpiece of the Governor, and not the recording secretary. If a commission is not necessary, and the private secretary, under the direction of the Governor, addresses a communication to the appointee, informing him of his appointment, that may be considered the final act; but in this case the evidence shows that the communication was not signed by the private secretary, but his name was signed by the recording secretary, without authority.

It results that it was within the power of the executive to "hold up" the instructions previously given and make a new appointment.

WILKS v. WILKS et al.

(Supreme Court of Alabama. Feb. 17, 1912.)

1. EQUITY (§ 150*)—PLEADING—MULTIFARIOUSNESS—JOINT INTEREST OF PARTIES.

A widow by bill alleged that by fraudulent misrepresentations of her two sons as to the value of the estate and her interest therein she had been induced to accept from them a sum greatly less than the real value of her interest and to convey to them and to her other children, who were made parties defendant, all her interest in the property of the deceased, that afterwards one of the sons was appointed administrator, and prayed that the conveyance be set aside and that the administration be removed into the chancery court. *Held*, that all the parties were interested in the administration, and the quantum of their respective interests was affected by the conveyance, and the administrator was affected in both his personal rights and his representative capacity and the bill was not multifarious.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 150.*]

2. FRAUD (§ 22*)—MISREPRESENTATIONS—RELINQUISHMENT.

Where statements are made of facts which concern matters which may be assumed to be within the knowledge of the party making them, the party to whom they are made has the right to rely upon them without making inquiry for himself, in the absence of knowledge of his own which would arouse suspicion.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 19-23; Dec. Dig. § 22.*]

3. CANCELLATION OF INSTRUMENTS (§ 37*)—PLEADING—OFFER TO RESTORE CONSIDERATION—INTEREST.

A bill for the cancellation of a deed for fraud, which offers to refund the consideration to the grantees or to such of them as the court may deem entitled thereto, or to allow the same to be credited upon plaintiff's distributive share of the estate as widow, without paying or tendering the money into court or saying anything of interest, is a sufficient offer of restoration, since interest may be considered as a mere incident to the principal sum and covered by the offer to refund.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 37.*]

4. PLEADING (§ 11*)—MATTERS OF EVIDENCE.

In an action by a widow against her children to set aside a deed executed by her to defendants, and which she claimed was induced by the fraudulent representations of defendants as to the value of the estate, allegations in the bill that decedent was interested in several partnerships at the time of his death, though relating to matters of evidence, were proper as serving to inform the defendants in part of the nature of the evidence to be met, and, where the bill was not unduly incumbered by such averments, it was not thereby rendered subject to demurrer.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 11.*]

5. COSTS (§ 173*)—PROCEEDINGS INVOLVING TRUST PROPERTY—STATUTORY PROVISIONS.

Code 1907, § 3010, provides that, where the administration of a trust is involved, the

court may tax as costs a reasonable attorney's fee, to be paid to the attorney representing the trust or common property. A widow, claiming an interest in the estate of her deceased husband, after a son had been appointed administrator and had filed his inventory and an appraisal of the estate, brought a bill to set aside a conveyance by her to the defendant and her other children on the ground that it had been procured by fraudulent misrepresentations. *Held*, that the statute was not intended to authorize cestuis que trustent or parties claiming to be such to employ, at the expense of the trust, attorneys for the litigation among themselves of adversary claims as to their respective interests therein; and hence the court was not authorized to award such fee to the complainant's attorney.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 173.*]

6. EQUITY (§ 222*)—PLEADING—PRAYER FOR RELIEF—DEMURRER.

A bill, sufficient in other respects is not demurrable because it contains, in addition to a proper prayer, a prayer for further but unwarranted relief.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 222.*]

Appeal from Chancery Court, Covington County; L. D. Gardner, Chancellor.

Bill by Mrs. Bobbie C. Wilks against John R. Wilks, administrator, and others. Demurrer to bill overruled, and defendants appeal. Affirmed.

Reid & Prestwood and W. L. Parks, for appellants. Albritton & Albritton and Foster, Sanford & Carroll, for appellee.

SAYRE, J. [1] After the administrator, defendant John R. Wilks, had filed his inventory and an appraisal of the estate of his intestate, but before any further steps had been taken for the administration of the estate, appellee, widow of the deceased and mother of all the defendants, who are children also of deceased, filed her bill in chancery alleging that she was interested in the estate and its administration, but that, by the false and fraudulent misrepresentations of her sons W. W. Wilks and John R. Wilks, as to the value of the estate and her interest therein, she had been induced to accept from them a sum greatly less than the real value of her interest and on consideration thereof to execute a conveyance to all the children of her entire interest in the real and personal property of the deceased. Shortly afterwards John R. was appointed administrator. The bill prays that the conveyance be set aside and annulled for the fraud alleged and that the administration of the estate be removed from the probate into the chancery court. The chancellor overruled a demurrer to the bill, and this appeal is prosecuted from that decree.

The bill is said to be multifarious, in that it would complicate the administration of the estate of decedent by the introduction into the cause of a controversy about

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the validity of the conveyance in which the estate and those interested in its administration, except John R. and W. W., personally are not concerned, and about which they ought not to be put to trouble and expense. But it needs only a cursory reading of the bill, disclosing the status above stated, to show that all the parties to this cause are interested in the administration of the estate and that the quantum of their respective interests is affected by the controversy as to the validity of the conveyance in question. Not all the parties defendant are charged with participation in the fraud, but it is charged that the alleged fraud, unless annulled by the decree of chancery, has inured or will inure to the benefit of all the defendants. Thus it appears that the administrator is not only affected in his personal rights, but the administration of his trust for the other distributees is affected also. Such being the case, the chancery court may with obvious convenience and propriety take jurisdiction of the administration and the controversy as to the conveyance in one cause. This court has heretofore sanctioned the conjunction in one suit of more distantly related controversies where all the parties were jointly interested in both controversies. *Noble v. Tate*, 119 Ala. 399, 24 South. 438; *Baker v. Mitchell*, 109 Ala. 490, 20 South. 40.

Siglin v. Smith, 168 Ala. 398, 53 South. 260, presented a different question. On the facts averred in the original bill in that case complainant was entitled to remove the administration into chancery. But she averred in her supplemental bill that she had been fraudulently induced to convey her interest in decedent's estate to persons whom she averred had no interest in the estate—to strangers, and this subsequent to the filing of the original bill. On these facts it seemed clear to the majority of the court that all other distributees, whose rights and interests were not questioned, ought not to be drawn into, and the ascertainment and distribution of their shares embarrassed and delayed by, a litigation with strangers to the estate about a conveyance in which they had no part or interest. It was thought that she might protect her interests by a separate, though perhaps more difficult, bill in chancery impounding the separate interest involved without affecting primarily the settlement of the estate or at all the shares of distributees. And so might the complainant in the case at bar; but no consideration of multifariousness requiring her to do so is found in the bill.

True, it may be determined after a while that complainant must be bound by her conveyance, that she has no interest in the estate, and that, therefore, she is not entitled to a removal of the administration; but in that event no harm will have been done, for the administration will have progressed in

a court of ample powers without risk to the contested interest and without entangling any party in foreign difficulties. And in that event, also, the court of chancery, having acquired a lawful jurisdiction in the beginning of a proper subject-matter, will proceed to a final disposition of all equities and rights.

[2] In the next place, the sufficiency of the charges of fraud in the procurement of the conveyance is questioned. It is said that, for aught appearing in the bill, the representations made by W. W. and John R. Wilks were mere expressions of opinion made in regard to the value of the estate. It is said that it is not shown that they knew their representations were false, that doubtless complainant was as familiar with the affairs of her deceased husband as were her sons, the defendants alleged to have made the misrepresentations, and that, at least, she might have informed herself by inquiry. In large part these objections are answered by the language of the bill which charges that she was ignorant of the value of her husband's estate and of her dower, homestead, and distributive rights therein, that the representations were false and made with the purpose of inducing her to part with her rights and interests in the estate at a sum greatly less than their real value, and that she relied upon them in making her deed. As for the rest, the averment is that she was at the time of the conveyance still greatly grieved and mentally and physically ill and incapacitated by reason of the then recent death of her husband. These circumstances would ordinarily be considered enough to relieve a mother of inquiry into the good faith of her sons. But the averment goes further. It is that she was ignorant, and that her sons were looking after the affairs of their father's estate and were in a position to know approximately its value. Where statements are made of facts, especially where they concern matters which may be assumed to be within the knowledge of the party making them, the party to whom they are made has a right to rely upon them. In the absence of knowledge of his own which would arouse suspicion, he is not bound to make inquiry or examine for himself. A party asserting facts cannot complain that the other took him at his word. "Positive representation of a fact cannot be counteracted by the implication that the party might have ascertained to the contrary; under such circumstances, he need not institute an independent investigation." *Shahan v. Brown*, 167 Ala. 534, 52 South. 737; *McDonald v. Pearson*, 114 Ala. 638, 21 South. 534. The bill was not defective in the point here taken.

[3] Complainant offers to refund to the grantees in the alleged fraudulent conveyance the sum received by her as consideration for same, or to such of the grantees as the court

may deem entitled to the same, or to allow the sum to be credited upon her distributive share of the estate, should the court so decree. Appellant complains that she does not pay or tender the money into court and that she says nothing of interest. It is suggested that, upon proof taken, it may appear that complainant has received more than her interest in the estate, and in that event the court would be without effective power to compel complainant to repay the overplus. But in that event defendants will not be entitled to rescind. They will have equity in a decree establishing the conveyance and taxing complainant with the costs incurred in maintaining it. As for the interest, that may be considered as a mere incident to the principle sum and covered by the offer to refund, and by complainant's complete submission to any decree the court may deem proper in the premises. The offer was sufficient (*Perry v. Boyd*, 126 Ala. 169, 28 South. 711, 85 Am. St. Rep. 17; *Martin v. Martin*, 35 Ala. 560), if indeed, under the circumstances, anything more was necessary than a general submission to the power of the court to do complete equity in the premises.

[4] References in the bill to the fact—averments of the fact, if you please—that deceased was interested in two mercantile partnerships at the time of his death, were not essential to the equity of the bill. They were mere allegations of evidence, of facts going to show the value of decedent's estate, a fact alleged with sufficient detail elsewhere in the bill. The particulars here in question were not the proper subject of demurrer, and its consideration in that respect might have been pretermitted. They were, however, proper averments, served to inform the defendants in part of the nature of the evidence to be met, and of them, since the bill was not thereby unduly incumbered, the defendants have no reason to complain.

[5] Section 3010 of the Code provides as follows: "In all suits and proceedings in the probate courts and chancery and other courts of like jurisdiction, where there is involved the administration of a trust, or where there is a partition in kind of real or personal property between tenants in common, the court having jurisdiction of such suit or proceeding may ascertain a reasonable attorney's fee, to be paid to the attorneys or solicitors representing the trust, joint, or common property, or any party in the suit or proceeding, and is authorized to tax as a part of the costs in such suit or proceeding such reasonable attorney's fee, which is to be paid when collected as the other costs in the proceeding to such attorneys or solicitors as may be directed or ordered by the court." This is a codification and improvement of the act of February 2, 1903 (Gen. Acts, 1903, p. 33). We think it was not intended to authorize cestuis que

trustent, or parties claiming to be cestuis que trustent, to employ at the expense of the trust attorneys or solicitors for the litigation among themselves of adversary claims as to their respective interests in the trust. In such questions the trust as a trust is not interested, nor would it be equitable that other cestuis—not sui juris perhaps, as is the case with some of the distributees here—should be taxed through the trust fund or estate to carry on litigations, or specific and separable branches of litigations, in which they are not interested, as may well be the case. [6] But section 5½ of the amended bill, though in the form of an averment of fact, avers no fact involving the equities of the bill. It is really nothing more than a suggestion of matter which would necessarily come to the court's attention in the administration of the trust or in the progress of the separable controversy as to the validity of the deed, and is followed by amendment of the prayer of the bill so as to ask for the allowance of a solicitor's fee. The demurrer then, in effect, said the complainant ought not to have the specific relief prayed. But a bill, stating equities and praying for proper relief is not demurrable for the reason that a prayer for further, but unwarranted, relief is conjoined. *Rosenau v. Powell*, 55 South. 789. This seems to have been the view taken by the chancellor. He overruled the demurrer, but indicated in his opinion that the ruling was not to be taken as indicative of any purpose to allow a solicitor's fee. That, he said, would depend upon developments. In this he properly disposed of the case.

Let the decree be affirmed.

Affirmed. All the Justices concur.

(130 La.)

No. 18,809.

CORDILL v. ISRAEL.

(Supreme Court of Louisiana. Feb. 12, 1912.)

(Syllabus by the Court.)

1. PARTY WALLS (§ 2*)—PRESUMPTIONS.

The presumption of article 677 of the Civil Code that a division wall betwixt two buildings is a wall in common does not apply to a division wall between a building and a vacant lot.

[Ed. Note.—For other cases, see *Party Walls*, Dec. Dig. § 2*.]

2. PARTY WALLS (§ 9*)—DIVISION WALL—RIGHTS OF PATENTED LANDOWNER.

A division wall between a building and a vacant lot remains the exclusive property of the owner of the building until the owner of the adjoining lot pays its value or one-half of the cost of construction. Where, in such a case, the owner of the vacant lot sells the same with the buildings and improvements thereon, the warranty clause of the deed does not cover that portion of the division wall resting on the vacant lot. Quoad the division wall, such sale transfers only the right of the vendor to make the division wall

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a wall in common by paying one-half of its value or cost of construction.

[Ed. Note.—For other cases, see Party Walls, Cent. Dig. §§ 42-53; Dec. Dig. § 9.*]

Appeal from Civil District Court, Parish of Orleans; Thos. C. W. Ellis, Judge.

Action by C. C. Cordill against Mayer Israel. Judgment for plaintiff, and defendant appeals. Affirmed.

Rouse, Grant & Grant, for appellant. Dart, Kernan & Dart, for appellee. Howe, Fenner, Spencer & Cocke, for New Orleans Real Estate, Mortgage & Securities Co.

LAND, J. Plaintiff sued the defendant for one-half of the cost of a division wall, erected at the expense of the plaintiff, and used by the defendant in the construction of a building on his adjoining vacant lot.

The defendant answered, denying liability, and averring that he purchased the adjoining lot with all the buildings and improvements thereon, including the portion of the party wall on his lot, with full warranty of title, from the New Orleans Real Estate, Mortgage & Securities Company, called his "vendor in warranty."

The said company, for answer to the call in warranty, averred that it sold to defendant the vacant lot next to the building of the plaintiff, and that respondent did not sell or undertake to sell any interest in the adjoining wall of plaintiff's building. There was judgment in favor of the plaintiff against the defendant for \$2,453.92, with legal interest from May 20, 1909, until paid, and for costs, and also against the defendant on the call in warranty. The defendant has appealed.

Counsel for appellant admits the correctness of the judgment in favor of the plaintiff, and submits that the only question for this court to determine is the liability of the warrantor. The contention of the appellant is thus stated in his brief:

"Where a lot of ground is sold with the buildings and improvements thereon, with full warranty, and the only buildings and improvements thereon are the party walls erected on either side, the purchaser has a right to assume that he acquired by his purchase the right to use such party walls for the support of his buildings, without being obliged to pay the owners of the adjoining lots on either side for such use."

On the other hand, counsel for the warrantor contend that the defendant acquired by his purchase, so far as the adjoining wall of plaintiff was concerned, nothing more than a right to make it a party wall by paying one-half of the value thereof.

It appears that the buildings on three lots fronting on Canal street were destroyed by fire. Buildings were reconstructed on two of the lots, leaving the intervening lot vacant. This vacant lot was purchased by de-

fendant after the reconstruction of the building on either side. Plaintiff rested one-half of his wall on the vacant lot, but had no right to compel the owner thereof to contribute to the raising of this wall. Civ. Code, art. 675. The vendor of defendant contributed nothing to the building of the wall, but preserved the right of making it a wall in common by paying to the plaintiff one-half he had paid out for its construction. Civ. Code, art. 676. Hence it follows that the vendor of the defendant had no ownership in the wall that it could transfer to him or any other person. "Nemo plus juris ad alium transferre potest quam ipse habet." Defendant does not dispute the above proposition, but contends that his vendor nevertheless did transfer to him, with warranty, that portion of the wall that rested on the vacant lot. The argument of defendant is that such portion of the wall was included in the term "buildings and improvements thereon," used in the act of sale, and that the presumption was that the wall was one in common. In support of the last contention, the defendant cites article 677 of the Civil Code, which reads as follows:

"Every wall which is a separation between buildings as high as the upper part of the first story, or betwixt the yard and garden in the cities and towns, and their suburbs, of this state and even any other inclosure in the fields, shall be presumed to be in common, if there be no title, proof or mark to the contrary."

On the face of this article, the presumption is only *prima facie*, and must yield to proof that the adjoining owner, claiming to own one-half of the wall erected by his neighbor, did not contribute to the building of the wall, and has not paid one-half of the cost of its construction. Moreover, the article relates to a wall which is a separation between buildings, and neither the letter nor the reason of the law apply to a wall which rests in part on vacant ground.

Article 653 of the Code Napoléon reads as follows:

"Dans les villes et les campagnes, tout mur servant de séparation entre bâtiments jusqu'à l'herbage, ou entre cours et jardins, et même entre enclos dans les champs, est présumé mitoyen, s'il n'y a titre ou marque du contraire."

This article corresponds substantially with article 677 of the Civil Code of 1870, which, however, contains the additional word "proof."

Fuzier-Herman, in his annotations under C. N. 653, cites the court of cassation and commentators to the effect that this presumption does not apply where there is an edifice on one side and a court or garden on the other, or where one of the buildings was constructed after the erection of the wall. See *Id.* vol. 1, pp. 901 and 902. We do not deem it necessary to consider the op-

posite views of a few of the French commentators.

Baudry-Lacantinerie, in commenting on the same article, argues that the law says between houses, then between yards and gardens; but it does not say between a house and a yard or a garden. An analysis of article 677 of our Civil Code will lead to the same conclusion. When plaintiff's wall was constructed, the lot now owned by the defendant was vacant, and there is no presumption in law or in reason that the wall was the common property of the plaintiff and the vendor of the defendant. In fact, the wall belonged to the plaintiff alone, and the defendant had no just reason for thinking otherwise when he purchased the adjoining vacant lot.

A dividing wall between yards and gardens necessarily benefits the adjoining proprietors from the time of its completion. It is otherwise with a division wall between a house and a vacant lot.

The contention of the defendant that his vendor sold him the portion of the wall resting on the vacant lot is repelled by the decision of the court, on rehearing, in the case of Lavergne v. Lacoste, 28 La. Ann. 509. This case was carefully considered, and, on rehearing, the opinion was handed down by Ludeling, C. J., who said, in part, as follows:

"In our former opinion and decree, we refused to allow the plaintiff anything for the half of the cost of wall A. This was error. When wall A. was built, the owner of the contiguous lot refused to pay for the wall. The owner of that lot, however, could always make the wall a wall in common by paying half of its cost. He sold the lot to the plaintiff, who subsequently sold it to the defendant. Did said sales relieve the owner of the Burgunder lot from paying for the wall in common when he desired to use it? We think not. The right which the original owner had to make the wall a wall in common by paying for it, passed with the lot to the vendee, but nothing more. The vendor of the defendant did not sell his wall, but only the lot which he had bought from Burgunder."

The facts of that case may be briefly stated as follows:

In 1841, Blasco purchased a vacant lot, upon which he erected a building; the wall resting one half on his own lot and the other half on the adjoining lot. In 1859, the Lavergne minors purchased the Blasco lot with the buildings and improvements thereon, and in the same year purchased the adjoining lot from Burgunder. In 1866, the Lavergne minors sold to Mrs. Lacoste the Burgunder lot. Immediately after her purchase, Mrs. Lacoste caused buildings to be erected on her lot, resting them on the wall of the building on the Blasco lot. The Lavergne minors brought suit to recover from Mrs. Lacoste one-half of the value of said wall. Counsel for defendant argue that the sale

in the Lavergne-Lacoste Case did not include the buildings and improvements. The answer is that a division wall between a building and a vacant lot forms no part of the buildings and improvements on the lot. Such a wall remains the exclusive property of the owner of the building until the owner of the adjoining lot pays one-half of its value or cost of its construction. In the Lavergne-Lacoste Case, *supra*, one of the justices dissented, and we do not consider the decision as having the weight of stare decisis. We, however, are of opinion that the dictum of the court in that case is fully sustained by reason and authority.

It is therefore ordered that the judgment below be affirmed, and that the defendant and appellant pay costs of appeal.

(130 La.)

No. 18,785.

CLAUSSEN v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Supreme Court of Louisiana. Jan. 29, 1912.
Rehearing Denied Feb. 28, 1912.)

(Syllabus by the Court.)

1. COSTS (§ 194*)—TAXATION—RULE—SUFFICIENCY.

The plaintiff in a suit is primarily liable for the costs of court, and in a rule to tax the costs on the party cast it is not necessary that he should allege that he has paid the costs; it is sufficient that he is liable for them, especially when it appears that the clerk of court has already paid the costs, such as jury fees, etc.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 194.*]

2. COSTS (§ 175*)—LIABILITY FOR JURY FEES.

Under the statute relating to the fees of jurors, they are allowed two dollars per day for the time they serve; but jurors who are only in attendance and do not serve are not entitled to be paid this sum by the one cast in the suit.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 698, 699; Dec. Dig. § 175.*]

3. COSTS (§ 3*)—DEPENDENT ON STATUTE.

Costs, being unknown to the common law, are creatures of statutory law, and can be taxed only when there is a provision of law creating them.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 1; Dec. Dig. § 3.*]

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Charles A. O'Neill, Judge.

Action by Otto C. Claussen against the Cumberland Telephone & Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Foster, Milling, Brian & Saal, for appellant. Denegre & Blair and Caffery, Quintero, Gidliere & Brumby, for appellee.

BREAUX, C. J. This cause is before the court, as alleged in a rule of plaintiff, to fix

the amount of the costs. The facts are not disputed, and only questions of law are presented.

The plaintiff claimed the following items:

Per diem for 12 jurors, who served 5 days at \$2 a day.....	\$120 00
Mileage of these jurors, per diem.....	6 25
Of 11 jurors summoned on venire and in attendance on the court from 1 to 5 days, but not serving in this case....	50 00
Mileage of defendant.....	14 40
Publishing venire list.....	20 00

The costs were incurred in the suit brought by plaintiff against defendant, in which plaintiff recovered judgment for the sum of \$75. The defendant paid the judgment in principal and interest and those of the costs that were considered due.

The costs paid were:

Sheriff's costs as per bill rendered....	\$ 13 50
Clerk's costs.....	158 70
Witnesses' fees.....	31 50

Respondent denied its liability for the items first above mentioned for jury fees and mileage, and denied its liability for the item of \$20 due to W. H. Latham for advertising the jury venire.

Respondent's contention is that it could only be taxed for jury fees at the rate of \$1 per day that each juror served during the trial of the cause, and that each of the 12 jurors who tried the case served a total of 5 days. Respondent made a tender of \$60 for jury fees, but denied all indebtedness for a larger amount due to the jurors.

At the conclusion of the trial, the defendant filed an answer to the rule, denying plaintiff's claim, and alleging, in substance, that the petit jurors were drawn to try civil cases and there were a number of civil cases on the docket of the court; that the case entitled as above was fixed to be tried on June 14th; and that other civil cases were likewise fixed for trial during the week.

[1] One of the grounds of defendant as set forth in the answer is that there is neither allegation nor proof that plaintiff has expended or owes one cent for jury fees, and that he may never be called upon to pay one cent for these fees, and that until he pays he cannot call on the defendant.

The defendant joins in the appeal, and asks that the judgment be amended by sustaining its exception. We have not found a special exception in the case, but only the answer, in which there are grounds in the nature of an exception. The defendant, in the answer to the appeal, in the alternative, asks that the judgment be amended by allowing \$1 to the jurors, instead of \$2, a day.

We have noted that the judgment allowed was \$120. The further ground is urged by appellee that there is no proof before the court that the costs have been actually paid by defendant to those entitled to these costs; that is, to the jurors and others.

Taking up, first, for decision the last of

appellee's grounds: There would be great force in this position if it were not that the clerk has paid the costs. It is true that he did this without being requested so to do by either plaintiff or defendant. As, however, he has paid these costs, under the jurisprudence, plaintiff in rule can proceed against the defendant, in order to compel him to pay the amount to satisfy the claim of the clerk of court, who, doubtless, in turn will seek proper settlement from the police jury. The plaintiff is primarily liable for costs. He can therefore stand in judgment as plaintiff in a suit for an amount which has been paid to the officer entitled to recover it. If the amount be not paid by the defendant, it would have to be paid by the plaintiff. These fees are chargeable to the party cast.

[2] As to the costs of other jurors than those who have served, and as regards publishing the jury venire, we can only say there is no statute under which the costs of publishing the jury venire and mileage per diem of other jurors than those who have served can be taxed on the party cast in the suit.

We infer that the clerk had the \$12 in his possession, which he applied in paying in part the amount which was due to the jury, and he completed the act of payment by paying the jurors in full. We have noticed the point, although there was really no necessity for thus noticing it. For, while it is argued that the costs have never been paid, there is no allegation nor proof that they have not been paid. The point not having been made, the defendant has no good cause of complaint. We base our conclusion on this point on the fact that there is no evidence of record that the jurors have not been paid; but, on the contrary, it appears that they have been paid as before mentioned.

As relates to the amount of the per diem, we are of the opinion that it is \$2. There is a provision contained in one of the articles of the Constitution directing the Legislature to adopt a jury law and to provide for the compensation of the jurors. This mandate of the Constitution was complied with, and the jury law was adopted, to wit, section 12 of Act 135 of the General Assembly for the year 1898. The statute cited above expressly states that the per diem shall be \$2. The court has always interpreted section 13 of that statute as allowing \$2 per day for jury services.

Something has been said about the \$12, which the statute directs shall be deposited with the clerk in order to have the trial before a jury, as limiting the amount to \$1 per day for each juror. But the law does not so read; on the contrary, it makes provision for securing an additional amount, in case an additional amount should be due for several days service of the jury, requiring that a bond shall be furnished, payable to the police jury for this amount. See the act before cited, providing that the clerk shall

require bond for additional per diem, in case there is additional costs due.

As relates to other items per diem, jurors who were in attendance and did not serve, and the mileage and the publishing of the jury venire, we will state again a little more in detail, and in order to cite decisions, we do not think that they should be charged to the party cast in the suit. They are part of the court's expenses. The jury, after it is organized, is a part of the court for the administration of the law, and the expense of a jury should not be charged to the parties litigant, unless there is a special provision under which the charge can be made. We have decided that it is the duty of the state to make provision for these costs. See *O. G. & N. E. Railway Co. v. St. Landry Cotton Oil Co.*, 121 La. 801, 46 South. 810.

[3] For another reason, we are of opinion that these last costs cannot be allowed, as costs are chargeable under statutes; they are creatures of the law, and should not be taxed to the litigants without statutory sanction. *State ex rel. Johnson v. Judge*, 107 La. 69, 31 South. 645.

We quote the following as pertinent from 5 Ency. of Pleading & Practice, p. 110:

"As this recovering of costs eo nomine was unknown to the common law and was not expressly recognized until provided for by statute, it became the settled doctrine of the courts of law that costs were the creatures of the statutes merely, and that the allowance of them in any case would depend entirely upon the terms of the statute; that courts have no inherent power to award costs, which can only be granted in any case or proceeding by virtue of expressed statutory authority."

The act cited above (135 of 1898) is the only law giving to plaintiff the jury costs in case the defendant is cast. Testing the claims by this statute, it is evident that the additional items to which we have just referred are not due by the defendant, who has paid all the items required by statute.

It is therefore ordered, adjudged, and decreed that the judgment of the district court, allowing \$120 for jury service, is affirmed, at appellant's costs.

(130 La.)

No. 18,551.

STANDARD CHEMICAL CO. v. ILLINOIS CENT. R. CO. et al.

(Supreme Court of Louisiana. Oct. 16, 1912.
On Rehearing, Feb. 26, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 79*)—USE OF STREETS—GRANTS OF RIGHTS BY CITY.

A grant by a municipal corporation to a private corporation of a right of way through the public streets is a privilege personal to the grantee, and not disposable, and the privilege cannot create the relation of landlord and tenant between the grantee and one using the

right of way without the consent of the grantee. If the rights of the grantee are invaded by another using his right of way, he has an action in tort, but cannot maintain an action for rent because that can arise only from the relationship of landlord and tenant.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 79.*]

2. LIMITATION OF ACTIONS (§ 30*)—LIMITATIONS APPLICABLE—CONTRACT OR TORT.

The plea of three years prescription applies only to cases arising from contractual relations, but the plea of one year prescription is the proper one to be applied to this case as the deprivation charged by the plaintiff is tortious, and the latter plea is therefore sustained.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 141; Dec. Dig. § 30.*]

On Rehearing.

3. PARTIES (§ 27*)—JOINDER—DEFENDANTS.

The allegation that two persons have committed identically the same tort is sufficient, upon its face, and in the absence of evidence to the contrary, to convey the idea of co-operation and of such identity of interest as to warrant their being joined as defendants in an action for the recovery of damages alleged to have been sustained as the result of the tort.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. § 35; Dec. Dig. § 27.*]

4. INJUNCTION (§ 65*)—SUBJECTS OF RELIEF—INTERFERENCE WITH FRANCHISE.

The allegation that defendant has, without plaintiff's permission, taken possession of rights of way, switch track privileges, switch tracks, and other property pertaining thereto, of which plaintiff is owner, and tortiously, wrongfully, and illegally holds such possession, to the exclusion of plaintiff, discloses a cause of action for the issuance of the writ of injunction for the protection of plaintiff's property rights.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 134; Dec. Dig. § 65.*]

5. RAILROADS (§ 79*)—USE OF STREETS—GRANT OF RIGHTS—INTERFERENCE—REMEDY.

Whilst the grantee of a right of way and switch track privileges on a public street has ordinarily no right of action to recover rent, as such, for being tortiously and wrongfully deprived of the enjoyment of such right and privileges, he may be entitled to recover damages, resulting from such deprivation, based upon the rental value of the property, and a petition alleging the tortious dispossession and deprivation and claiming such damages discloses a cause of action for their recovery.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 79.*]

6. LIMITATION OF ACTIONS (§ 32*)—LIMITATIONS APPLICABLE—TORT.

An action for damages for the alleged tortious, wrongful, and illegal taking and holding possession of a right of way and switch track and other property connected therewith is an action ex delicto, and the claim for all damages save those which were sustained within the year preceding the service of citation is barred by the prescription of one year.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 143-145; Dec. Dig. § 32.*]

Appeal from Civil District Court, Parish of Orleans.

Action by the Standard Chemical Company against the Illinois Central Railroad Company and another. From a judgment for de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

defendants, plaintiff appeals. Reversed and remanded.

Solomon Wolff, for appellant. Gustave Lemle and Hunter C. Leake (Blewett Lee and C. L. Sivley, of counsel), for appellees.

BREAUX, C. J. Plaintiff sued the defendant to recover \$2,500 annually for a period of 15 years on the ground that defendant has taken and usurped a privilege to run through certain streets, which privilege plaintiff claims it owns.

The facts are, as relates to this privilege, that on February 16, 1894, the city of New Orleans granted to the Southern Chemical & Fertilizing Company (the author of plaintiff) the privilege to construct and operate a switch track from Broad street to Hagan avenue, connecting there with the switch track of the Yazoo & Mississippi Valley Railroad Company.

The Southern Chemical & Fertilizing Company subsequently conveyed the southwestern part of the square, bounded by Clark, Perdido, and Hagan streets, to the city.

On this part of the square granted there were two switches constructed by the Southern Chemical & Fertilizing Company.

In the conveyance the Southern Chemical & Fertilizing Company reserved the use of the switch tracks for a period of 20 years from the 5th day of January, 1898.

Thereafter the Standard Chemical Company, plaintiff in this case, acquired from the Southern Chemical & Fertilizing Company the rights and privileges which the Southern Chemical & Fertilizing Company had acquired from the city of New Orleans (including the roadbed and other property and privileges) located on said lots.

Plaintiff alleged that on the 24th day of October, 1906, the city approved and confirmed the transfer made by the Southern Chemical & Fertilizer Company to the plaintiff, the Standard Chemical Company, and that for adequate consideration the city gave to the plaintiff company the privilege of conducting and operating a switch track over the street before named for a period of 21 years from the 27th day of November, 1906.

Plaintiff's complaint is that the Illinois Central and the Yazoo & Mississippi Valley Railroad Companies have unlawfully taken possession of its right of way and also of the switch track privilege and of other property, and are using this property to their advantage and to the detriment of plaintiff's interest.

Plaintiff charges that these acts are wrong and tortious.

Plaintiff claims rental, and the question presented here is whether plaintiff is or is not entitled to rental.

We do not think that it is entitled to rental.

The questions presented for decision grow

out of defendant's exception, which was maintained by the district court, in which defendant alleged misjoinder; no cause of action, and the prescription of one and three years.

First, as to misjoinder:

Plaintiff does not allege that defendants have a common interest of any kind. They are referred to substantially as distinct corporations, owing a common amount for rent.

Although it does not appear that there was a common interest, we will not decide the case on that ground. As to the rent itself as claimed, there was misjoinder. In view of the issues as presented together with other grounds, we will not dispose of the case on the ground of misjoinder, for it is different as to the wrongful and tortious acts alleged. As to these, there was ground sufficient to join defendants in one suit. All the different grounds lead to one conclusion that the plaintiff has no cause of action.

[2] We leave this point, and take up the issue raised by the plea of prescription of three years.

There is no ground upon which to maintain that prescription for the reason that there are no contractual relations between the parties.

We have seen that plaintiff claims rent.

Were we to sustain the plea of rental due, it would be subject to the three years prescription.

This is not possible, for such is the nature of the case that no rent can be recovered, and therefore the prescription just mentioned cannot be of any avail to defendant.

This brings us to the consideration of the plea of one year prescription.

Plaintiff alleged that defendants wrongfully and tortiously continued in using the property of petitioner.

As relates to this improper use, as alleged, the plea of one year prescription bars the claim, if anything be due for any act by defendant of a date one year anterior to the date the suit was brought.

The unlawful deprivation of possession of premises is subject to the prescription of one year.

Prescription runs from the day on which the injury or damage was sustained. *Lizardi v. N. O. Canal & Banking Co.*, 25 La. Ann. 414. The plea of one year's prescription is sustained.

Defendant in the exception sustained by the district court pleaded that plaintiff alleged no cause of action.

To the extent that the plea of prescription does not bar acts within a year prior to the suit, we will consider this exception.

[1] We have scanned plaintiff's petition, and have not found that plaintiff owns a fee in the soil on which the roadbed is constructed.

Although plaintiff has a privilege, as we

have seen, granted by the city, it has no right to dispose of that claim. It is revocable. This revocability shows the restricted condition of the right.

A privilege may be granted that does not grant the right to recover rent.

Plaintiff has a right to remuneration for its expenses, its work, and services as a public service corporation.

That does not give it the right to claim rental.

It has a right to a possessory or a petitory action.

They do not confer the right of collecting for rent on account of the occupancy of the ground over which it claims it had a privilege, and which it never claimed before this suit was brought.

The courts have decided that they will protect a right of way over streets by injunction.

That is not the action here.

If it be entitled to the right claimed, necessary protection will be given to the extent to which it is entitled.

Plaintiff has no authority to declare itself landlord, and claim rent from its asserted tenant.

The streets are for the common use of the public.

The municipality has the right, for certain purposes, to restrict that right in part, to grant a privilege. But it remains, as before stated, subject to certain rights of the grantor representing the public.

The municipality has it in its power to allow others to pass over the same road.

Plaintiff has not acquired such a right of ownership as will enable it to stand in judgment in this case.

For reasons stated, it is ordered, adjudged, and decreed that the judgment appealed from is affirmed at appellant's costs.

On Rehearing.

MONROE, J. Defendants (the defendant not named in the title being the Yazoo & Mississippi Valley Railroad Company) filed exceptions of misjoinder, no cause of action and prescription (of one and three years), and the district court maintained the exceptions (without specification) on the face of the papers, and dismissed the suit, from which ruling plaintiff appealed. On the former hearing in this court, it was held that the prescription of one year was well pleaded as to a certain aspect of the case, and the exception of no cause of action as to other aspects.

The petition, after alleging that the city of New Orleans had granted to the Southern Chemical Company rights of way, with the privilege of operating switch tracks, through certain streets, that said company, owning and operating such tracks, had conveyed the same, together with said rights and privileges, to petitioner; and that the

conveyance had been ratified and approved by the city of New Orleans, proceeds as follows:

"Your petitioner further shows that the defendant railroad companies, without the permission of your petitioner, * * * have taken possession of the rights of way and the switch track privileges and other property belonging to your petitioner, and are constantly using the same, with great profit to themselves and to the loss and detriment of your petitioner; that, notwithstanding the protests and complaints of your petitioner, the said defendant companies, tortiously and wrongfully continue in the use of your petitioner's property, and tortiously and wrongfully prevent your petitioner from in any way using it, and refuse and neglect to pay your petitioner the rental value thereof, though constantly negotiating with your petitioner and inducing your petitioner to believe that a settlement would be made. Your petitioner avers that a reasonable rental for the use of the switch track and all the rights and privileges pertaining thereto and all the other property of your petitioner would be \$2,500 a year; that the defendants since the 16th day of February, 1894, and up to the 16th day of February, 1909, have occupied and operated and used the property for a period of 15 years which at \$2,500 a year amounts to \$37,500; * * * that, notwithstanding its objection and protest, the said defendant companies continue to use your petitioner's property, and wrongfully and illegally prevent your petitioner from using it, and that a writ of injunction is necessary and proper to protect your petitioner's rights and privileges in the premises."

The relief prayed for is, first, a writ of injunction (to be issued after hearing), restraining defendants from further using the property mentioned in the petition and prohibiting them from interfering with plaintiff's use of the same; and, second, a judgment condemning defendants in solido in the sum of \$37,500, with interest.

As the allegations of the petition negative all idea of an action ex contractu and fix the status of the proceeding as an action sounding in tort, the exceptions are to be considered from that point of view.

[3] The exception of misjoinder of defendants:

The general rule established by C. C. art. 2324, that "he who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, in solido, with that person for the damage caused by such act" is, impliedly, qualified by the equally general rule that "parties cannot be joined in a suit unless they have an identity of interest in its subject-matter." Cross on Pleading, p. 13.

From which it follows that, when two or more persons, by independent acts, neither of them causing, assisting, or encouraging the act of the other, commit different torts, however similar or synchronous or both, there is no identity of interest between them, and they cannot be joined as defendants in the same suit for damages. Where, however, as in this instance, it is alleged that two persons have committed, and are committing, identically the same tort, the allegation, tak-

en by itself and in the absence of evidence to the contrary, conveys the idea of co-operation between such persons, and hence of such identity of interest as upon the face of the papers to authorize their being joined as defendants in an action for the recovery of the damages resulting from such tort. The exception of misjoinder should, therefore, have been overruled.

[4] The exception of "no cause of action."

Adhering to the view that the grantee of the franchise of a right of way for the construction and operation of a switch track upon a street in New Orleans would ordinarily have no right of action for the recovery from another person of "rent" eo nomine for the use of the street, nevertheless, he is entitled to the protection of the law against unwarranted interference with his enjoyment of his franchise; and where, as in this instance, the grantee alleges that a third person has, without his permission, taken possession of such right of way and privilege and of the switch track itself and other property owned by him, and tortiously, wrongfully, and illegally holds such possession, to his entire exclusion, and that a writ of injunction is necessary for his protection in the premises, we are of opinion that a cause of action for the issuance of the writ is disclosed.

[5] In the opinion heretofore handed down, the court was led by the inartificial manner in which the petition is drawn to conclude that plaintiff is claiming "rent" for the use of a public street, but, on a further consideration of the language used, we are satisfied that such is not its meaning. By reference to the excerpt therefrom, heretofore given, it will be seen that the petition alleges that:

"Said defendant companies tortiously and wrongfully continue in the use of your petitioner's property, and tortiously and wrongfully prevent your petitioner from in any way using it, and refuse and neglect to pay your petitioner the rental value thereof."

We have already held that the allegations of the petition negative the idea of a suit on a contract, and fix the status of the action as one sounding in tort, and the complaint contained in the language above quoted is consistent with that ruling, since it is, not that defendants refuse and neglect to pay "rent," but that defendants refuse and neglect to pay the value of the use of the property, including, not only the right of way and switch track privileges granted by the city, but the switch track, or tracks, of which plaintiff alleges that it is owner, and which were not granted by the city, which value is, in effect, alleged to be the value or "price" at which the property might be leased, if it were susceptible of being leased (for, be it noted, under our law, the consideration moving to the lessor for the use of his prop-

erty, under the contract of lease, is called the "price" (C. C. art. 2669 et seq.), and the word "rent" is used only in connection with the peculiar contract (emphyteusis, in effect) provided for by C. C. art. 2778 et seq. It is true that plaintiff somewhat further along in its petition avers that a reasonable "rental" for the use of the switch track and all the rights "and privileges pertaining thereto and all the other property of your petitioner would be \$2,500 a year," but in the prayer nothing is said either of rental value or rental, and for the reasons stated we think upon a fair construction of the whole petition the intention is merely to claim compensation for the damage resulting from the alleged tortious and unlawful use and deprivation of the property based upon the value of such use, as determined in the manner in which such value is ordinarily determined in cases of property subject or susceptible to lease. The exception of no cause of action should therefore have been overruled.

[6] The exception of prescription of one year.

Upon this point the case falls within the doctrine enunciated in the case of *De Lizardi v. N. O. Canal & Banking Co.*, 25 La. Ann. 414, in which it was held that, where a plantation belonging to one person is seized and detained under a writ of attachment issued against another, such seizure and detention constitute a quasi offense, and the claim for damages, which is barred by one year, includes that for all rents and revenues, save those arising during the year immediately preceding the filing of the suit, as, also, the claim for the value of sugar and molasses seized with the plantation. See, also, *Shields v. Whitlock & Brown*, 110 La. 714, 34 South. 747.

The exception of the prescription of three years, as we have heretofore held, has no application and was properly overruled.

For the reasons thus assigned, it is now ordered, adjudged, and decreed that the judgment heretofore rendered by this court be set aside; that the judgment appealed from be avoided and reversed; that the plea of prescription of one year be maintained, as barring plaintiff's claim for any damage alleged to have been sustained more than one year prior to the service of citation herein; that the plea of prescription of three years be overruled; and that the exceptions of misjoinder and no cause of action be overruled. It is further decreed that this cause be remanded to the district court, to be there proceeded with according to law and to the views expressed in the foregoing opinion. It is further decreed that defendant pay the costs of the appeal, and that the costs of the district court await the final judgment.

(130 La.)

No. 18,895.

CHATMAN v. BUNDY et al.

(Supreme Court of Louisiana. Feb. 12, 1912.)

(Syllabus by the Court.)

1. DEEDS (§ 196*)—PRESUMPTIONS—REBUTTAL.

While there is a presumption that a sale by a father to his daughter, where the vendor remains in possession of the property for a number of years, is a simulated sale, still this presumption may be rebutted by evidence serving to explain the possession of the vendor.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 196.*]

2. DEEDS (§ 74*)—VALIDITY—EQUITABLE ESTOPPEL—ACQUIESCENCE.

Where parties to a sale have acted for a number of years as if the sale had transferred real rights, they will be estopped from denying such sale.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 74.*]

Appeal from the Civil District Court, Parish of Orleans; Thos. C. W. Ellis, Judge.

Action by Horace Chatman against Sophie Bundy and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Charles Louque, for appellant. William R. Ker, for appellees.

BREAUX, C. J. Horace Chatman sold the undivided half of a lot of ground, situated in this city, to Sophie Chatman, wife of Murray Bundy, for \$600 cash on the 13th day of February, 1894. On the 24th of July following, he sold two lots of ground to Murray Bundy, all three lots in New Orleans. The last he sold for \$150.

He must have regretted to have made these sales, the first to his daughter, and the other to his son-in-law; for, on the 2d day of February, 1907, he brought suit against Sophie Chatman, his daughter, and against his granddaughter, Olivia Bundy (Murray Bundy died in 1901, and, for that reason, the surviving daughter of Murray Bundy was made party defendant), for judgment annulling the sales, and, in addition, for judgment in the sum of \$520.

In his petition to annul these sales, he represented that he never received any consideration for these sales; that they were made for convenience, and were simulated; that he retained possession of the Orleans street property (one of the properties sold by him) up to within six months ago, when Sophie Bundy, his daughter, took possession of a portion of the property. One of the lots was taken possession of a short time before the suit was brought, and the remaining property was in his vendors' possession.

The defendants set up their respective titles, and claim that they have paid, if not cash, as stated in the deeds they paid, a consideration, from time to time, which was equivalent to the price.

Plaintiff propounded interrogatories to

Sophie Bundy, which he made part of his petition, and which she answered, and stated that she had paid for the property; and she also testified, in answer to interrogatories propounded, that her son-in-law, Mr. Bundy, and she paid for the property. She also explained why it was that her father had remained in possession of part of the property.

After the interrogatories had been answered, plaintiff, Horace Chatman, departed this life, and his widow and testamentary executrix made herself party to the suit, reiterating his allegations and making other averments on her account. She claims that her late husband had received amounts for which he was liable, and which are secured by privilege and mortgage on the property involved in this suit. The claim on the part of the executrix is not sustained by the facts.

The parties, Horace Chatman and his daughter, Sophie Bundy, were in account with each other. At the date of the death of the latter's mother, plaintiff retained the whole property, as he owned one half and had the usufruct of the other half. Years ago he became the husband of Clementine, the present plaintiff, and continued in his possession of half of the property as usufructuary, although he had lost the usufruct by second marriage. In their different dealings, beyond question, according to the testimony, amounts were paid by the daughter to the father on account of the sale, and he, in addition, collected amounts for which he owed an accounting to his daughter.

[1] Considering that interrogatories were propounded to the daughter, as before stated, to her answers should be given some weight. After weighing the testimony, we arrived at the conclusion that the least that can be held is that the sale was not a simulation. One of the present plaintiff's contentions is that the father remained in possession after the sale; that this gave rise to the presumption that the sale was simulated; also that, as it was a transaction between father and daughter, that also gave rise to a presumption of simulation.

While there is presumption growing out of the continued possession and out of the close relationship of vendor and vendee, it is a presumption which is subject to an explanation, and which can be rebutted. This, we consider, has been done, as it is conclusively proven that amounts were received on account.

Our learned Brother of the district court thought that in the accounting, if an accounting were made, it would result in proving that the succession of Horace Chatman is indebted to his daughter, the defendant. In that as it may, it appears that an amount was paid; although if small, it would be sufficient to sustain the sale as not simulated.

ed. The presumption of simulation is overcome by proof.

Regarding the inability of the son-in-law, who died in 1901, to pay any part of the purchase price, witnesses, among them the present plaintiff, testified that he earned \$10 per week. An economical workman may, on this limited amount, economize enough to pay something on property bought for \$150.

[2] There is good ground of estoppel. During years, according to their own understanding, these parties have permitted a condition of ownership to remain which we do not think we should set aside on the evidence adduced.

For reasons stated, the judgment is affirmed.

(130 La.)

No. 19,164.

VACCARO v. PIGNIOLO.

In re PIGNIOLO.

(Supreme Court of Louisiana. Jan. 29, 1912.
Rehearing Denied Feb. 27, 1912.)

(Syllabus by the Court.)

IMPROVEMENTS (§ 4*)—COMPENSATION—GOOD FAITH OF CLAIMANT.

One who takes possession of land in plain disregard of the calls of his and his author's title becomes a possessor in bad faith, and is not entitled to be reimbursed the cost of improvements which are inseparable from the soil, nor for the enhanced value of the land resulting therefrom.

[Ed. Note.—For other cases, see Improvements, Dec. Dig. § 4*]

Action by Joseph Vaccaro against Joseph Pignolo. Judgment for defendant was reversed in the Court of Appeal, and he applies for certiorari or writ of review. Judgment of the Court of Appeal reversed, and that of the District Court affirmed.

James Wilkinson, for relator. P. J. Paterno and G. B. Smart, for respondent.

MONROE, J. John B. Pignolo and Marco Popovich purchased from the city of New Orleans certain tracts of land in the parish of Plaquemines, which they divided between them; Popovich taking, among others, a tract measuring 1,117 feet 6 inches front on the Mississippi river, and Pignolo taking an adjoining tract, lower down, measuring about 2 arpents front on the river. On September 3, 1881, Popovich sold to Dr. Rabasse a portion of the tract so acquired by him, by the following description:

"A certain tract of land * * * measuring 982 feet 6 inches front on the Mississippi river, * * * bounded above by the land of J. Johnson and below by the land of M. Popovich (the present vendor), and being 135 feet from the tract of land purchased by J. B. Pignolo from the city of New Orleans. * * * The said tract of land is comprised within the lines E. F. G. G. H. and H. E. and the side

lines bearing S. 72° W.; the whole, according to a sketch, paraphrased ne varietur by the parties to this act, and by me, notary, to identify same with present act, and hereto annexed for future reference."

John B. Pignolo died, and his son, Joseph R. Pignolo (defendant herein), acquired the two-arpent tract above referred to; and Dr. Rabasse died, and Vaccaro acquired the tract that he had bought from Popovich, and which, in the sale to him (Vaccaro), is described as "measuring 982 feet 6 inches front on the Mississippi river, * * * bounded above by the lands of J. Johnson and below by the lands of Popovich," etc. Thereafter, in 1908, Joseph R. Pignolo bought from Popovich the tract having 135 feet front, referred to in the sale from Popovich to Rabasse, and a few months later brought an action in boundary against Vaccaro, who answered, in effect, as follows:

"Defendant admits the purchase of Joseph Pignolo from Marco Popovich, and joins plaintiff in the allegation that said purchase was made as per plot or plan annexed to an act of sale No. 68, dated September 3, 1881, and which plot or plan is annexed to plaintiff's petition and made part thereof. Defendant, further answering, alleges that the boundary line between the land of defendant and Marco Popovich, the vendor from whom plaintiff purchased the land in question, has been established and still exists, and plaintiff is now aware of their [its] existence and was aware of their [its] existence at the time that he purchased the land in question from Marco Popovich. Defendant specially denies that he is in possession of any land formerly belonging to Marco Popovich and now belonging to plaintiff, Joseph Pignolo, by virtue of his (plaintiff's) one dollar purchase."

Upon the issues thus presented, the case was tried, and a judicial survey having been ordered and made in the presence of the litigants, and it having been thereby ascertained that Vaccaro was occupying a strip of land having some 26 feet of the 135 feet front, constituting the tract that Pignolo had purchased, there was judgment for Pignolo, from which Vaccaro failed to prosecute an appeal. He, however, brought this suit, in which he alleges that, by the judgment referred to, the boundary between his land and that of Pignolo

—"was declared to be about 26 feet inside petitioners' former boundary line; * * * that said parcel of land was a part of a certain tract of land acquired by petitioner by purchase from the succession of * * * Rabasse; * * * that said * * * Rabasse acquired * * * by purchase from * * * Popovich and * * * Pignolo, who acquired from the city of New Orleans; * * * that, at the time of the purchase by * * * Rabasse, his vendors were residing in the parish of Plaquemines, on land adjoining the property in question, which was acquired and taken possession of by said Rabasse; that during its occupancy by said Rabasse a fence existed dividing the property taken possession of by Rabasse, under his purchase from Popovich and Pignolo, from the property occupied by

his said vendors: that some orange trees were on the division line between the said pieces of property, and it is of record that said Rabasse and his said vendors were dividing the fruits of the trees; * * * that petitioner bought * * * in pursuance of an order * * * in the succession of * * * Rabasse, and, upon taking possession * * * found the division line between his property and that of Popovich and Pignuolo consisted of a fence and said orange trees; that he took possession of said property with the full knowledge of his aforesaid neighbors, who at no time attacked, by word of mouth or otherwise, his right to do so."

And he further alleges that he thereafter constructed and improved a canal on the 26-foot strip of land in question at a cost of \$500, and planted other orange trees thereon and on said line, and that he is entitled to reimbursement on those accounts in the sum of \$1,325, and to an injunction restraining Pignuolo from going into possession of said strip until said amount is paid, as, also, to a recognition of his lien upon the land therefor and an order for its sale in satisfaction thereof. And a preliminary injunction was issued accordingly.

The petition does not correctly state the facts. The 26-foot tract, of which the judgment in the boundary suit decreed Pignuolo to be the owner, was never part of the tract acquired by Vaccaro from the succession of Rabasse, and Dr. Rabasse did not acquire the tract which Vaccaro bought from his succession from Popovich and Pignuolo. He acquired it from Popovich. Nor does it appear that at the date of the purchase by Dr. Rabasse Popovich was residing "on land adjoining the property in question." The 26-foot strip was part of the 135-foot tract which, in the sale from Popovich to Rabasse, is referred to as bounding the land sold on the lower side, and intervening between said land and that owned by John B. Pignuolo, and our conclusion from the testimony is that, as Popovich lived in New Orleans, some 62 miles from the locus in quo, John B. Pignuolo and Dr. Rabasse occupied his 135-foot tract, which separated their holdings, to suit themselves—Pignuolo up to a certain fence, and Rabasse down to the same fence—and that they divided between them the orange crops from the trees which grew along the fence, which fence was some 26 feet below the line dividing said tract from that which Rabasse had bought from Popovich, and some 109 feet above the line which divided said tract from the 2-arpent tract which Pignuolo owned and lived on. And matters so continued after John B. Pignuolo

died and his son, Joseph R. Pignuolo (defendant), acquired the interests of his co-heirs in the 2-arpent tract which his father had owned, and after Vaccaro had acquired from the succession of Rabasse the tract which Rabasse had acquired from Popovich. Rabasse, as we have seen, acquired according to a plat of survey and a description which could leave no doubt as to his boundary. Vaccaro acquired according to a description which gave him 982 feet 6 inches front, and informed him that he was bounded above by Johnson and below by Popovich, and he admits that defendant acquired the 135-foot tract which separated his holding from the 2-arpent tract originally held by John B. Pignuolo. When, therefore, as appears from the evidence, he took possession down to the fence, upon the other side of which he found Pignuolo in possession, he did so in the face of the calls of his title and of the title of his author, which distinctly informed him that the land which he had purchased was bounded on the lower side by that of Popovich, and was separated from that of Pignuolo by a tract having a front of 135 feet on the river. The proposition that, under such circumstances, he was a possessor in good faith, because he chose, in the absence of Popovich, to take possession up to a fence, beyond which Pignuolo was in possession, is wholly untenable, since Pignuolo's upper line was not his lower line, but was separated from it by a tract 135 feet wide that belonged to Popovich, and was given in his (plaintiff's) title as his lower boundary. There was judgment in the district court in favor of defendant; but it was reversed in the Court of Appeal, which gave judgment for plaintiff, awarding him a certain amount by way of reimbursement for money expended, as set forth in his petition. It is clear, however, that, as a matter of law, he was a possessor in bad faith, and can recover nothing for improvements which are inseparable from the soil, or from the enhanced value of the land resulting therefrom. *Volers v. Atkins Bros.*, 113 La. 303, 36 South. 974; *Lisso & Bros. v. Unknown Owner*, 114 La. 398, 38 South. 282; *Wood v. Monteleone*, 118 La. 1011, 48 South. 657; *Quaker Realty Co. v. Bradbury*, 123 La. 20, 48 South. 570.

It is therefore ordered, adjudged, and decreed that the judgment of the Court of Appeal here made the subject of review be annulled, avoided, and reversed, and that the judgment of the district court be affirmed. All at the cost of the plaintiff.

(130 La.)

No. 19,059.

Succession of DRYSDALE.

(Supreme Court of Louisiana. Jan. 29, 1912.
Rehearing Denied Feb. 26, 1912.)*(Syllabus by the Court.)*1. DESCENT AND DISTRIBUTION (§ 69*)—
RIGHTS OF HEIRS—GIFTS BY DECEDENT.

The wife of a testator who leaves three or more legitimate children cannot take from him, by donations of any kind, more than one-third of his estate. Civil Code, art. 1493.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 208-212; Dec. Dig. § 69.*]

2. WILLS (§ 710*) — RIGHTS OF HEIRS—FOR-
FEITURE.

Article 1029 of the Civil Code, relative to the forfeiture of an heir's share in succession property embezzled or concealed by him, has no application to a legatee who was at the same time executrix of the estate.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 710.*]

3. WILLS (§ 740*)—GUARDIAN AND WARD
(§ 41*)—RIGHTS OF LEGATEES—VALIDITY OF
CONTRACTS—SALE BY TUTRIX.

A sale by legatees to a colegatee of their respective shares in an estate will be annulled when procured through a fraudulent suppression of the fact that the purchaser, late executrix of the estate, had in her possession common assets to a large amount, which had never been inventoried. The sale by the tutrix of a minor's share in a succession, when not authorized by the court, on the advice of a family meeting, is an absolute nullity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1888-1895; Dec. Dig. § 740;* Guardian and Ward, Cent. Dig. § 172; Dec. Dig. § 41.*]

4. LIMITATION OF ACTIONS (§ 183*)—PLEAD-
ING—NECESSITY.

A general plea of prescription is bad and will not be considered by the court. The particular prescription relied on should be specially pleaded.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 683-692; Dec. Dig. § 183.*]

5. ESTOPPEL (§ 54*)—EQUITABLE ESTOPPEL—
KNOWLEDGE OF FACTS.

There is no equitable estoppel against a party who was ignorant of the real facts and of his legal rights in the premises.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 128-135; Dec. Dig. § 54.*]

6. PARTITION (§ 29*)—BAR OF SUBSEQUENT
ACTION.

Property not included in a prior partition may be made the subject of a supplemental partition.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 29.*]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

In the matter of the succession of Andrew Drysdale. Petition by Mrs. Marcella Drysdale Ennis and others against the executors of the succession of Mrs. Julia P. Drysdale and another. From a judgment for the petitioners, an appeal is taken. Reversed, with directions.

Woodville & Woodville, for appellants John Thomas Pike and Mary Ann Pike. Geo. W. Flynn, for appellees Mrs. Marcella Drysdale Ennis and others. Chas. I. Denichaud, for appellee Mrs. Jeannette Carpenter.

LAND, J. Andrew Drysdale, a resident of the city of New Orleans, died in Canada, in August, 1896, leaving a surviving wife, Mrs. Julia Pike Drysdale, and children of a prior marriage.

Decedent left a last will in notarial form, of date October 16, 1893, which was duly probated. The testament contains the following declarations and dispositions:

"My name is Andrew Drysdale, I am seventy three years old, I was married twice, by my first marriage with Mary Cunly, I had four children. James Drysdale, Marcella Drysdale, wife of William Ennis, Jeannette Drysdale, wife of Thomas P. Carpenter, and John Drysdale, they are all living except John Drysdale, who is dead. He left four children, Samuel, Jeannette, Hazel and Rodney, I am now married to Julia Pike. We have no children."

"I give and bequeath to my present wife, in full ownership, one third of all the property which I may die possessed of, the balance of my property to be divided among my descendants according to law."

"I appoint my wife and James Fahey, joint executors of this will with seizen."

Mrs. Julia Pike Drysdale qualified by taking oath as executrix on September 22, 1896, before a notary public at Hamilton, Canada. On November 24, 1896, Mrs. Marcella Drysdale Ennis, James Drysdale, and the widow and minor heirs of John Drysdale, filed a motion for an order to compel the executrix to commence and complete an inventory of the estate as previously ordered by the court. This motion was never tried.

On December 1, 1896, Mrs. Jeannette Drysdale, wife of Thomas P. Carpenter, joined, authorized, and assisted by her said husband, filed a suit for a partition of the estate of Andrew Drysdale, represented as consisting of his community half interest in a certain lot, with improvements thereon, fronting on Esplanade avenue, city of New Orleans. Issue was joined on this petition by the answer of all the defendants, to wit, Mrs. Julia Pike Drysdale, individually, as executrix, and as legatee of the decedent, by the widow and minor heirs of John Drysdale, by Mrs. Marcella Drysdale, wife of William J. Ennis, and by James Drysdale.

The experts appointed by the court to examine and appraise the property to be partitioned valued the lot on Esplanade avenue at \$7,000, and reported that in their opinion said property was not susceptible of a division in kind between the interested parties. The partition suit was regularly tried, and on December 23, 1896, judgment was rendered, recognizing the community rights of Mrs. Julia P. Drysdale in the entire estate acquired during her marriage with the de-

cedent, and recognizing the other parties as the children and grandchildren of the decedent, and sending them into possession, in the proportion established by the will of the decedent, of the entire estate of Andrew Drysdale, both real and personal, more particularly, however, the lot of ground on Esplanade avenue, and ordering a partition of all and singular the entire real and personal property owned in common between the plaintiffs and defendants, and further ordering the sale of said real property for the purpose of effecting a partition, and referring all parties to a notary public to complete said partition.

On January 26, 1897, all the recognized heirs of Andrew Drysdale appeared in person, or by attorney, before the designated notary, and declared that, pursuant to the judgment rendered in the partition suit, and a judgment rendered in the succession of John Drysdale, authorizing and empowering Mrs. Anna M. Drysdale, tutrix, to sell and transfer the interest of the minor heirs of said decedent in the property described in the act at private sale in order to effect a partition, said appearers granted, bargained, sold, assigned, and delivered unto Julia Pike Drysdale, "all their right, title, share and interest of every nature and kind whatsoever, without any exception or reservation, in and to the estate of the late Andrew Drysdale," and especially in and to the lot on Esplanade avenue, for the price and consideration of \$4,000, paid in cash by the said purchaser to the four heirs at law of Andrew Drysdale.

As Mrs. Julia P. Drysdale had a community half interest in the property, and one-third interest as legatee in the half belonging to the estate of Andrew Drysdale, it follows that the price of \$4,000, paid for the two-thirds interest of the forced heirs of said Drysdale, must have been based on a property valuation of \$12,000.

The share of the forced heirs in the lot appraised at \$7,000 was only \$2,333.33 $\frac{1}{3}$; and hence they must have received \$1,666.66 $\frac{2}{3}$ for their shares in other property belonging to the estate.

Mrs. Julia P. Drysdale, having thus acquired all the right, title, and interest of her husband's heirs in the estate, took possession of all the community property, and remained in undisputed possession of the same as owner during her life. Mrs. Julia P. Drysdale died in August, 1905, and a few days later her succession was formally opened in the civil district court for the parish of Orleans, and all the property left by her was duly inventoried. Thomas Pike and Mary Ann Pike, a brother and sister of the deceased, claimed the succession as the next of kin. But they were confronted with an application for the registry of a copy of an alleged last will of Mrs. Julia P. Drysdale, purporting to have been executed and pro-

bated in Canada. This alleged will named Thomas P. Carpenter, the son-in-law of Andrew Drysdale, as one of the executors, and contained dispositions in favor of the said Carpenter and his wife, born Jeannette Drysdale. The heirs of the decedent opposed the registry and execution of the document, on the ground that the signature of the alleged testatrix was a forgery. The original instrument was brought from Canada, and after a long litigation, including several appeals to the Supreme Court, the signature of Mrs. Drysdale was finally adjudged to be a forgery.

The inventory of the estate of Mrs. Julia P. Drysdale disclosed property, rights, and credits valued at \$39,000, and the litigation occasioned the production of statements rendered by Thos. P. Carpenter to Mrs. Julia P. Drysdale, as "adjuster" of the estate of Andrew Drysdale, apparently showing that said estate was worth more than \$30,000. These facts induced some of the heirs of Andrew Drysdale to believe that they had been despoiled of a large portion of their inheritance.

On August 12, 1909, pending the said litigation, Mrs. Marcella Drysdale Ennis and the heirs of John Drysdale, deceased, filed a petition, claiming that all the property inventoried in the succession of Julia P. Drysdale belonged to the estate of their father, Andrew Drysdale. The executors of the succession of Mrs. Julia P. Drysdale and Thomas H. P. Carpenter, both as executor and individually, were cited as defendants. The petition charged, in substance, that after the death of Andrew Drysdale the petitioners moved the court to enforce the order for an inventory; that they were informed by Mrs. Julia P. Drysdale, represented by Thomas H. Carpenter, that there was nothing to inventory, as Andrew Drysdale left no property of any kind; that after some discussion and delay Mrs. Drysdale and Carpenter conceded that the lot on Esplanade avenue belonged to the community, but maintained that said piece of property was the only asset of the estate of Drysdale, and that a sale of said lot and the division of the price among the heirs would relieve the necessity of making an inventory; that said property was sold to Mrs. Julia Pike Drysdale for \$4,000, which was obtained, as she and Carpenter claimed, out of a \$5,000 insurance policy which was paid to the said Mrs. Drysdale; that the said Mrs. Drysdale, acting and conspiring with the said Carpenter, committed a great fraud on petitioners by inserting a clause in the act of sale by which the heirs of Andrew Drysdale disposed of all their right, title, and interest in his estate, including the lot on Esplanade avenue, for \$4,000, a price really below the value of said property, when at the time the said Carpenter had in his possession, under his control, real estate, cash, stock, and bonds

amounting to fully \$39,000, as detailed in the petition, all of which belonged to the estate of the late Andrew Drysdale; that the said Mrs. Drysdale and Carpenter fraudulently concealed from petitioners and their coheirs the existence of all of said property, except the real estate, and that Mrs. Drysdale, in violation of her trust and oath as executrix, abstracted, despoiled, and concealed said assets for the purpose of converting them to her own use; that the said Carpenter aided and assisted the said executrix in said concealment and wrongful conversion, and after her death illegally sold and disposed of 20 shares of stock, worth \$2,000, which had been purchased by Mrs. Drysdale out of funds belonging to her husband's estate; that said Mrs. Drysdale and Carpenter, after completing the fraud on the estate, took steps to cover up their wrongdoing by selling and disposing of the securities fraudulently abstracted by them, and reinvesting the proceeds of sale in new securities and real estate; and that all the assets of the succession of the late Julia Pike Drysdale were purchased with the money and proceeds of the sales of stocks and securities belonging to the succession of Andrew Drysdale. The petition further represents that all the frauds therein set forth were kept secret from the petitioners, and were not brought to light until after the death of the said Mrs. Drysdale, and during the pendency of the litigation over the forged will.

The petition further alleges that by reason of the aforesaid concealment and diversion of trust funds the said Mrs. Drysdale be declared as having forfeited all her rights under the will of her predeceased husband. Petitioners prayed for judgment against the executors of the estate of Mrs. Drysdale, and against Thomas H. P. Carpenter, as executor and individually, decreeing all the property inventoried in the succession of Julia Pike Drysdale as belonging to the succession of Andrew Drysdale, or, in the alternative, for judgment against the defendants in the sum of \$39,975, with legal interest from August 22, 1896, until paid. Petitioners also prayed for a writ of judicial sequestration, which was issued and executed on all the property of the succession of Mrs. Drysdale, already in the hands of the sheriff under a previous sequestration issued in the litigation over the forged will.

Exceptions of prematurity and of no cause of action were filed by the defendant executors, and were overruled. When the litigation over the forged will terminated, several supplemental petitions were filed, making Thomas Pike, Mary Ann Pike, and Mrs. Carpenter defendants, increasing the amount of the demand to \$50,000, and by claiming fruits and revenues.

The defendants Thomas and Mary Ann Pike filed eight different exceptions, which were referred to the merits. The defendants

then answered, denying all the allegations of fraudulent concealment and conversion contained in the petition; and defendants averred that all the property left by Andrew Drysdale at his death belonged to the community, and that his surviving wife was entitled to one half thereof as widow in community, and one-third of the other half thereof, under the will of her husband, leaving two-sixths of said property to his forced heirs, which said proportion was purchased by the widow for \$4,000, a fair value, fixed by agreement of the parties to the sale.

Mrs. Carpenter answered, denying all knowledge of or participation in the alleged fraudulent acts of and transactions between Mrs. Drysdale and Carpenter, and averring that she received no special benefits from either of them as the result of the partition settlement of the estate of Andrew Drysdale. Further answering, Mrs. Carpenter, as one of the forced heirs of Andrew Drysdale, joined the petitioners in their allegations, except such as charged her with complicity in the frauds set forth in the petition, and in their prayers for judgment.

The case was tried and resulted in a judgment in favor of the petitioners and Mrs. Carpenter, and against Mary Ann Pike and John Thomas Pike, maintaining the judicial sequestration, except as to the Esplanade street property, and decreeing that all the other property, consisting of \$13,500 of Louisiana consols, \$2,000 in bonds of the city of New Orleans, \$1,677.38, balance of cash turned over to the deceased by Carpenter, with legal interest and proceeds of certain notes, amounting to \$2,428.05, and rents at the rate of \$50 per month from July, 1898, to August, 1905, with legal interest thereon, belonged to the community between Andrew Drysdale and Julia Pike Drysdale; and further declaring that, by reason of the fraud and concealment proven in the case, the legacy of the disposable portion to the said Mrs. Drysdale be decreed forfeited; and further decreeing said community property to belong one-half to the heirs of Andrew Drysdale and one-half to the heirs of Julia Pike Drysdale; and further decreeing that the plea of manual gift urged by defendants be set aside and dismissed, as not proven, and said defendants to pay the costs of the proceeding.

Mrs. Drysdale remained in Canada for about a year after the death of her husband. She employed Carpenter as her agent to take charge of and to settle the estate of her husband. Carpenter came to New Orleans, and arranged the partition settlement already mentioned, by which the heirs of Andrew Drysdale sold to Mrs. Julia P. Drysdale all their respective succession rights for the sum of \$4,000. In May, 1897, Carpenter rendered to Mrs. Julia P. Drysdale three statements, A., B., and C, showing the result of his administration. Statement A, under the cap-

tion of "Estate Late Andrew Drysdale of New Orleans, La.," showed the following assets:

House and lot Esplanade avenue..	\$ 8,000 00
Louisiana state bonds.....	13,500 00
Cash Traders' Bank.....	4,075 00
Cash in hands of Carpenter.....	400 00
Life assurance	5,000 00
Cash Union Nat'l. Bank.....	453 98
Balance cash do.....	52 00
Cash in Germania Savings Bank..	696 40
A/C's in hands of L. P. Labatut...	378 05
Note P. Mullen.....	1,200 00
Do E. Suydam.....	300 00
" J. W. Ryan.....	200 00
" V. Viviano.....	400 00
Two shares Temperance Hall....	20 00
Jewelry and Diamonds.....	2,150 00
Silverware, pictures, and household effects	250 00
Note Tiche	\$ 150 00
" Dobell	350 00
" Clayton	8,500 00
	\$9,000 00
Considered of no value.	

\$37,075 43

Statement B, under the same caption, showed disbursements of \$4,433.01. The list embraces expenses of last illness, of funeral, and of vault and lot; also attorney's fees and \$3,000 paid to Marcella Ennis, James Drysdale, and the estate of J. Drysdale for their shares of the estate.

Statement C showed account of Carpenter with estate: Debits, \$4,540; contra, a/c of T. H. P. C., \$4,340.40; balance due estate, \$193.60. Check inclosed to balance in full. At the foot of this statement, appears the following writing:

"May 27, 1897. Received payment. [Signed] Julia P. Drysdale."

Carpenter settled his indebtedness to the estate as follows:

Undertaker's bill paid.....	\$ 370 40
Accounts paid.....	16 00
Mrs. Carpenter's share in Esplanade house	1,000 00
Commissions of 10% for settling up estate on the gross estate, less life assurance and jewelry, etc....	2,950 00
	\$4,345 40

The undertaker's bill appears in statement B.

These statements show that Mrs. Drysdale received net assets to the amount of \$32,886.02 as the result of the adjustment, exclusive of \$3,900, due by Carpenter, and settled as above.

From these statements, it appears that at the time of the death of Andrew Drysdale the assets on hand acquired during the second marriage, and presumably belonging to the community, included all the items on statement A (except \$5,000 of life insurance) and Carpenter's indebtedness to the estate, \$4,540, as per statement C. Hence the property left at the dissolution of the marriage aggregated \$36,615.43. It is shown by the testimony of Miss Pike that Mrs. Drysdale

instructed her agent, Carpenter, to settle with the heirs on the basis of \$12,000, as representing all the property belonging to the community in which she had one-half interest as widow and one-third interest as legatee. The price of \$4,000, paid the heirs for their shares in the partition sale, shows that they were settled with on that basis. It follows that Mrs. Drysdale withheld assets to the amount of \$24,615.43. The legitimate disbursements for account of the estate, as shown by statement B, amounted to \$1,433.01, leaving a balance, after the partition of January, 1897, of \$23,182.42 in the hands of Mrs. Drysdale, as executrix of the succession. The records of the court, the testimony of Mr. McCloskey, attorney for the estate and agent of Mrs. Carpenter, of Mr. Cahill, notary, who passed the act of partition sale, of Mr. Grasser, the attorney who accepted the act as agent of Mrs. Drysdale, and the testimony of Mr. Flynn, attorney of three of the heirs, show conclusively that the only property known to them as belonging to the estate of Andrew Drysdale was the improved lot on Esplanade avenue. That Mrs. Drysdale fraudulently concealed the existence of the bonds, money, and notes, as per statement A, is proven beyond question. She paid Carpenter \$2,950 to effect a settlement with the forced heirs of Andrew Drysdale on the basis of a valuation of only \$12,000. Mrs. Drysdale did not disclose to the heirs, with the exception of Mrs. Carpenter, that she claimed any of the property as her own. Mrs. Carpenter testified that she knew some of the property left by her father, to wit, Esplanade residence, Temperance Hall stock, life insurance, bonds, jewelry, and household effects; that Mrs. Drysdale told her that the Esplanade property was all there was to divide among the heirs; that the rest of the estate belonged to her, and, should she divide it with the heirs in New Orleans, it would only be squandered.

In the case at bar, the defense on the merits is that Mrs. Drysdale acquired title to over \$24,000 of the property acquired during the marriage by manual gift from her husband.

The testimony of the Pikes show that Andrew Drysdale gave to his wife \$5,000 and other sums of money. This is corroborated by the account of Mrs. Julia Drysdale with the Commercial-Germania Trust & Savings Bank from July 2, 1890, to September 28, 1893, showing following deposits:

July 2, 1890.....	\$ 71 00
" 10, 1890.....	135 00
" 20, 1891.....	250 00
January 11, 1892.....	10 00
April 16, 1892.....	20 00
July 9, 1892.....	10 00
October 12, 1892.....	5,000 00
June 30, 1893.....	114 00

No other deposits were made in this bank after June 30, 1893. On September 28, 1893, Mrs. Drysdale drew out \$5,000, and on Oc-

tober 23, 1896, \$660, and on November 24, 1896, \$37.08. Mrs. Drysdale presumably deposited the \$5,000 in some other bank. On March 23, 1896, she purchased \$3,500 in Louisiana state consols at a cost of \$3,460.62, paid by her check on the Union National Bank. It is reasonably certain from the evidence that in 1896 Mrs. Drysdale invested \$2,100 in the purchase of the mortgage notes of Mullen, Suydam, Ryan, and Viviano, listed on Carpenter's statement A. Besides the notes and bonds just mentioned, Mrs. Carpenter had, when her husband deceased, balances in bank as follows:

Germania Savings.....	\$ 696 48
Union Savings.....	453 98
Traders' Bank of Canada.....	556 68
	<hr/>
	\$1,707 06
Notes and bonds above.....	5,600 00
	<hr/>
Total	\$7,307 06
Accounts with Labatut.....	378 05

[1] This is a fair estimate of the assets that may have been derived from manual gifts of the husband. This estimate leaves a balance of about \$15,500 of assets, over and above manual gifts, wrongfully retained by Mrs. Drysdale. As executrix, she was bound to inventory and account for all the community property in her hands. As legatee of the disposable portion which could not, including donations inter vivos, exceed one-third of the testator's estate (C. C. 1493), she had no legal right to retain assets in which the forced heirs owned a two-thirds interest. The community assets in the hands of the executrix, less debts and costs, should have been divided into two equal parts, and the forced heirs of the husband should have received two-thirds of one-half of the whole.

In such a partition, the heirs would have received at least \$7,000 in cash values more than the sum of \$4,000 paid them by Mrs. Drysdale.

Defendants John Thomas Pike and Mary Ann Pike pleaded the following exceptions to plaintiff's petition, to wit:

- "(1) No cause of action.
- "(2) Prescription.
- "(3) Res adjudicata.
- "(4) Estoppel by record.
- "(5) Estoppel by conduct.
- "(6) Equitable estoppel.
- "(7) Jurisdiction *ratione materiae*.
- "(8) Jurisdiction *ratione personae*."

[3, 5] Counsel for appellants in their brief discuss estoppel by record and conduct, and prescription. As already stated, the record shows that the partition was confined to the lot on Esplanade avenue, and no other property was inventoried and appraised. The sale of the shares of the heirs was not ordered by the court, but was a matter of agreement between the major heirs. The tutrix of the minor heirs of John Drysdale was utterly without authority to enter into

any such agreement. There can be no equitable estoppel against a party who is ignorant of the true facts of the case and of his legal rights in the premises.

[4] A general plea of prescription is bad, and will not be noticed by the court. *Gaines v. Succession of Del Campo*, 30 La. Ann. 246, citing *Blake v. Bredall*, 15 La. 550, and *Mansfield v. Doherty*, 21 La. Ann. 396; *Walker v. Simon*, 21 La. Ann. 671.

The next contention of the appellants is that the court below erred in decreeing the forfeiture of the legacy of the disposable portion to Mrs. Drysdale.

[2] The Civil Code provides that:

"Heirs who have embezzled or concealed effects belonging to the succession, lose the faculty of renouncing; and they shall remain unconditional heirs notwithstanding their renunciation, and shall have no share in the property thus embezzled or concealed." Article 1029.

The Civil Code further provides that:

"If the heir secrete anything belonging to the succession, or has knowingly or in bad faith failed to include in the inventory any of the effects of the succession, he is deprived of the benefit of inventory." Article 1061.

Article 1029 is found under the title "Of the renunciation of successions," and article 1061 under that "Of the benefit of inventory and the delays for deliberating." The latter article has no application to testamentary successions. Article 1029 applies to heirs at law who, without accepting or renouncing the succession, embezzle or conceal its effects. Laws denouncing penalties or forfeitures should be strictly construed. It is only by a strained construction that a legatee of one-third of an estate, who is at the same time in possession as executrix, can be brought within the purview of article 1029. We therefore conclude that the judge a quo erred in decreeing the forfeiture of Mrs. Drysdale's share as legatee in the estate of Andrew Drysdale.

The testimony of Carpenter was taken under commission. He confessed his participation in the concealment of assets of the estate to a large amount. His testimony as to the correctness of statement A is corroborated by the fact that such statement was rendered by him to Mrs. Drysdale, was used as the basis for the settlement between them, was preserved by Mrs. Drysdale as a voucher, and by the fact that Mrs. Drysdale paid Carpenter a commission on the assets as per statement A, less insurance money, jewelry, etc. The amount of assets listed by Carpenter in 1897 as belonging to the estate of Andrew Drysdale is confirmed by the fact that Mrs. Drysdale left an estate valued at about \$39,000, which could not have been derived from any other source than the community of the second marriage.

As the law prohibited Andrew Drysdale

from disposing of more than one-third of his estate by gift or legacy, to the prejudice of his forced heirs, it really makes no difference what amount of property he gave to his second wife during their marriage, since, for the purposes of a partition, property disposed of by donations inter vivos is considered a part of the estate of the decedent. C. C. 1505.

[6] This suit is in its nature of an action for a supplemental partition of property not included in the partition of 1897, because not disclosed, or withheld by Mrs. Drysdale, in possession of the same as executrix and legatee.

The transfer of the shares of the heirs inserted in the act of partition was void as to the minor heirs of John Drysdale, and voidable as to the major heirs, for lesion and error and fraud, superinduced and practiced on the part of Mrs. Drysdale or her agent.

The assets of the estate of Andrew Drysdale received by Mrs. Drysdale were, for the most part, converted into money, or invested in real estate and securities. But she retained the Louisiana consols of the par value of \$13,500, and they were included in the judicial sequestration. As these bonds are more than sufficient to liquidate the shares of the plaintiffs, it is unnecessary to consider the status of the other assets.

After giving the record our best attention, we conclude that the proven facts warrant a judgment for \$7,000, with interest and costs, in favor of the plaintiffs and Mrs. Carpenter.

It is therefore ordered that the judgment below be amended and reversed so as to read as follows:

It is therefore ordered, adjudged, and decreed that Mrs. Marcella Drysdale, wife of Wm. Ennis, and Mrs. Jeannette Drysdale, wife of L. C. Chamberlain, Miss Hazel Drysdale, and Rodney Drysdale, heirs of John Drysdale, and Mrs. Jeannette Drysdale, wife of Thomas P. Carpenter, do have and recover of John Thomas Pike and Mary Ann Pike, the full sum of \$7,000, with legal interest thereon from January 26, 1897, until paid, in full settlement of their respective shares as heirs and legatees in the succession of Andrew Drysdale, late of the city of New Orleans, state of Louisiana. It is further ordered that the judicial writ of sequestration herein be sustained, and that the said defendants pay costs below, and that plaintiffs pay the costs of this appeal. It is further ordered that, in the event of the failure of said defendants to satisfy this judgment within the legal delays, the right is reserved to the plaintiffs to apply to the court below for an order of sale of a sufficient amount of the property under sequestration to pay this judgment and costs.

(130 La.)

No. 18,670.

KEEL et al. v. SUTHERLIN et al.

(Supreme Court of Louisiana. Jan. 29, 1912.
Rehearing Denied Feb. 26, 1912.)

(Syllabus by Editorial Staff.)

1. GUARDIAN AND WARD (§ 42*)—LANDS—SALE BY GUARDIAN.

Under Civ. Code, art. 341, providing that the sale of property of a minor shall be authorized by the judge and made at public auction, after having been duly advertised in the manner required for other judicial advertisements, during 10 days for movables and 30 days for immovables, the tutor of a minor had no power to convey a portion of the minor's interest in certain land to attorneys employed to redeem the same, notwithstanding Act No. 124, of 1906, creating a special privilege in favor of lawyers for their fees on judgments obtained by them, etc.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 173-185; Dec. Dig. § 42.*]

2. GUARDIAN AND WARD (§ 42*)—SALE OF LAND—IMPLIED REPEAL OF STATUTE.

Act No. 124 of 1906, creating a special privilege in favor of lawyers for their fees on judgments obtained by them, did not impliedly repeal Civ. Code, art. 341, prohibiting a sale of minor's property except at auction so far as to authorize a conveyance of a part of a minor's land to his attorneys in consideration of services in redeeming the same from mortgage foreclosure; such statutes not being inconsistent.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 42.*]

Appeal from First Judicial District Court, Parish of Caddo; Thos. F. Bell, Judge.

Action by Maud Curtis Keel and others against E. W. Sutherlin and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

N. C. Blanchard and J. D. Wilkinson (S. L. Herold, of counsel), for appellants. Frank J. Looney, for appellees.

PROVOSTY, J. This is a suit to annul a conveyance of minor's property as having been made without observance of the formalities prescribed by law.

No evidence was taken, the parties having entered into a written agreement that the case should be decided on the pleadings. Whether this meant that only the facts alleged in the petition should be considered, or also those in the answer, is now matter of dispute; but it is immaterial, since the defendants lose in either event.

The facts taken from the answer are as follows: In 1901 the mother of the plaintiffs sold the property in question, which was her homestead, to Spell, and delivered possession. She reserved the right to redeem, on reimbursing Spell the purchase price of \$350, with 8 per cent. per annum interest. This reservation was made in the act of sale itself, and without limit as to time. She died in 1904. The two plaintiffs, whose father

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

had died previously, were left penniless, save for the said right of redemption, considered of little or no value, and were taken charge of by relatives. In the latter part of 1904, the said land began to show signs of greater value, as an effect of the tendency of the Caddo oil field to extend in its direction, and the grandfather of plaintiffs bethought him of the advisability of redeeming; and as Spell was claiming that the right of redemption had been lost, because of not having been exercised in time, and that his title was absolute, the grandfather consulted the defendants, who are lawyers, and offered to give them one-third of the property as their compensation if they should recover it for the minors by either suit or redemption, they to furnish all moneys necessary for that purpose, and be reimbursed out of the share of the minors. The grandfather was as destitute as the minors were of the means wherewith to redeem the property. Defendants would not then undertake to furnish the money, as they thought that for making the redemption the taxes paid by Spell and interest thereon would have to be added to the purchase price and interest, and that the property was not worth that much. But they deemed it advisable that the grandfather should qualify as tutor, and that the land should be inventoried as belonging to the minors; and this was done, they acting as attorneys in the matter. Things remained in that condition for some four years, until April, 1908, when a written contract was entered into between the grandfather as tutor and the defendants, whereby the defendants were to have one-third of said property for the recovery of same by suit or redemption, they to furnish all moneys necessary for that purpose, and be reimbursed out of the share of the minors. On the day itself on which this contract was entered into, defendants tendered to Spell \$640 in redemption. Spell refused to accept. Two days later, April 10, 1908, defendants brought suit. In this suit they made the allegations, among others, that the redemption sale was a mere contract of security, and that the minors had continued to be owners of the property. On receiving service of citation, Spell concluded to accept the tender; and on April 14, 1908, executed a formal reconveyance to the minors. This was six days after the contract with the defendants had been entered into, and four days after suit had been brought. The redemption money was furnished by the defendants. On the 28th day of April, 1908, 14 days after the property had been retroceded to the minors, a family meeting was held, and the said contract by the tutor with the defendants was duly ratified, and the tutor was authorized and directed to carry out the same; and accordingly, on the same day, April 28, 1908, he did so, by executing in favor of the defendants the conveyance now sought to be annulled.

Defendants contend that the property did not belong to the minors, since their mother had sold it; that all they had was the right to redeem; and that a contract for enabling them to exercise this right was not an alienation of the property, but was, on the contrary, in fact and in law, a contract for the acquisition of the property, or of whatever portion of it would inure to them under the contract.

[1] This contention is not very consistent with the fact that the defendants caused the property to be inventoried as belonging to the minors, and alleged in the suit which they filed for the minors that the redemption sale to Spell was a mere contract of security. Again, the very fact itself of a sale being made with right of redemption, instead of out and out, indicates that the vendor has not the intention of finally parting with the ownership; and the reserve of the right of redemption is the resolutive condition on the accomplishment of which matters are placed in the same situation as if the sale had never taken place (C. C. art. 2045); so that the right of redemption in principle at least would seem to represent in the hands of the vendor the property itself. But putting aside all this, and assuming, for argument, that the only thing the minors owned was this right of redemption, this right, such as it was, was property, and by an inflexible statutory rule (article 341, C. C.), the property of minors cannot be alienated, in whole or in part, by private contract, or otherwise than at public auction. The only exception to this rule is that where the sale is made to effect a partition. And the fact of a special statute having been found to be necessary for creating this exception serves to emphasize this rule. And this rule has been enforced by this court in a line of decisions extending from *Gayoso de Lemos v. Garcia*, 1 Mart (N. S.) 338, to *Gremillion v. Roy*, 125 La. 524, 51 South. 576, and involving almost every conceivable variety of attempts at disposing of minors' property by private contract.

This court did on one occasion approve of a retrocession made in payment of the purchase price of the property where the minors were unable to pay in any other manner and were being pressed for payment. *Mahle v. Elder*, 26 La. Ann. 681. But two of the five judges dissented, and on the plain ground that the said article 341, C. C., requires the property of minors to be sold at public auction in all cases without exception. The majority of the court in that case rested their opinion on the fact that the retrocession had been for the best interest of the minors, as if the said article 341, C. C., allowed the property of minors to be sold at private sale in cases where it was to the interest of the minors to sell it in that way.

The defendants cite the case of *Holliday v. Bank*, 118 La. 1000, 43 South. 656, where the present bench approved a compromise

whereby a certain sum was accepted in settlement of a claim of minors to certain property. The distinction between a sale, or alienation, and a compromise, is that in the compromise there is not, and in the nature of things can never be, any certainty of anything having been alienated. It is simply the settlement of a lawsuit.

[2] Defendants next contend that by Act No. 124, p. 210, of 1906, an exception to said rule of article 341, C. C., has been established in favor of contracts like the one in question made with an attorney for the recovery of property.

This act does not purport by its title to do more than amend and re-enact section 2897, R. S., creating a special privilege in favor of lawyers for their fees upon the judgments obtained by them. If, therefore, it contained a provision amending the said article 341, C. C., such provision would be unconstitutional, null, and void as not having been expressed in the title of the act. The announcement of an intention in the title of an act to legislate upon the special privilege accorded to lawyers for their fees upon the judgments obtained by them would certainly not advise any one that the time-honored rule of article 341, C. C., by which the property of minors can be sold only at public auction was proposed to be modified.

The said act does not purport to do anything of the kind. It simply purports to remove the disability, real or supposed, of an attorney to contract with his client for an interest in the property to be recovered, in compensation for his services. The clause of said act relied upon as authorizing the alienation of minors' property by private sale reads as follows:

"By written contract signed by the client, attorneys-at-law may acquire as their fee an interest in the subject matter of the suit," etc.

The argument is that, inasmuch as the attorney is here authorized to acquire by private contract, the tutor is authorized to make the contract.

By the same token, the curator of an interdiction or of an absentee, the administrator, executor, or other legal representative of a succession, or of an estate in course of judicial administration, could make a like contract. In fact, all agents could, though not authorized by their principals. Manifestly, said act has no such scope as this, and means no more than that the attorney may make such a contract with those clients who have the legal capacity to make the contract.

Said act is a general law, and, as such, does not repeal, amend, or affect all those special laws governing and regulating the capacity of persons to contract, or the manner of disposing of property in particular cases. The rule is that a special law is not repealed

or amended by a general law, unless the two cannot possibly stand together, or unless the intention to repeal or amend is otherwise manifest. 36 Cyc. 1057; 26 A. & E. E. 739. As illustrations of this rule, we will cite the following: In the case of *Hayes v. Morgan's R. R. & S. S. Co.*, 117 La. 593, 42 South. 150, it was held that a statute providing that all public carriers may be sued at the point of delivery did not have the effect of repealing a special act requiring the defendant in that case to be sued at its domicile. In *Welch v. Gossens*, 51 La. Ann. 852, 25 South. 472, the court held that a provision of the charter of a city requiring for the election of the mayor a majority of all the votes cast was not repealed by the provision of the general election law to the effect that in elections held under this law the person receiving the largest number of votes should be deemed elected; and this, although the election was held under the general election law. In *Succession of Fletcher*, 2 La. Ann. 498, a law authorizing the Auditor of Public Accounts "to employ attorneys to recover money due the state from any cause whatever" was held inapplicable to the city of New Orleans, as by the law creating the office of Attorney General the state had to be represented by that officer in all suits in the parish of Orleans. In *St. Martin v. New Orleans*, 14 La. Ann. 113, it was held that the law fixing the salary of a particular city officer was not repealed by a subsequent act conferring upon the council the power to fix the salaries of all city officers. It will hardly be said that a law authorizing in general terms lawyers to contract for a part of the property in litigation, as their compensation for their services in the litigation, is incompatible with other laws regulating the forms which must be observed in disposing of property of minors, interdicts, successions, etc.

The case was tried twice in the lower court, each time by a different judge, and was decided both times for the plaintiffs.

Judgment affirmed.

(130 La.)

No. 18,794.

COPLAND v. CAREY et al.

(Supreme Court of Louisiana. Feb. 12, 1912.)

(Syllabus by the Court.)

1. CANCELLATION OF INSTRUMENTS (§ 60*)—JUDGMENT—POSSESSION OF DEFENDANT.

As Miss Desimone, one of the defendants, has already sold the property which is the subject of this suit and has no control over it, it very naturally follows that a judgment ordering her to transfer the property to the plaintiff would be of no avail, as it could not be executed by her.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 60.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. VENDOR AND PURCHASER (§ 239*)—BONA FIDE PURCHASERS—RIGHTS OF BONA FIDE PURCHASER.

Where one purchases on the faith of the public records, which show that the vendor has a clear title to the property sought to be sold, the vendee gets a title good as against the world.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 583-600; Dec. Dig. § 239.*]

Appeal from the Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

Action by Peter Copland against Santiago Joseph Carey and another. From a judgment for plaintiff, defendants and John C. Dodt appeal. Reversed, and petition dismissed.

Anthony J. Rossi, for appellant S. J. Carey. Chas. I. Denechaud, for appellant Miss Nellie Desimone. B. R. Forman, for appellant John C. Dodt. T. B. Walker, A. A. Sunseri, and Benjamin Y. Wolf, for appellee.

BREAUX, C. J. This was an action by plaintiff against defendants to annul an act of sale made by Mrs. Santiago Joseph Carey to Nellie Desimone, dated March 7, 1910, of a lot of ground, with improvements, designated by the municipal Nos. 426 and 430 North Rampart street, and to compel Carey to deliver this property to petitioner, or, in the alternative, that defendants be taxed in damages. Plaintiff claims to have bought this property from Carey on March 5, 1910, for the price of \$6,000, and alleges, substantially, that, although he bought the property, the vendee never asked him to deposit 10 per cent. at the signing of the agreement of sale as earnest money, a deposit of an amount he was always willing to make, had it been requested. The offer to buy the property made by plaintiff, and the consent to sell, are in evidence, as also the written consent to deposit with Blakely & Chapron 10 per cent. of the amount offered to bind the sale.

Late in the afternoon of the same day the attorneys of Carey notified plaintiff that, if he did not comply with his agreement and buy the property and deposit \$600 to bind the sale, and pay the cash price as agreed, suit would be instituted against him. Plaintiff avers that he did comply with this demand, and that, on the Monday following the Sunday after the sale that he could not comply on Sunday early in the day, he called upon Blakely & Chapron, who were the agents of Carey, and deposited \$600 on account of his purchase of the property sold to him at private sale on March 5, 1910, and thereafter he was really willing to pay the price; that he thereby finally completed the act of sale of the property from Carey to him; but that, none the less, Carey disregarded his agreement by selling the proper-

ty on the same day to Miss Nellie Desimone, codefendant, for \$5,000 in cash.

Richard Pearce intervened and became a party to this act, and relinquished all rights he had under an agreement of sale by Santiago Joseph Carey to him. Pearce, also, after the defendant had abandoned the idea of selling, became a prospective vendee.

Defendant Carey admitted that he signed an agreement to sell the property, but denied that plaintiff had complied with the agreement. The agreement was that the usual deposit of 10 per cent. would be made immediately. In the office of the notary, Mr. Upton, it was stated by the purchaser to Blakely & Chapron that, instead of depositing the 10 per cent. with them in accordance with the agreement, it would be deposited with his own notary, Upton. This excited the sensitiveness of the real estate agents, and it resulted in the employment by them of an attorney to compel the purchaser to comply with the agreement, and deposit the amount with them. On the trial, plaintiff sought to prove that the real estate agents had consented to a delay. That contention is not fully proven; besides, it is abundantly shown that the vendor never consented to depart from the written agreement.

Miss Desimone averred in her answer that she purchased the property in good faith on the 7th day of March, 1910, and stood upon her rights as an alleged purchaser.

The district court rendered judgment for plaintiff Copland and against defendants Carey and Miss Desimone, condemning them to deliver the property to plaintiff as owner, the plaintiff to pay the sum of \$5,400. From this judgment condemning these last-named persons to make title to plaintiff, Carey and Miss Desimone appealed, and thereafter John C. Dodt, as a third person with interest, also appealed.

It will not take much time to dispose of the case in so far as Miss Desimone is concerned, for she admitted as a witness that the property was bought in her name for the sake of convenience; and this statement is confirmed by a written letter declaring that John C. Dodt furnished the purchase price, and that she would, whenever required, make conveyance of it to him.

The exception of no cause of action:

[1] There are two propositions interposed by the defense presenting the important issues for decision; that is, in the first place that there never was a contract of sale contemplated between plaintiff and defendant Carey; and, in the second place, if there was a contemplated sale between them, then that plaintiff could still not recover the property because it had been transferred, and was in the possession of a third person as owner for a good and valid consideration. The deed under which Dodt owns has been

timely recorded, and the price paid by him.

Taking up the first proposition for discussion, the proposal to sell was clear and direct; and should have been accepted, and performance by depositing the required amount should have immediately followed. Instead, there was delay on the part of the would-be purchaser.

In the present suit the last purchaser, Dodt, was not made a party. After the evidence had been heard and proceedings had been had, this purchaser intervened. We have noted that no action was taken upon this intervention. The intervener intervened only for the appeal, but it is very evident that he cannot be ignored in matter of the title.

The district court held that the property must be delivered by Miss Desimone, the alter ego of the original owner, Carey. If this judgment were affirmed, she would be placed in a dilemma. The judgment would be ineffective, for she would be powerless to deliver the property. While it is true that she might be obliged to deliver property in her possession, she cannot be made to deliver possession of property of another, Dodt, who is in his possession under title. Whether the title is good or bad, it is the latter's title, which he can insist upon holding until legally divested.

The judgment goes no further than to order the defendant to deliver the property. The question of damages asked in event of failure to deliver the property was passed by the court *a qua* without notice. The appellee has not asked in this court for an amendment of the judgment, but only for an affirmance of the judgment. It results that the damages are entirely eliminated from the case on appeal. The defendant Carey would be exceedingly fortunate if the judgment were affirmed as rendered. He would only have to stand by and see the property delivered while he would have the price paid by each of the purchasers. He would receive two prices. That would be for him, a fortunate termination of a litigation, if it were possible under the law.

[2] We sum up the facts as follows:

D. (Dodt) bought land of C. (Carey). C. had previously sold to C. (Copland). The latter was slow in making required deposit of 10 per cent. of the price in accordance with agreement. D. evidently knew that there had been some negotiations with C. about this land. But the negotiations, on account of C.'s delay to perform his part in the proposed transaction, were brought to a close. C. said to D. that he had abandoned all idea of selling to C., in the language of business, that the negotiations were "off," as stated by C., and that he had thus declared to C. as the latter had not deposited the 10 per cent. of the price in accordance

with agreement. It was afterward that he sold to D.

Evidently D. was not over confident. On his request, another, D. (Miss Desimone), signed the deed for him as purchaser from whom he required a counter letter. It was a mere nominal sale. C., the owner, who had offered to sell to C., was for reason not explained anxious to sell. He was hasty and even precipitate in his dealings. It was his property none the less, and he had a right to be hasty if he chose.

C., wishing to hastily dispose of his property, negotiated with another real estate broker, P. (Pearce), to such an extent that the latter's name appeared in the position of one who had acquired a right in the property from P. He, Pearce, renounced that right. It does not appear to us that in thus renouncing the main features of the transaction between D. and C. were changed. There is no fraud in this act which can affect the right of D., who was not at fault in buying on the face of the record, which was clear of adverse claims, and on the assurance of all concerned, except C., that there was no pending deal between C. and D.

We might stop here, without going a step further and considering the merits. We might sustain the defendant's exception of no cause of action, but we pursued the subject further, and decided the case on the merits. We might stop here. Having considered the other issues presented, further conclusions were arrived at, disposing entirely of the disputed points, which we will now state.

There never was a contemplated sale, and plaintiff did not exert himself to acquire the property as he might and should have done. One is at liberty to offer his property for sale on his own terms and conditions. If they are accepted, whatever devolves upon the purchaser should be done. It does not appear with any degree of certainty that the promise was executed. Furthermore, the purchaser accepted the situation, and was not at fault in accepting a sale when nothing proved that another had title, for the good reason that there was no title.

For reasons stated, the judgment appealed from is annulled, avoided, and reversed. plaintiff's demand is rejected, and his petition dismissed, at his costs in both courts.

(130 La.)

No. 18,625.

STATE *ex rel.* BARTHE & LEVY *v.* MAYOR
OF CITY OF NEW ORLEANS.

(Supreme Court of Louisiana, Feb. 12, 1912.)

(*Syllabus by Editorial Staff.*)

1. COURTS (§ 122*)—JURISDICTION—AMOUNT
IN CONTROVERSY.

In a suit to restrain interference by the mayor of a city with moving picture shows,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the petition, alleging that the value of the films and the right to exhibit them exceeds \$2,000, is sufficient to show jurisdiction, though it does not separately value the possession of the films and the right to exhibit them, and the defendant does not seek to deprive plaintiff of the possession of the films.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 427; Dec. Dig. § 122.*]

2. PLEADING (§ 228*)—EXCEPTION—DETERMINATION.

The exception of no cause of action must be disposed of on the face of the petition, irrespective of the allegations of the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 584-590; Dec. Dig. § 228.*]

3. EVIDENCE (§ 32*)—JUDICIAL NOTICE—CITY ORDINANCES.

The court will not take judicial notice of city ordinances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 42; Dec. Dig. § 32.*]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by the State, on the relation of Barthe & Levy, against the Mayor of the City of New Orleans. From a judgment for defendant, relators appeal. Reversed and exceptions to petition overruled, and cause remanded to be tried on the merits.

Legler & Gleason, for appellants. I. D. Moore, City Atty., and Andrew M. Buchmann, Asst. City Atty., for appellee.

PROVOSTY, J. The petition in this case reads as follows:

"The petition of the state of Louisiana, on the relation of Barthe & Levy, a copartnership, composed of Louis F. Barthe and Rudolph J. Levy, domiciled in the parish of Orleans, respectfully represents:

"That relators are engaged in the business of exhibiting moving pictures in the city of New Orleans, and for that purpose are conducting a theater at No. 126 Royal street in this city; that they have complied with all the ordinances of the city of New Orleans necessary for the conduct of such a place, and have duly paid the license, Charity Hospital charge, and procured the necessary permit to operate.

"Relators further aver that among the various films which they propose to exhibit are moving pictures showing the scenes leading up to and including the boxing contest between James J. Jeffries and Jack Johnson.

"That the said boxing contest was held at the city of Reno, in the state of Nevada, during the early summer of the past year. That the said James J. Jeffries was known as the heavy-weight champion of the world, was of the Caucasian race, whereas the said Jack Johnson was a heavy-weight boxer of the African race, and that the outcome involved the championship of the world.

"That said contest was of international importance from a sporting standpoint, and was witnessed by most of the sporting celebrities of the world. That the said pictures depict, not only the progress of the contest, but also all the scenes incidental to the same, as well as those leading up to same, and are illustrated by a lecture, pointing out all the sporting characters and celebrities shown by the aforesaid pictures.

"Relators further represent that the same films have been exhibited in other sections of

the United States, and that many exhibitions of moving pictures displaying glove contests have been heretofore shown in this city.

"That within the past two months moving pictures, showing the contest between the said Jack Johnson and one Stanley Ketchell, were shown in this city in Canal street, and that no untoward incident occurred as a result thereof. That the said Johnson is the same person who participated in the contest with Jeffries, and the said Ketchell was known as the middle-weight champion of the world.

"Relators further represent that the theater is conducted for white people only.

"That the possession of the aforesaid films and the right to exhibit them is a valuable vested property right, and is worth more than the sum of \$2,000.

"That there is no state law nor ordinance of the city of New Orleans pretending to suppress their exhibition, or warranting any interference with them whatsoever.

"That by reason of the mere fact that one of the contestants was of African blood, while the other was of Caucasian blood, the honorable mayor of the city of New Orleans believes that the exhibition of the aforesaid films to be provocative of public disturbance, and has notified your relators that he will officially prevent the exhibition of the said films, unless enjoined by the courts.

"Relators further represent that the mayor of the city of New Orleans is without official authority to exercise any right of censorship over the exhibition of said pictures, or interfere in any respect with their mere exhibition.

"That the prevention of their exhibition amounts to taking of relators' property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States of America, and in violation of the Constitution of Louisiana.

"That the discrimination against pictures exhibiting pictures of people of African blood is based upon race, color, and previous condition of servitude, in violation of the thirteenth amendment to the Constitution of the United States of America.

"Relators further aver that they have no objection to the policing of their theater, so as to prevent any disturbance of the peace, if same is deemed necessary; but that a writ of injunction is necessary to prevent any interference with the orderly exhibition of the picture films.

"Wherefore," etc.

To this petition the mayor, made defendant, filed the following exception and answer:

"Now into this honorable court comes the mayor of the city of New Orleans, who, by the undersigned, the city attorney, the legal representative of the city of New Orleans, for answer to the rule nisi herein issued, commanding him to show cause why the preliminary writ of injunction should not issue herein, first pleads the following exceptions to the petition:

"(1) Misjoinder of parties, forasmuch as the state of Louisiana has and can have no interest in this suit, and is therefore improperly joined as plaintiff.

"(2) That this court is without jurisdiction *ratione materiae*, inasmuch as the petition does not allege the value of the right to exhibit the said pictures in the city of New Orleans.

"(3) No cause of action.

"And further answering the rule nisi, respondent says that, acting in his official authority under the ordinances of the city of New Orleans, and for the preservation of the morality and well-being of the community, and to conserve the peace and tranquillity of the com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

munity, respondent refused, as he had done in a number of other similar cases, to permit the exhibition of moving pictures showing the prize fight between the negro, Jack Johnson, and James Jeffries, a white man.

"That by Ordinance No. 3131, C. S., it is provided that no exhibition of any kind may be given in any theater where all persons are admitted for their money without having obtained from the mayor permission for that purpose, in addition to having paid the license tax thereof. The punishment for the violation of this ordinance is the infliction of a fine of \$25 for every offense.

"That by Ordinance No. 6926, C. S., the mayor of the city of New Orleans is directed 'to cause to be shut up any place of public resort whenever the maintenance of order and public safety and tranquility may require it.'

"That by Ordinance No. 1194, C. S., exhibitions of prize fighting between human beings, whenever engaged in with or without gloves of any device or design whatever, whether with or without price of admission, are declared contrary to good order and the police of the city, and are prohibited; violations of this ordinance being punishable by a fine of \$25 or imprisonment for 30 days.

"That by Ordinance No. 3971, C. S., it is provided that there shall not be exposed any object whatsoever calculated to excite scandal, immorality, or disturbance of the peace or tranquility of the community. Violation of this ordinance is punishable by fine of not more than \$25 or by imprisonment of not exceeding 30 days.

"That, acting under and in obedience of the said ordinances, and considering the exhibition of a moving picture of the prize fight between the said Jeffries and the said Johnson to be immoral, debasing, scandalous, and might tend to disturb the public peace and tranquility of this city, and it being of a character anything but edifying to be witnesses [witnessed] by women and children, respondent, as aforesaid, refused to give a permit, and has ever refused to give a permit, for the exhibition of the said prize fight.

"Respondent further says that the city authorities have not and will not attempt to disturb or interfere with the exhibition of moving pictures in the theaters operated by the plaintiffs in this suit. But, unless restrained by judicial authority, will continue to prevent and defeat the exhibition of the character and kind referred to in plaintiff's petition.

"Respondent further says that, in view of the fact that respondent is acting under and by authority of municipal ordinances as above referred to, and all of which are hereto annexed and made part of this answer, the action of the plaintiffs herein is an effort to enjoin by civil process the execution of penal ordinances.

"Wherefore," etc.

The case was tried on the exceptions. That of no cause of action was sustained, and the suit dismissed. Defendant and appellee has filed an answer to the appeal, asking that the exception of want of jurisdiction *ratione materiae* be also sustained.

[1] In support of this plea to the jurisdiction, the argument is that the only allegation contained in the petition as to the amount in dispute is as to the value of the possession of the said films and the right to exhibit them; and that, as the right to exhibit said films is not valued separately from the possession of the said films, and as the

plaintiffs are not deprived of the possession of the films, but only of the right to exhibit them, the petition contains no positive and certain allegation of the amount in dispute.

This argument is purely specious; the possession and the right to exhibit the films go together as one and the same thing for all purposes of the plaintiffs' suit.

[2] The exception of no cause of action has to be disposed of on the face of the petition, irrespective of the allegations of the answer. The allegations of the answer will come up for consideration only when the case comes to be tried on the merits. As presented in this petition, the case is one where the mayor simply, by the virtue of his office of mayor, and without being authorized thereto by the law or by ordinance, has taken upon himself to suppress the films in question. The city charter confers upon the mayor no such authority.

[3] Whether the ordinances referred to in the answer would serve as a sufficient basis for such action, is a question to be considered on the merits. Such ordinances have not been introduced in evidence, and are not as yet before the court. For all the court knows, they do not exist. The court cannot take judicial notice of them. State courts do not take judicial notice of city ordinances. *Wigmore, Ev., par. 2572, p. 3608; Hassand v. Municipality, 7 La. Ann. 495; City v. Boudro, 14 La. Ann. 303; City v. Hill, 32 La. Ann. 1161; City v. Labatt, 33 La. Ann. 107; Baton Rouge v. Cremonini, 35 La. Ann. 367; State v. Ciesl, 44 La. Ann. 85, 10 South. 409; State v. Callac, 45 La. Ann. 30, 12 South. 119; State ex rel. Judge, 105 La. 759, 30 South. 105.*

Judgment set aside, exceptions overruled, and the case remanded to be tried on merits.

(130 La.)

No. 18,875.

LEE v. BAHAM.

(Supreme Court of Louisiana. Feb. 23, 1912.)

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; Thomas M. Burns, Judge.

Action by Elias Lee against Nise C. Baham for divorce. Judgment for plaintiff, and defendant appeals. Affirmed.

Miller & Morphy, for appellant. Ellis & White, for appellee.

MONROE, J. This is a suit for divorce, on the ground of adultery. There are two witnesses who testify positively to the fact, and the circumstances are strongly corroborative. Defendant made an attempt to impeach the witnesses, which the judge a quo, who saw them, heard them, and probably knew them, evidently concluded was not successful. Our examination of the record has led us to the same conclusion.

The judgment appealed from is therefore affirmed.

SANDERS v. McALISTER BROS. & CO.
(No. 15,564.)

(Supreme Court of Mississippi. March 11, 1912.)

BILLS AND NOTES (§ 362*)—TRANSFER—ASSIGNEE OF BONA FIDE PURCHASER—RIGHTS.

Defendant executed a note to a savings bank in consideration of a certificate of deposit for an equal amount drawing a higher rate of interest. The note was deposited by the savings bank as security for a debt to the C. Bank, which took it before maturity and without notice of any defense thereto. After the note matured, and the failure of the savings bank, the C. Bank attempted to collect the note. There was no claim of a set-off made until the C. Bank sold the note at public auction to plaintiff, with other collaterals, after maturity, when defendant gave notice of its alleged right of set-off. *Held*, that plaintiff, having acquired the note from the C. Bank, which was a holder in good faith, was himself a bona fide holder for value, and that the certificate of deposit was, therefore, not available as a set-off as against plaintiff's rights.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 937-943; Dec. Dig. § 362.*]

Appeal from Circuit Court, Tippah County; W. A. Roane, Judge.

Action by J. B. Sanders against McAlister Bros. & Co. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Sharp & McIntyre, for appellant. Stephens & Kenneday, for appellees.

MAYES, C. J. The record in this case shows that during the years 1906 and 1907 the Tishomingo Savings Institution was a banking corporation engaged in the banking business and having its domicile at Corinth, Miss. It also appears that this Institution had several branch banks, one of which was located at Ripley, known as the Ripley Branch of the Tishomingo Savings Institution. This Ripley Branch decided to issue certificates of deposit to such persons as would take them, these certificates of deposit to bear interest at the rate of 12½ per cent. per annum. The reason for issuing these certificates of deposit is stated in the record to have been for the purpose of inducing the persons to whom they were issued to conduct their banking business with the branch bank. The following is a copy of the certificate of deposit issued by this branch bank: "No. G. \$500.00. Ripley Branch of the Tishomingo Savings Institution, of Corinth, Miss. This certifies that McAlister Brothers & Co. has placed with the Ripley, Miss., Branch of the Tishomingo Savings Institution the sum of five hundred dollars to be used by the said Institution in its business. The said Tishomingo Savings Institution agrees to pay on said sum 12½ per centum per annum, payable annually. This certificate shall be redeemable at its face value

upon surrender to the said Institution at any time after five years from date hereof, and the said Institution at its election may call in this certificate for payment at its face value and cancellation at any time after one year from date hereof. This certificate is nonnegotiable, and is transferable only on the books of said Institution by the holder hereof, in person or by attorney, upon the surrender of this certificate properly indorsed. The holder hereof agrees that he will not sell this certificate without first giving the said Institution an option to purchase the same at its face value within three months prior to the sale. In testimony whereof the said Tishomingo Savings Institution has caused this certificate to be signed by its president, and its corporate seal to be affixed, and to be attested by the manager of its Ripley Branch, this the first day of January, 1907. Tishomingo Savings Institution, by J. W. Taylor, President. [Seal.] Attest: Jno. Y. Murry, Jr., Manager of Ripley Branch."

The legal principles controlling the decision in this case are not affected by the reasons which controlled the Branch Bank in issuing these certificates, and we shall not attempt to pursue the reasons. It is sufficient to state that the Branch Bank issued the certificates, and McAlister Bros. & Co. bought one, and paid for it with their note at 8 per cent. and due on January 1, 1908. The note appears in full below. In order to obtain one of these certificates, it was not necessary that the party purchasing it should actually place the money on deposit with the bank, as the certificate stated that he had done; but the bank undertook to exchange these certificates of deposit bearing 12½ per cent. interest for the note of a person for the same amount as the certificate, the note to bear interest at 8 per cent. In other words, the bank issued its certificate for \$500, agreeing to pay the holder 12½ per cent. interest, and in exchange therefor to take a note at 8 per cent. The note executed by McAlister Bros. & Co. was as follows: "\$500.00. Corinth, Miss., January 1, 1907. One year after date, we, and each of us, promise to pay to the Tishomingo Savings Institution, of Corinth, Miss., the sum of five hundred dollars, with interest thereon, from date until paid, at the rate of 8% per annum, payable at the Tishomingo Savings Institution, Corinth, Mississippi, and said interest payable annually, and in case of failure to pay said interest at its maturity, then said interest is to bear interest at the rate of ten per cent. per annum from its maturity till paid, and in case this note is placed in an attorney's hands for collection, we agree to pay ten per cent. on the amount due, for attorney's fees. No. 2139. [Signed] McAlister Bros. & Co. Address, Ripley, Miss. Due, [Merchants]."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

After the execution of this note, it was indorsed by the Tishomingo Savings Institution, by J. W. Taylor, President, and about March 5, 1907, was placed as collateral security with the National Bank of Commerce, of St. Louis, for a debt that was owing the National Bank of Commerce by the Tishomingo Savings Institution. Subsequently the National Bank of Commerce of St. Louis indorsed this note to the Ripley Bank or order for collection. The Tishomingo Savings Institution, prior to March 5, 1907, was indebted to the National Bank of Commerce of St. Louis in the sum of about \$40,000, and about the 5th day of March, 1907, this note of McAlister Bros. & Co. was placed with the National Bank of Commerce as collateral to secure the payment of their indebtedness to this bank. It seems that the note in question was not originally placed as collateral security to the indebtedness due by the Tishomingo Savings Institution to the National Bank of Commerce, but after the making of the note by McAlister Bros. & Co., and delivering it to the Tishomingo Savings Institution, the McAlister Bros. & Co. note was substituted in lieu of some other collateral, which the Tishomingo Savings Institution had placed with the National Bank of Commerce, which had matured. The Tishomingo Savings Institution failed some time in December, 1907, and failed to pay its indebtedness to the National Bank of Commerce, and this last bank was forced to undertake to realize on its securities. Before this note of McAlister Bros. & Co. became due, the note falling due January 1, 1908, the National Bank of Commerce, on November 28, 1907, wrote to McAlister Bros. & Co., calling their attention to the fact that they were the holders of the note for \$500, dated January 1, 1907, and maturing on January 4, 1908, and asking them to advise the bank what their intentions were with reference to the payment of this note. Again, on February 18, 1908, after the note became due, the National Bank of Commerce wrote to McAlister Bros. & Co., again calling their attention to the fact that the note was due, and asking for a remittance on same. Again, on March 10, 1908, they wrote, asking that the note be paid, and calling attention of McAlister Bros. & Co. to the fact that it was long past due. The record does not show that there was ever any reply made by McAlister Bros. & Co. to these letters. On November 28, 1908, the National Bank of Commerce sold this and several other notes held by it as collateral security at public auction, and this note was bought in by George L. Edwards for the account of the bank, and afterwards the National Bank of Commerce sold this note to one J. B. Sanders, the plaintiff in this suit. Sanders instituted a suit on this note as the legal holder thereof, commencing same by attachment.

It is needless for us to pursue the course

of the proceedings, since there is no question involved as to that; but the defense made to the note by McAlister Bros. & Co. is that the note was procured to be executed by fraud, and is void for want of authority in the Ripley Branch Bank to issue the certificate; that at the time these certificates of deposit were issued the Branch Bank represented itself to be solvent, when, as a matter of fact, it was insolvent, and in great need of money, and was issuing these certificates to various parties for the purpose of raising funds and saving itself from financial ruin; and that these facts were unknown to the makers of the note. At the time that this note was taken by the National Bank of Commerce as collateral, it is not shown that they had any knowledge of the alleged fraud; nor is it shown that McAlister Bros. & Co. ever stated to them, when written to about the note, that they had any such defense, or any defense. On the hearing the trial court gave a peremptory instruction to find for the defendants, and from this judgment an appeal is prosecuted.

This record, as a matter of fact, nowhere shows that, at the time of the issuance of these certificates of deposit, the bank issuing same was insolvent; but, on the contrary, the manager of the bank, Mr. Murry, testified that at the time these notes were taken and the certificates of deposit issued there was no question as to the solvency of the bank. Therefore, so far as this record shows, when this note was given and the certificate of deposit issued, the bank was entirely solvent, and its insolvency on the 10th day of December following grew out of the panic occurring about that time and the inability of the bank to realize on its securities. There was no want of consideration for the execution of this note, and no failure of consideration. The note was executed for the certificate of deposit, and the certificate of deposit was delivered. At the time of delivery it seems to have been a solvent certificate; but later the bank failed, and the certificate of deposit became valueless. But innocent holders of the note cannot be affected by this. If a person give his note for stock in a corporation, and the corporation prove a failure, the validity of the note is not affected thereby. The principle involved in this case is the same. McAlister Bros. & Co. got what they undertook to buy with this note. It is difficult for us to understand from this record on what theory the lower court could have granted a peremptory instruction to find for the defendants. It does appear that on November 28, 1908, at the time this note was sold, but long after it had become due, and long after the attention of McAlister Bros. & Co. had been called to the fact that the National Bank of Commerce held the note, Mr. Murry went to St. Louis at the time of the sale, and gave notice to

all persons present at the sale that there was an offset outstanding against this note. But such was not a fact in law. Murry undertook to give notice that these notes were given for certificates of deposit, and that the bank had paid nothing on these certificates of deposit; but this notice was given, as stated before, in 1908 or 1909, and long after the National Bank of Commerce had become an innocent holder of same. When this notice was given, it appears that the plaintiff was present and afterwards bought the notes from the Bank of Commerce; but, of course, plaintiff is fully protected by the good faith of the National Bank of Commerce, the original holder of the note.

Section 4001 of the Code of 1906 is not involved in this litigation in any way. Under the proof in this record, McAllister Bros. & Co. had no defense to this suit on the note, either before or after notice of the assignment. Murry testifies that these certificates of deposit were issued in good faith and for the purpose of procuring the business of the persons to whom they were issued, that the certificates were issued at a time when the banks were solvent and to extend the business of them, and there is no testimony in contradiction of this.

Reversed and remanded.

SMITH et al. v. LEAVENWORTH.

(No. 14,477.)

(Supreme Court of Mississippi. Nov. 20, 1911.

Suggestion of Error Overruled
Dec. 18, 1911.)

1. TAXATION (§ 734*)—TAX SALE—VALIDITY.

A sale of land for taxes is void, where the land is assessed to the state, although, before the sale was had, some one drew a line through the word "State" on the assessment roll, as such change did not constitute an assessment of the land to unknown owners.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.*]

2. TAXATION (§ 805*)—TAX TITLES—VALIDITY.

When a person and his grantor have been in possession of land for three years under a tax deed, by the express provisions of Code 1892, § 2735, he obtains a good title, although the tax sale was void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.*]

3. TAXATION (§ 776*)—ALLUVION—TITLE.

A tax deed, describing the property as "all fractional section 24," conveys title to the alluvion which has formed in the river adjoining section 24.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1544, 1545; Dec. Dig. § 776.*]

4. NAVIGABLE WATERS (§ 44*)—ALLUVION—TITLE.

The owner of land adjoining a river owns the alluvion in front of his land, notwithstanding such alluvion first commenced to form in

front of adjoining property, and extended later in front of his property.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 266-278; Dec. Dig. § 44.*]

5. NAVIGABLE WATERS (§ 44*)—ALLUVION—APPORTIONMENT.

The general rule for apportioning alluvion between adjoining owners, by giving each the same proportion of the new shore line as they possessed of the old line, is not absolute, and exceptional circumstances may require a different rule.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 266-278; Dec. Dig. § 44.*]

Appeal from Chancery Court, Coahoma County; M. E. Denton, Chancellor.

Suit by George Leavenworth against J. F. Smith and the Paepcke-Leicht Lumber Company. From the decree, defendants appeal. Affirmed.

Complainant filed a bill in chancery, setting up his claim to fractional section 24, township 27, range 7 W., in Coahoma county, and alleging that defendant Smith claimed title to section 14 adjoining and that said lumber company claimed the timber on said section 14 by virtue of a deed from said Smith. The bill further alleges that, at the time this land was originally platted, sections 14 and 24 were fractional sections, extending to the old river bank, which touched the corner of sections 13, 14, and 24; that for many years accretions have formed along the old river bank, and the channel of the stream was changed; that on the land so formed by these accretions there has grown up valuable timber, and that said lumber company claiming under its deed from Smith, has entered upon a certain portion of the accretions between the north and south line passing through said corner and an east and west line passing through said corner; that the accretions in question lie south of section 14 and west of section 24, and extend to the present channel of the Mississippi river. The bill further alleges that said lumber company is claiming the ownership of the timber on this disputed territory by virtue of its conveyance from Smith, which conveys, among other sections, section 14, "together with all accretions thereof. The latter include the accretions lying west of a line extending from the corner of sections 13 and 14 and 24 south to the bank of the river, as well as accretions lying west of sections 14 and 11." This conveyance was dated December 29, 1906. The prayer of the bill is for an injunction to restrain the cutting by the defendants of the timber of the complainant on this disputed land, and for a decree settling the rights of the parties to the accretions formed in this territory, and establishing a boundary line between the accretions belonging to complainant and defendants. The answer of the appellants at-

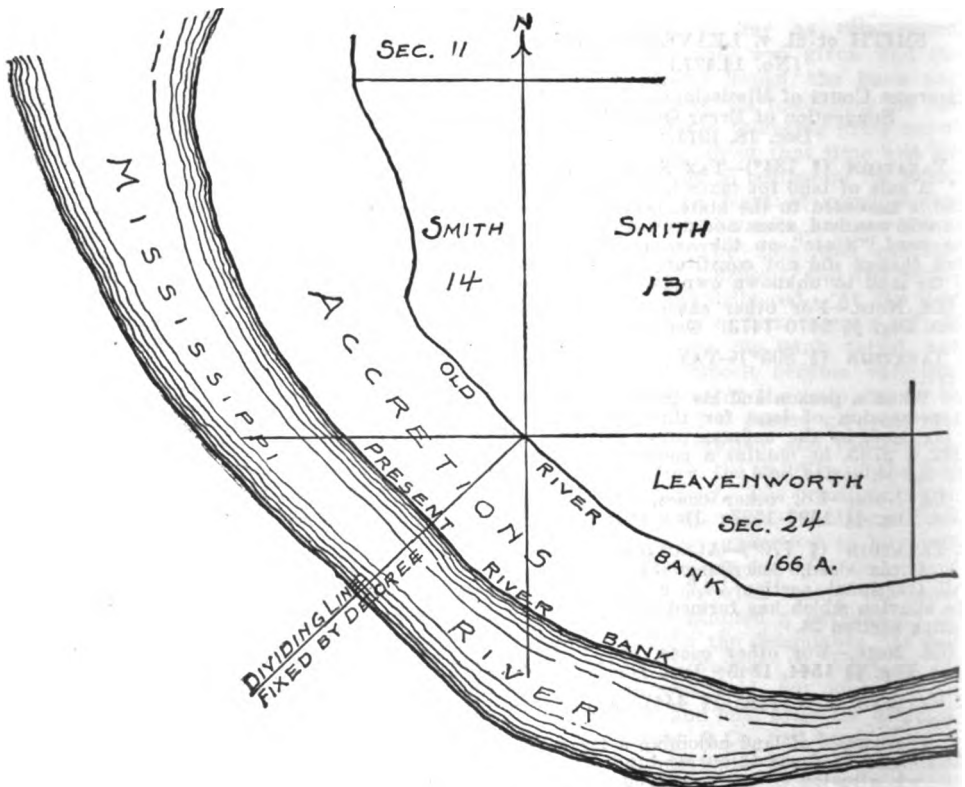
tacks complainant's title to section 24 and to the accretions in question, and is a general denial of the allegations of the bill of complaint. The answer does not set up any claim of title to section 24 in the defendants. On the hearing the court entered a decree dividing the accretions between the complainant and defendants, giving equal acreage to each of the accretions in the disputed territory. From this decree defendants appeal.

The complainant derails his title as follows: "Tax Collector to the State of Mississippi. Tax sale, dated 1876. Consideration, \$16.80. Sold for the taxes of 1875. Lands conveyed: All fractional section 24, township 27, range 7 west." "Tax Collector to the State of Mississippi. Tax sale, dated 3/8/81. Consideration, taxes for 1880. Lands conveyed: All fractional section 24, township 27, range 7 west." "State of Mississippi to John Scott. State tax deed, dated 5/20/99, filed 1/8/01, recorded 1/21/01, Book 1, page 527. Consideration, \$40.50. Land conveyed: All fractional section 24, township 27, range 7 west." "Jno. Scott to George Leavenworth. Warranty deed, dated 3/13/02, filed 3/19/02, recorded 3/19/02, Book 4, page 22. Consideration, \$80.00. Lands conveyed: All fractional section 24, township 27, range 7 west." It will be seen that complainant relies upon a tax sale in March, 1876, for the taxes of 1875, and also a tax sale in March,

1881, for the taxes of the year 1880. It seems that there was some irregularity in the sale for the taxes of 1875, and the lands were again listed, and sold in 1881 for the taxes of 1880. Complainant entered into possession of said section 24 in the year 1899, by agreement with Scott, who afterwards executed a deed to the property, and relies, also, on adverse possession for a space of three years after two years from the date of said tax sale, as provided by section 2735 of the Code of 1892, brought forward as section 3095, Code of 1906.

The defendants attack the sale of 1881, because the land was not subject to taxation at that time; the title being then vested in the state under the sale of 1876, which latter was a valid sale. It seems that the Attorney General had found some objection to the sale, and had ordered the lands struck from the Auditor's records and certified back to the county. When they were so certified back, the sheriff or clerk, or some one in the office of one of these officers, ran a line through the word "State" on the assessment roll, said land being listed as belonging to the state, and the sheriff then proceeded to resell the land to the state for the taxes of 1880. The land is described in the tax deed as "all fractional section 24, township 27, range 7 west."

The following is a plat of the premises in question:



O. G. Johnston, for appellants. Maynard & FitzGerald and Wynn & Wasson, for appellee.

SMITH, J. [1] The sale of the land in controversy to the state for taxes in the year 1881 was void, for the reason that it was at the time assessed to the state. The two faint pencil lines, if such in fact there be, drawn through the word "State" on the original assessment roll, cannot be held to constitute a change in the assessment, and to be the equivalent of an assessment to "Unknown," as contended by counsel for appellee. Public records cannot be altered in such a loose and irregular manner.

[2] Appellee and his grantor have been in possession of this land for more than three years under this tax deed, and consequently appellee's title has been perfected by section 2735, Code 1892. *Hamner v. Yazoo Delta Lumber Co.* (this day decided) 58 South. 466.

[3] One of appellant's contentions is that the alluvion formed opposite fractional section 24 was not embraced within the description of the land as assessed and sold. This description was as follows: "All fractional section 24, township 27, range 7 west, county of Coahoma." In addition to this, the assessment roll, under the heading "Number of Acres Held by State for Taxes," contains the figures 166. When fractional section 24 was originally surveyed and platted, it contained only 166.16 acres; the Mississippi river forming its southern and western boundary. Afterwards a large amount of alluvion formed opposite this section and section 14, the property of appellant lying north of it. This alluvion became the property of the owners of the mainland, constituted a part of each section to which it formed, and is included in the assessment and deed describing the land by its sectional number. *Jefferies v. East Omaha Land Co.*, 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 878; *Towell v. Etter*, 69 Ark. 34, 63 S. W. 53; *Crill v. Hudson*, 71 Ark. 390, 74 S. W. 299.

[4, 5] The fact that the alluvion began forming north of section 24 and opposite the land of appellant is immaterial. When it reached appellee's shore line in its southward progress, he became entitled to his portion thereof. The general rule for apportioning alluvion between coterminous landowners is to give each such proportion of the new shore line as they possessed of the former shore line before the formation of the alluvion. This rule, however, is not absolute, and there may be exceptional cases requiring the application of a different rule, as was done in the case at bar, in order that justice may be done. This, however, it is unnecessary for us to decide, for the reason that the method of apportionment adopted seems to be more beneficial to appellant than the general rule, and we do not understand him to seriously

complain of the method of apportionment, but of the fact that any apportionment was made at all.

Affirmed.

EVANS et al. v. HOYE. (No. 15,213.)
(Supreme Court of Mississippi. March 11, 1912.)

ACCOUNT (§ 17*)—JURISDICTION—COMPLETE RELIEF.

Complainant E., having purchased supplies from defendant for three years without having a settlement, made a written contract by which defendant agreed that on E.'s payment to defendant of \$100 rent for certain real property for 1910, and on further payment of \$1,000, defendant would convey the property to him; E. having previously occupied the premises under a parol contract to purchase, which defendant had repudiated, and under which E. had expended \$740 in improvements. In the fall of 1910 he paid defendant \$100 rent and all of the account for supplies for that year, and was then advised that defendant held a deed of trust against him for \$293, secured by certain live stock and agricultural products, in which P. was trustee. E. denied the validity of this instrument, but alleged that he had become indebted to C. for \$100, secured by a deed of trust on two bales of cotton from the first cotton gathered and marketed in 1910, which was prior to the trust deed under which defendant claimed, and alleged that the first two bales were sold and the proceeds applied to the payment of \$100 rent to defendant, the next two bales to the payment of the supply account, and the fifth and sixth bales to complainant B. in settlement of the debt to C., which had been assigned to him, and that thereafter the alleged trustee, P., seized the fifth and sixth bales by writ of replevin, claiming under the alleged deed of trust, which E. repudiated. The bill also denied any indebtedness to defendant, and prayed an accounting and an injunction to prevent P. and a justice of the peace from continuing the replevin suit. *Held*, that defendant was estopped, by his retention of the proceeds of the first two bales sold, to prosecute the replevin suit for the two bales of cotton involved, and, having no lien for supplies, the bill stated a case for an accounting in equity, in which a preliminary injunction against the replevin suit should have been retained until the final hearing, and complete justice done.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 77-88; Dec. Dig. § 17.*]

Appeal from Chancery Court, Newton County: Sam Whitman, Jr., Chancellor.

Suit by Henry Evans and another against H. W. Hoyer. From a decree dissolving a temporary injunction and dismissing the bill, complainants appeal. Reversed and remanded.

The appellants, Evans and Blackburn, filed a bill in the chancery court, alleging that Evans had entered into a parol agreement with appellee, Hoyer, by which it was agreed that Hoyer should convey to Evans a certain tract of land for the sum of \$800, to be paid within three years; that immediately Evans began to make improvements upon the place, and had expended the sum of \$740

thereon, which money was expended in good faith; that at the end of the third year—that is, in 1909—Evans demanded of Hoyer a deed to the place, which was declined. The bill averred that Evans had bought supplies from Hoyer during the years 1907, 1908, and 1909, but had never been able to get a settlement of his account; that, not being able to get the deed to the property when demanded, he had entered into a written contract with Hoyer on December 16, 1909, whereby it was agreed that he should pay Hoyer \$100 rent for the year 1910, and upon the payment of the further sum of \$1,000 Hoyer was to deed him the place; that in the fall of 1910 Evans paid Hoyer \$100 rent and all of the account for supplies for the year 1910, and took his receipt therefor; that thereupon Hoyer advised Evans that he held a deed of trust against him for \$293, secured by certain live stock and agricultural products, in which deed of trust one Powe was trustee. Evans denied that he had executed any such instrument, and that he owed Hoyer anything. The bill further alleged that Evans had become indebted to R. D. Cooper for the sum of \$100, and had secured same by deed of trust on two bales of cotton from the first gathered and marketed in the year 1910; that, however, the first two bales of cotton were sold and the proceeds applied to the payment of \$100 rent to Hoyer, and the next two bales of cotton were sold and the proceeds applied to the payment of the supply account for 1910; that the fifth and sixth bales of cotton were sold and delivered to R. A. Blackburn (also complainant in this suit) in settlement of the Cooper note, which had been assigned to Blackburn; that thereafter the trustee, Powe, seized these last-mentioned bales of cotton by virtue of a writ of replevin, claiming the right to this cotton because of the deed of trust alleged to have been given by Evans to Hoyer, which deed of trust was dated subsequent to the date of the filing of the Cooper deed of trust. The bill further alleged that the deed of trust held by Hoyer was not executed bona fide, but, if it did exist, was obtained by fraud. The bill denies any indebtedness, and prays that an injunction issue to prevent the trustee and the justice of the peace before whom the replevin suit had been brought from proceeding further, and prays for an accounting with said Hoyer, and for judgment against him for the improvements. Upon this bill a preliminary injunction was granted.

The appellee answered, denying most of the averments of the bill, and made his answer a cross-bill. Affidavits were taken by each party, and on motion of the appellee the chancellor dissolved the injunction, denied the appellants relief, dismissed the bill, and granted an appeal to the Supreme Court. In support of the motion to dissolve, the defendants set up three causes: (1) Be-

cause the bill of complaint shows on its face that complainant is not entitled to the relief prayed for, there being no equity in the bill. (2) Because the bill seeks to enjoin proceedings in a court of law pending before a justice of the peace for cotton alleged to be the property of Blackburn by virtue of a deed of trust executed by Evans in favor of Cooper on the first two bales of cotton raised by Evans in the year 1910, while the bill shows on its face that the cotton in controversy was not the first two bales. (3) Because the bill shows that Evans was a tenant of Hoyer during 1910, and Hoyer had a prior lien upon all products grown on the premises during said year and for supplies furnished by said Hoyer.

R. D. Cooper, for appellants. W. I. Munn and J. R. Rowzee, for appellee.

WHITFIELD, C. This was a case in which the injunction should have been retained until the final hearing. There was no possible way in which the various equities involved in this case could have been settled in the replevin suit. The court had jurisdiction to go into the mutual accounts existing between the parties, and settle the equities arising therefrom, and to determine the matter of the claim for improvements. Hoyer was estopped to prosecute the replevin suit for the two bales of cotton here involved. Hoyer had no lien for supplies, because they had been paid, as shown by his receipted accounts; nor for rent for the year 1910, for that had been paid, as shown in the same way. Hoyer could not retain the proceeds of the first two bales of cotton, belonging to Blackburn, and institute this replevin suit for the other two bales. The chancery court, therefore, was the proper forum in which to litigate these three questions—the accounts, the estoppel, and the claim for improvements. The court erred in prematurely dissolving the injunction. It was peculiarly a case where the injunction should have been retained for full proof on the final hearing, and complete justice could be done between the parties.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the decree is reversed, the injunction reinstated, and the cause remanded.

FULLER v. STATE. (No. 15,521.)

(Supreme Court of Mississippi. March 11, 1912.)

1. COURTS (§ 26*) — "INHERENT POWERS" — SCOPE.

The "inherent powers" of a court are such as result from the very nature of its organization, and are essential to its existence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and protection, and to the due administration of justice (citing 4 Words and Phrases, 3605).

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 82, 83, 88-90; Dec. Dig. § 26.*]

2. CRIMINAL LAW (§ 1001*)—SENTENCE—SUSPENSION OF EXECUTION—JUDICIAL POWER.

A court has no power, inherent or otherwise, to suspend execution of a sentence during defendant's good behavior.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2554-2559; Dec. Dig. § 1001.*]

3. CRIMINAL LAW (§ 1001*)—SENTENCE—INVALID PROVISION—EFFECT.

A void provision in a judgment, that sentence be suspended during accused's good behavior, does not prevent his punishment, even though a longer period of time than that for which he was sentenced has elapsed since the sentence was imposed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2554-2559; Dec. Dig. § 1001.*]

On suggestion of error. Overruled.

For former opinion, see 57 South. 6.

Potter & Hindman and Burch & Stricker, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

SMITH, J. Appellant suggests that we have confused the question of a court's power to suspend the imposition of a sentence with the question of its power to suspend the execution of a sentence after it has been imposed. As the first question is not involved herein, we will pretermit any discussion thereof, and confine ourselves to the latter; that is, the power of a court to suspend the execution of a sentence after it has been imposed.

[1, 2] Power to suspend the execution of its sentence has not been conferred upon any court in this state by our Constitution or statutes, and consequently, if such power exists at all, it must be one of the inherent powers of courts, or be derived from the common law. The inherent powers of a court are such as result from the very nature of its organization, and are essential to its existence and protection, and to the due administration of justice. *Watson v. Williams*, 36 Miss. 331; *In re Waugh*, 32 Wash. 50, 72 Pac. 710; 8 Am. & Eng. Ency. Law, 28; 4 Words and Phrases, 3605. It cannot be said that power to suspend the execution of a sentence is essential to the existence or protection of a court, or that it is essential to the due administration of justice, and consequently it has no such inherent power.

At common law, while a judgment remained unreversed, there were only two methods by which its execution could be stayed or prevented: First, by a reprieve, which merely delayed the execution of the sentence; second, by a pardon, which operated as an absolute bar to its execution. The power to pardon was never claimed or exercised by the courts, and will not be fur-

ther considered here. Reprieves were of three kinds: First, *ex mandato regis*; second, *ex arbitrio iudicis*; third, *ex necessitate legis*. The first and third kinds of reprieves have no relevancy here, and we may dismiss them from further consideration. Reprieves *ex arbitrio iudicis*, or discretionary reprieves, were granted by the courts only in exceptional cases, to prevent abuses of their process, and to prevent irreparable injustice from being done to defendants. Some of the circumstances under which this power was exercised were, as follows: "Where the defendant pleads a pardon, which, though defective in point of form, sufficiently manifests the intention of the crown to remit the sentence, where it seems doubtful whether the offense is included in some general act of grace, or whether it amounts to so high a crime as that charged in the indictment. The judge sometimes also allows it before judgment, or at least intimates his intention to do so, as when he is not satisfied with the verdict, and entertains doubts as to the prisoner's guilt, or when a doubt arises, if the crime be not within clergy, or when, from some favorable circumstances, he intends to recommend the prisoner to mercy." 2 Hawkins, Pleas of the Crown, 657; 2 Hale, Pleas of the Crown, 412; 1 Chitty's Crim. Law, 757; Archbold's Crim. Plead. & Prac. 206; 4 Blackstone, 394. This right of the court did not rest on any express authority or recognized principle, but stood alone on ancient usage. 2 Dyer, 205.

In Bishop's New Crim. Proced. (4th Ed.) § 1299, it is stated that "the law of respite or reprieve appears to apply alone to capital cases." In 1 Chitty's Crim. Law, 577, and *Sterling v. Drake*, 29 Ohio St. 457, 23 Am. Rep. 762, the statement is positive that reprieves were granted only in capital cases. As all of the early cases which have come under our observation, upholding this power of the court, were cases wherein the death penalty was imposed, it may be that the law relative thereto applies only to capital cases. It is unnecessary, however, for us to so hold here, for the reason that the power to suspend the execution of a sentence was never exercised or claimed by the courts at common law, as we have heretofore stated, except when necessary to prevent an abuse of their process, or to prevent irreparable injustice from being done a defendant.

It may be also, as some courts have held, that the difference between our present criminal procedure and that of the early English courts is such that it is no longer necessary or proper for the courts to grant reprieves; but it is unnecessary for us to express any opinion on this point, for the reason that the reprieve or suspension granted in the case at bar was not for the purpose of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

preventing an abuse of the court's process, or to prevent any injustice from being done appellant, but simply that it might be held over him in *terrorem*, thereby forcing him to refrain from further acts of lawlessness and to become a more law-abiding citizen. Since the "great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind," it may be that courts ought to possess the power within certain limits to suspend the execution of a sentence during good behavior; but the question before us is not what power the courts ought to have, but what their power in fact is. Among the cases upholding the foregoing views are *Spencer v. State* (Tenn.) 140 S. W. 597; *State v. Abbott*, 87 S. C. 466, 70 S. E. 6, 33 L. R. A. (N. S.) 112; *In re Webb*, 89 Wis. 354, 62 N. W. 177, 27 L. R. A. 356, 46 Am. St. Rep. 846; *Tanner v. Wiggins*, 54 Fla. 203, 45 South. 459, 14 Ann. Cas. 718.

We have examined all the cases called to our attention which are in real or apparent conflict with the views here expressed, and have re-examined those cited in support of our former opinion, and find that all of them are either not in point or were decided upon a misconception of the inherent powers of a court, or of what the common law upon this point was. In *State v. Crook*, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260, which was a case involving the power of the court to suspend the imposition of a sentence and not of the execution thereof, the court, in upholding the power of the lower court so to do, frankly stated that it could find no precedent to support its decision. We are therefore of the opinion that we erred in holding that the lower court had inherent power, or any power at all, to suspend the execution of a sentence during the good behavior of a defendant.

[3] It does not follow from this, however, that appellant must now go unpunished. That portion of the judgment which directed "that the jail sentence be suspended during the good behavior of the defendant" was void, and the defendant could have been taken into custody immediately upon the rendition of the judgment. The postponement of his imprisonment was presumably with his consent, for it does not appear that he at any time requested, as he had the right to do, to be taken into custody, and consequently he cannot now object to being called upon to serve it. "*Consensus tollit errorem.*" *Gibson v. State*, 68 Miss. 241, 8 South. 329. It is immaterial that a longer period of time than that for which appellant was sentenced has elapsed since the sentence was imposed. While at large under this void order, to which he did not object, appellant was in the same situation that he would have been, had he simply escaped from custody. In

such case the sentence is not satisfied until it has been actually served. *Ex parte Bell*, 56 Miss. 282; 1 Bishop's Crim. Proced. (4th Ed.) 1384; *Spencer v. State* (Tenn.) 140 S. W. 597; *State v. Abbott*, 87 S. C. 466, 70 S. E. 6, 33 L. R. A. (N. S.) 112; *Miller v. Evans*, 115 Iowa, 101, 88 N. W. 198, 56 L. R. A. 101, 91 Am. St. Rep. 143; *Neal v. State*, 104 Ga. 509, 30 S. E. 858, 42 L. R. A. 190, 69 Am. St. Rep. 175; *Tanner v. Wiggins*, 54 Fla. 203, 45 South. 459, 14 Ann. Cas. 718.

We have carefully examined the cases cited in opposition to this view, and think they were erroneously decided. In our former opinion we held that the exercise by the courts of the power to suspend the execution of a sentence was not in conflict with that clause of our Constitution which gives to the Governor the power "to grant reprieves and pardons"; but, since we have ascertained that the court below had no power to suspend the execution of appellant's sentence, it now becomes unnecessary for us to express any opinion upon this point, and all that was said in our former opinion relative thereto is hereby withdrawn.

The suggestion of error is overruled.

EICHELBERGER v. COOPER. (No. 15,314.)
(Supreme Court of Mississippi. March 11, 1912.)

REFORMATION OF INSTRUMENTS (§ 36*)—DEEDS—MISTAKE.

Where complainant claimed that, when he conveyed certain land to defendant, it was agreed that complainant was not the sole owner of one of the tracts, and that he was conveying only his interest therein, that he left the preparation of the deed to defendant, who was an attorney, and assumed that it would be drawn according to their agreement, but that instead the deed contained a warranty of title as to both tracts, and defendant had refused to pay the purchase price because of an alleged breach of such warranty, a bill alleging such facts sufficiently stated a case for equitable relief in the reformation of the deed.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 141-146; Dec. Dig. § 36.*]

Appeal from Chancery Court, Scott County; Sam Whitman, Jr., Chancellor.

Action by W. H. Eichelberger against A. W. Cooper. From a decree dismissing the bill, complainant appeals. Reversed and remanded.

Appellant was complainant in the court below, and appellee was defendant. The case comes to the Supreme Court from a decree overruling complainant's demurrer to defendant's plea to the jurisdiction and dismissing the original amended bills of complaint. The pleadings disclose the following facts: On August 27, 1904, the appellant conveyed by warranty deed to appellee two tracts of land in Scott county, Miss.; one tract containing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index.

16 acres and the other containing 81 acres. The consideration was \$500; the deed reciting that it was paid. At the time the deed was executed, appellee executed his note for \$450, due November 15, 1905, with 10 per cent. interest from date until paid. The note recites on its face that it is for the land conveyed by the said deed. The note was not paid when due and some time thereafter, to wit, December 4, 1909, appellant filed a bill in chancery for the purpose of foreclosing his vendor's lien upon said property for the balance of the purchase money, as evidenced by said note, together with interest thereon; the bill of complaint praying that the said property should be sold and applied to the satisfaction of the indebtedness, and praying also for general relief.

Defendant answered, admitting the transaction, and entering a general denial of the allegations of the bill, and alleging that complainant had represented that he had a perfect title to the property, whereas other parties had an interest in one of the tracts of land; that defendants had subsequently sold to one Duckworth all of said property, and given him bond for title, before he discovered that there were outstanding claims against it, and that upon discovering this he had filed suit to perfect the title, but had subsequently obtained quitclaims from the claimants; that thereafter he discovered that other parties claimed an interest in the property, and he had filed another suit to perfect the title, which was still pending; and that he had an agreement with complainant that whatever the costs of perfecting the title amounted to should be deducted from any balance due complainant by defendant. He further states that he would not be protected on his warranty until his title is perfected; that a vendor's lien was not reserved by complainant when he sold the same to the defendant; and that when the title is perfected, if anything is due complainant, it will be paid.

Thereafter, by leave of the court, complainant, who avers that he had just been advised that the property had been conveyed away by the defendant, filed an amended bill, stating that it was understood between him and the defendant that complainant was not the sole owner of the smaller of the tracts of land, certain of his relatives having an undivided interest therein, and that he only conveyed his interest to said smaller tract, and that he had left the preparation of the deed to the defendant, who was an attorney, and assumed that it was drawn in accordance with their agreement, and prayed for a reformation of the instrument, and for a sale of the property to satisfy his lien.

To this amended bill the defendant filed a plea to the jurisdiction, setting up the fact that he had no interest in the land, having conveyed same to Duckworth, who was an

innocent purchaser for value, without notice that the title was not perfect, and that the chancery court is without jurisdiction to render any decree in said cause affecting said land; that whatever right of action complainant might have is exclusively cognizable in a court of common-law jurisdiction.

To this plea complainant demurred on the grounds: (1) That the plea stated no complete defense; (2) that, since the bill asks for reformation of the contract, equity has original jurisdiction; (3) that when jurisdiction is obtained for one purpose, it will be retained for complete relief; (4) that the plea does not deny that complainant is entitled at least to a portion of the relief prayed for.

Issue was joined, and on the hearing the chancellor overruled the demurrer, sustaining the plea, and dismissing the bills.

Watkins & Watkins, for appellant. R. L. Bullard, for appellee.

WHITFIELD, C. The chancery court had jurisdiction, in the case made by this record, to reform the deed between Eichelberger and Cooper, if the proof warranted any reformation, and then to adjust the equities between the parties, and enter a decree for the one or the other, as the evidence might warrant, on the matters growing out of the warranty on the one hand and the costs to Cooper of getting in the outstanding claims on the other.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the decree is reversed, and the cause remanded, to be proceeded with in accordance with this opinion.

KENNINGTON v. HEMINGWAY et al. (No. 15,391.)

(Supreme Court of Mississippi. Feb. 12, 1912.
Suggestion of Error Overruled March 11, 1912.)

1. FRAUDULENT CONVEYANCES (§ 104*) — TRANSFERS — VALIDITY—STATUTES—"GOODS AND CHATTELS."

Gifts of necessary wearing apparel and personal ornaments by a husband to his wife are not within Code 1906, § 2522, providing that a transfer of "goods and chattels" between husband and wife is invalid as against third persons, unless in writing and acknowledged and filed for record as a mortgage; the object of the statute being to prevent the perpetration of frauds by pretended transfers between husband and wife, without affecting the duty of a husband to support his wife in a way suitable to her station and his condition in life.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 337-344; Dec. Dig. § 104.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3130-3137; vol. 8, p. 7678.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. STATUTES (§ 181*)—CONSTRUCTION—LEGISLATIVE INTENT.

The court in construing a statute must seek the real intention of the Legislature, and then adopt such interpretation as will give effect thereto, though the interpretation may be beyond or within the mere letter of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

Appeal from Chancery Court, Hinds County; G. G. Lyell, Chancellor.

Suit by R. E. Kennington against T. W. Hemingway, and others. From a decree of dismissal, complainant appeals. Affirmed.

In 1882 T. W. Hemingway married Mrs. E. L. Catchings, and they lived together as husband and wife until 1907, when they were divorced. In the year 1903, while they were living together, and while Hemingway was solvent and in a prosperous condition, he gave his wife a diamond ring worth about \$700, which she kept after they were divorced, with his full knowledge and consent, and which she wore as a personal ornament. In the year 1908 Mrs. Catchings, who had then been divorced from Hemingway, pledged the ring with a bank in Jackson as security for a loan. The money was loaned Mrs. Catchings without knowledge of the fact that the ring had been given her by her husband, and without knowledge that Hemingway had ever owned it, or that he was indebted to the appellant. In November, 1909, the appellant, Kennington, obtained a judgment against Hemingway, and enrolled the same on December 11, 1909. Afterwards, on April 12, 1910, Hemingway was adjudicated a bankrupt, and a trustee appointed to take charge of his estate.

Afterwards the appellant filed a bill in chancery against Hemingway, Mrs. Catchings, the bank, and the trustee of the bankrupt estate of said Hemingway, as parties defendant. Later, Mrs. Catchings having died, the suit was revived against the administrator of her estate. The prayer of the bill was that the court adjudicate the rights of the various parties to the ring held by the bank, and that the judgment against Hemingway in favor of Kennington be decreed to be a lien upon said ring, and that said ring be sold to satisfy the lien. Appellant contends that the gift by Hemingway to his wife of this ring is in violation of section 2294 of the Code of 1892, requiring gifts between husband and wife to be in writing and acknowledged and recorded, in order to be valid against claims of third persons.

Mayes & Longstreet, for appellant. Watkins & Watkins and John B. Ricketts, for appellees.

SMITH, J. [1] One of the questions presented by this record, and which, if answered in the affirmative, will dispose of the whole case, is this: Is a gift by a husband to the

wife of a personal ornament—in this instance, a diamond ring—"valid as against any third person," when such gift is not evidenced by a written instrument, acknowledged and recorded as provided by section 2294 of the Code of 1892, the same being section 2522 of the Code of 1906? In the case at bar the ring was given to the wife eight years prior to the institution of this suit, at a time when the husband was solvent, and without any intention on his part of defrauding any one. This section is as follows: "A transfer or conveyance of goods and chattels, or lands or any lease of lands, between husband and wife, shall not be valid as against any third person, unless the transfer or conveyance be in writing and acknowledged and filed for record as a mortgage or deed of trust is required to be; and possession of the property shall not be equivalent to filing the writing for record, but, to affect third persons, the writing must be filed for record." The words "goods and chattels" are ordinarily broad enough to cover all personal property; and if the statute is to be interpreted literally, all gifts of personal property, including necessary wearing apparel and ornaments for the person, made by a husband to the wife, must be by a written instrument, acknowledged and recorded; and in that event the fact that the wearing apparel of every person is exempt from execution or attachment would not aid the wife, for as against any third person such wearing apparel would be dealt with as if it remained the property of the husband. If this is the meaning of the statute, its absurdity is manifest, and that the Legislature intended such a result is inconceivable.

[2] After the enactment of this statute it still remained, as it had always been, the legal and moral duty of the husband to support his wife in a way suitable to her situation and his condition in life. In order to do this he must, among other things, give her necessary wearing apparel, and ought, so far as his means will permit and within the limits of a wise economy, to give her such personal ornaments as good taste and the usage of the society in which she moves demands. If the innumerable gifts which he must make her in discharging this duty, if the transfer of each article of clothing and each personal ornament, must be by a written instrument, acknowledged and recorded, the statute requiring it would not only be an absurd one, but would be unreasonable, and would result in such great inconvenience and expense as to be intolerable. Legislators must be presumed to be reasonable and sane men, "and to intend the natural, direct, and probable consequences of their acts, that these shall not be absurdly or unreasonably construed, and therefore that they intend to avoid absurdities and nonsense." 4 Hughes, Grounds and Rudiments of the Law, 1104. If, there-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

fore, wearing apparel and personal ornaments can be, consistent with the rules of construction, excluded from the operation of this statute, it becomes our duty to do so. *Railroad Co. v. Hemphill*, 35 Miss. 17; *Ingraham v. Speed*, 30 Miss. 410; *Board of Education v. Railroad*, 72 Miss. 236, 16 South. 489; 2 *Lewis' Suth. Statutory Construction* (2d Ed.) §§ 488-490, and authorities there cited; 86 Cyc. 1108. At the same time, we must bear in mind that the enactment of a wise or a foolish statute is for the determination, not of the courts, but of the lawmakers; and when the intention of the lawmakers is clearly understood, the statute must be enforced as written, it matters not to what absurd results such enforcement may lead.

Human language is not a perfect vehicle for conveying thought, and it frequently happens that words used have a broader or narrower meaning than that intended by the person using them. One of the maxims of the common law, therefore, is "*verba intentioni debent inservire*." (Words are to be governed by the intention.) As was said by this court in *Board of Education v. Railroad Co.*, supra: "It is familiar learning that, in the construction of statutes, courts chiefly desire to reach and know the real intention of the framers of the law, and, reaching and knowing it, then to adopt that interpretation which will meet the real meaning of the Legislature, though such interpretation may be beyond or within, wider or narrower than, the mere letter of the enactment." The courts have repeatedly given the words "goods, wares, and merchandise," as they appear in various statutes, a broad or restricted meaning, according to the context and the evident purpose of the statutes. See authorities cited in 20 Cyc. 1272; 14 A. & E. Ency. of Law, 1079. The object of the statute was to prevent the perpetration of frauds, by means of pretended transfers of property between husband and wife. *Gregory v. Dodds*, 60 Miss. 549. The number of frauds that could be perpetrated by means of pretended gifts by husbands to wives of wearing apparel and personal ornaments is so infinitesimal in comparison with the number of such gifts that must be made by husbands in the discharge of the duty to support their wives, and the inconvenience, expense, and absurdity of evidencing such gifts by a written instrument, acknowledged and recorded, is so great, that the conclusion is irresistible that the Legislature did not intend to include such gifts within the meaning of the words used in the statute. In *Queen v. Clarence*, L. R. 22 Q. B. Div. 65, it was said by Lord Coleridge that "in such a matter as the construction of a statute, if the apparent logical construction of its language leads to results which it is impossible to believe that those who framed or those who passed the statute contemplated, and from which one's own

judgment recalls, there is in my opinion good reason for believing that the construction which leads to such results cannot be the true construction of the statute."

The question propounded in the beginning of this opinion must therefore be answered in the affirmative, and the decree of the court below must be affirmed.

HOGGETT v. STATE. (No. 15,544.)

(Supreme Court of Mississippi. March 11, 1912.)

1. CRIMINAL LAW (§ 982*)—SUSPENSION OF SENTENCE—RIGHT OF ACCUSED TO COMPLAIN.

One who does not object to the suspension of a sentence, which is merely the continuation of the case for sentence at a subsequent time, may not complain at a subsequent term that the court has no authority to suspend sentence, and that by doing so it lost jurisdiction to proceed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

2. CRIMINAL LAW (§ 982*)—SUSPENSION OF SENTENCE—VOID PROVISIONS.

A proviso, in an order suspending sentence, that accused leaves and remains away from the county, is void.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

3. CRIMINAL LAW (§ 982*)—SUSPENSION OF SENTENCE—POWER OF COURT.

A court of record has no power to indefinitely suspend sentence after plea or verdict of guilty; and, where accused did not object, the court at a later term may impose sentence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

On suggestion of error. Overruled.

For former opinion, see 57 South. 9.

SMITH, J. Appellant having entered a plea of guilty to an indictment charging her with the unlawful sale of intoxicating liquor, the court, instead of imposing sentence immediately, ordered that the same be suspended, "provided the defendant leaves and remains away from Forrest county, Miss." At a later term of the court, on motion of the district attorney, sentence was imposed upon appellant on this plea entered at the former term. From this last judgment this appeal is taken.

[1] Her complaint is that the court was without authority to suspend the imposition of the sentence, and that by having done so it has lost jurisdiction to proceed further in the cause, and that, if mistaken in this, the second judgment was entered without any evidence being introduced tending to show that she had failed to leave and remain away from Forrest county. Suspending the imposition of a sentence is nothing more than a continuance of a case after plea or verdict of guilty for sentence at a later time. It is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

unnecessary for us to decide what the rights of appellant would have been, had the court below arbitrarily and over her objection continued her case after her plea of guilty had been entered for sentence at a subsequent term, for the reason that appellant did not object to this course being pursued, and, consequently, she cannot now complain thereat. "Concensus tollit errorem." *Gibson v. State*, 68 Miss. 241, 8 South. 329.

[2, 3] The proviso contained in the order suspending the sentence was void. What was this day said in the case of *Fuller v. State*, 57 South. 806, relative to the power of a court to suspend the execution of a sentence, applies with equal force to the power of the court to indefinitely suspend the imposition of a sentence after plea or verdict of guilty. The case remained in the same attitude, therefore, as if it had simply been continued for sentence with appellant's consent.

It does not appear that appellant was induced to plead guilty by reason of any expectation on her part that the imposition of sentence would be suspended. What her rights, therefore, would have been, in that state of case, is not here involved.

Suggestion of error overruled.

HOGGETT v. STATE. (No. 15,545.)
(Supreme Court of Mississippi. March 11, 1912.)

On suggestion of error. Overruled.
For former opinion, see 57 South. 9.

SMITH, J. This case is controlled by the opinion this day delivered in the case of *Emma Hoggett v. State* (No. 15,544) 57 South. 811.
Suggestion of error overruled.

HOGGETT v. STATE. (No. 15,546.)
(Supreme Court of Mississippi. March 11, 1912.)

CRIMINAL LAW (§ 1211*)—PUNISHMENT—SECOND OR SUBSEQUENT OFFENSES—INDICTMENT.

To justify a greater punishment for a second or subsequent offense than is imposed for the first offense, the indictment must allege that the offense is a second or subsequent offense, or it will be deemed a first offense.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3302; Dec. Dig. § 1211.*]

On suggestion of error. Sustained, and judgment of trial court reversed, and cause remanded for proper sentence.

For former opinion, see 57 South. 9.

SMITH, J. Appellant having entered a plea of guilty to an indictment charging her with vagrancy, the court, instead of imposing sentence immediately, ordered that sentence be "suspended, on payment of costs, so long as defendant remains out of the

state." At a later term of the court the following judgment was rendered on appellant's plea of guilty: "Comes the district attorney, who prosecutes for the state, and it appearing to the court that the defendant had entered a plea of guilty to said charge at a former term of this court, and that sentence had been suspended during good behavior, and it further appearing to the court that the defendant has been guilty of illegal conduct, it is therefore considered by the court that the defendant be sentenced to jail for 90 days, and pay all cost, and stand committed until paid; 60 days of said sentence is suspended during the time defendant remains away from Hattiesburg, Miss."

This case is controlled by the opinion this day rendered in *Emma Hoggett v. State*, except that the sentence imposed upon appellant was that provided for a second conviction of the crime of vagrancy, and her plea of guilty was to an indictment which contained no allegation that she had been theretofore convicted of a similar offense. "Where a greater punishment may be inflicted for a second or subsequent violation of a penal law than for the first, the fact that the offense is a second or subsequent violation must be directly averred in the information or indictment, to justify the increased punishment; else it will not be considered as an offense for which the increased punishment can be inflicted, but will be deemed to be the first offense." 10 Ency. of Pl. & Pr. 489; 22 Cyc. 356.

The suggestion of error is sustained, the judgment of the court below reversed, and the cause remanded for proper sentence.

GRIFFIN v. STATE. (No. 15,411.)
(Supreme Court of Mississippi. Dec. 18, 1911.
Suggestion of Error Overruled March 11, 1912.)

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Jim Griffin was convicted of grand larceny, and appeals. Affirmed.

Flowers, Alexander & Whitfield and Burch & Stricker, for appellant. Carl Fox, for the State.

PER CURIAM. Affirmed.

ILLINOIS CENT. R. CO. v. HAYNIE.
(No. 15,294.)

(Supreme Court of Mississippi. March 11, 1912.)

Appeal from Circuit Court, Lincoln County; D. M. Miller, Judge.

Action by Walter C. Haynie against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mayes & Longstreet, for appellant. Clem V. Ratcliff and Green & Green, for appellee.

PER CURIAM. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ILLINOIS CENT. R. CO. v. RINGOLD.

(No. 15,563.)

(Supreme Court of Mississippi. March 12, 1912.)

Appeal from Circuit Court, Carroll County; G. A. McLean, Judge.

Action by A. D. Ringold against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Dismissed.

PER CURIAM. Appeal dismissed.**ILLINOIS CENT. R. CO. v. JOSLIN.**

(No. 15,517.)

(Supreme Court of Mississippi. March 12, 1912.)

Appeal from Circuit Court, Panola County; W. A. Roane, Judge.

Action by S. L. Joslin against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Dismissed.

PER CURIAM. Appeal dismissed.**PACKARD v. ROTHENBERG.** (No. 15,193.)

(Supreme Court of Mississippi. March 11, 1912.)

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action between C. H. Packard and Levi Rothenberg. From the judgment, Packard appeals. Affirmed.

F. V. Brahan, for appellant. A. S. Bowman, for appellee.

PER CURIAM. Affirmed.**MERCANTILE LUMBER & SUPPLY CO. v. EDMONDSON LUMBER CO.**

(No. 15,671.)

(Supreme Court of Mississippi. March 11, 1912.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.

Action between the Mercantile Lumber & Supply Company and the Edmondson Lumber Company. From a judgment, the Mercantile Lumber & Supply Company appeals. Affirmed.

Hathorne & Hearst, for appellant. J. E. Davis, for appellee.

PER CURIAM. Affirmed.**YAZOO & M. V. R. CO. v. PLEW.**

(No. 15,258.)

(Supreme Court of Mississippi. March 11, 1912.)

Appeal from Circuit Court, Coahoma County; Sam C. Cook, Judge.

Action by Dr. E. Plew against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

ment for plaintiff, and defendant appeals. Affirmed.

F. A. Montgomery, for appellant. Brewer & Watkins, for appellee.

PER CURIAM. Affirmed.**MICHAELS v. CUNNINGHAM.**

(No. 15,482.)

(Supreme Court of Mississippi. March 11, 1912.)

Appeal from Circuit Court, Prentiss County; John M. Mitchell, Judge.

Action between J. D. Michaels and J. A. Cunningham. From the judgment, Michaels appeals. Dismissed.

PER CURIAM. Appeal dismissed.**DOUVILLE TIMBER & LAND CO. v. KEYSTONE LUMBER & BRICK CO.**

(No. 15,688.)

(Supreme Court of Mississippi. March 11, 1912.)

Appeal from Chancery Court, Jefferson County; J. S. Hicks, Chancellor.

Action between the Douville Timber & Land Company and the Keystone Lumber & Brick Company. From the judgment, the Douville Timber & Land Company appeals. Reversed by consent.

T. M. Miller, for appellee.

PER CURIAM. Reversed by consent.**MISSISSIPPI CENT. R. CO. v. ROBY.**

(No. 15,324.)

(Supreme Court of Mississippi. March 11, 1912.)

Appeal from Circuit Court, Lincoln County; D. M. Miller, Judge.

Action by T. M. Roby against the Mississippi Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jeff Truly, for appellant. Cassidy & Butler, for appellee.

PER CURIAM. Affirmed.**ENGLISH v. NEW ORLEANS & N. E. R. CO.**

(No. 15,279.)

(Supreme Court of Mississippi. March 11, 1912.)

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action between M. C. English and the New Orleans & Northeastern Railroad Company. From the judgment, English appeals. Affirmed.

Fewell & Cameron, for appellant. A. S. Bozeman and R. H. Thompson, for appellee.

PER CURIAM. Affirmed.

BLUTHENTHAL & BICKART v. CITY OF COLUMBIA.

(Supreme Court of Alabama. Feb. 8, 1912.)

1. BILLS AND NOTES (§ 327*) — BONA FIDE PURCHASER.

A purchaser of negotiable paper in due course, before maturity, without notice of defenses, is a bona fide holder for value, and takes the notes free from defenses available between the original parties.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 792; Dec. Dig. § 327.*]

2. BILLS AND NOTES (§ 375*) — BONA FIDE PURCHASER—ILLEGAL NOTES.

A note which is expressly made illegal and void by statute is void in the hands of even otherwise bona fide holders without notice of illegality, but if the statute merely, expressly or impliedly, makes the consideration illegal, the note will be valid in the hands of a bona fide purchaser without notice, though the burden is upon such purchaser to show that he is a bona fide holder.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 792; Dec. Dig. § 375.*]

3. PLEADING (§ 214*) — DEMURRER — ADMISSIONS.

A demurrer to the rejoinder admits the facts alleged therein.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.* Corporations, Cent. Dig. § 2044.]

4. BILLS AND NOTES (§ 333*) — BONA FIDE HOLDER.

A corporation purchased from a firm composed of persons, who afterwards became stockholders and officers of the corporation, a negotiable note executed by a city for liquors purchased for the dispensary, which note was illegal in the hands of the firm because executed in violation of the dispensary law. *Held*, that the corporation was not a bona fide holder; knowledge of the partners being imputed to the corporation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 806-811; Dec. Dig. § 333.*]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by Bluthenthal & Bickart against the City of Columbia. From a judgment for defendant, on overruling a demurrer to the rejoinder, plaintiff appeals. Affirmed.

Espy & Farmer, for appellant. W. L. Lee, for appellee.

MAYFIELD, J. Appellants, a private corporation, sued appellee, a municipal corporation, on a bond or note executed by the municipality to the appellants, on July 29, 1907, due one year thereafter. To the complaint the defendant filed a plea alleging that at the time the note sued on was executed, appellant corporation was a partnership composed of Aaron Bluthenthal and Monroe Bickart; that defendant was a municipal corporation, carrying on a dispensary under a general law known as the Moody dispensary law; that the appellants as such partnership attempted to sell to the defendant a

lot of spirituous, vinous, and malt liquors, on credit, in express violation of the dispensary law; that the consideration of the note sued upon was the liquor thus sold to the municipal corporation in violation of the statute; that, the consideration of said note being illegal, the note itself was void; and that the plaintiff was not entitled to recover thereon in this action. To this plea the plaintiff corporation filed a replication, alleging that the note sued on was negotiable, and that the partnership sold and assigned it to the plaintiff corporation before maturity and for value. To this replication the defendant filed a rejoinder to the effect that said Bluthenthal and Bickart, who composed the partnership which sold and assigned the note to the corporation, were both stockholders, officers, and managers of the corporation to which the note was so sold and assigned, and that they, as partners and as officers and managers of the plaintiff corporation to which the note was sold and assigned, had full knowledge of all the facts set forth in the plea showing the note to be illegal and void, at the time it was so transferred and assigned to the plaintiff corporation. To this rejoinder the plaintiff demurred, and, its demurrer being overruled, it declined to plead further, and suffered judgment, from which judgment this appeal is prosecuted.

A contract very similar to the one forming the original consideration for this note was considered by this court in the case of Bluthenthal & Bickart v. Headland, 132 Ala. 252, 31 South. 87, 90 Am. St. Rep. 904. In that case it was ruled that the sale of liquors, upon credit instead of for cash, to a dispensary, for the town of Headland, was in violation of the statute providing for the establishment and maintenance of dispensaries, and such sale was therefore illegal and void, and that no cause of action could arise from such contract, nor would assumpsit lie upon an implied contract, though the city received and enjoyed the benefit of the goods sold. The correctness of that decision is not assailed on this appeal, but the case is attempted to be distinguished upon the theory that this is an action upon a negotiable note by a bona fide purchaser for value, without notice of the illegal consideration upon which it was founded. The rejoinder, however, alleged that the plaintiff corporation, through its officers and managers, had notice of the illegal consideration before, and at the time, it became the purchaser and transferee of said note, and that it was therefore chargeable with notice, and liable to all defenses available against the note in the hands of the original payee.

We are of the opinion that the ruling of the trial court in this case must be sustained, for several reasons, some of which we will now proceed to state.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] It is true, as contended by appellant, that a purchaser of a negotiable paper in due course of business, before maturity and without notice of defenses that existed between the original parties, or that had subsequently arisen, is a bona fide holder for value, and as such takes the instrument free from defenses which were available between such original parties. *Brown v. Bank*, 103 Ala. 123, 126, 15 South. 435. In the hands of such a holder such an instrument is discharged of all legal and equitable defenses to which it may have been subjected before it came into such bona fide hands. This has been repeatedly held by this court to be true, even when the note was put into circulation by fraud, or was based upon an illegal consideration.

Mr. Randolph, in his work of *Commercial Paper*, and Mr. Daniel, in his work on *Negotiable Instruments*, both say that such a paper is in some respects like the currency of the country, a circulating credit, and that before maturity the genuineness of the obligation and the solvency of the parties are the sole matters to be considered in determining its value, and that such a paper has been aptly called a courier without language, which carries on its face its own history, and that the policy of the law requires that it shall tell its own history, and have effect in the hands of innocent holders for value according to what appears on its face. *Daniel, Neg. Instr.* § 1, 769a; *Randolph, Com. Pap.* § 14; *Brown v. Bank*, 103 Ala. 123-127, 15 South. 435.

[2] There are, however, a few exceptions to this rule, one of which is where a statute creates the prohibition which makes the note illegal, and thus makes it absolutely void in the hands of every holder, whether he has had such notice or not. Among such statutes, says Story, seem to be those against gaming and usury in England and in some of the American states. *Story, Prom. Notes*, § 192, p. 151. Mr. Daniel (*Neg. Instr.* § 197) asserts the same doctrine; and in substance says (section 198) that if a statute merely declares, expressly or by implication, that the consideration shall be deemed illegal, the bill or note founded upon such consideration will be valid in the hands of a bona fide holder without notice, but that the burden of proof will be upon such party to show that he is a bona fide holder without notice. He further says (section 199) that where a statute declares that all payments made for spirituous liquors sold contrary to law "should be held and considered to have been received in violation of law, without consideration, and against law, equity, and good conscience." It was held that a bill given for liquor so sold was valid in the hands of a bona fide holder without notice. As stated by these authorities, and as often repeated by this court, courts will not lend their aid to carry into effect contracts entered into by parties

with a view of accomplishing anything which is prohibited by law; but it is equally well settled that if the consideration of a negotiable paper is against law, yet it cannot be avoided on that account in the hands of a bona fide holder who is not a party nor privy to the illegality of the consideration, subject, however, to the exceptions before noted.

The law upon this subject has been well stated by Chief Justice Shaw, in the case of *Cazet v. Field*, 9 Gray (Mass.) 330, where he decided that as a rule a party cannot recover who is in the wrong himself, nor give a better title than he himself holds. But the law goes further in favor of commerce, and gives a high degree of character and honor to bills of exchange and negotiable promissory notes in the hands of indorsees without actual or constructive notice of anything affecting their validity or credit. If indorsees take such paper when overdue, this should put them on inquiry as to why it had not been paid at maturity; and such papers must always be taken in the ordinary course of business, and not in unusual circumstances. He further says, in the same case, that the general rule with regard to commercial paper founded on illegal consideration must be taken with some exceptions, and affirms what Daniel and Story said with regard to the provisions of some statutes against usury and gaming made notes, given in violation of the statute. In those cases the statute usually declares that notes will be absolutely null and void to all intents and purposes, or, as it is sometimes said, it is applied to the contract, and not to the party.

It is unnecessary to decide whether or not the municipal corporation in this cause could issue a negotiable paper, under the view we take of the whole case. Counsel for appellant insists that the Municipal Code authorized the municipality to issue negotiable paper. This, we do not decide, for two reasons: (1) Because it is not necessary to a decision of this case; and (2) because the Municipal Code had not been adopted, nor the statute passed upon which its codification was based, when the action in question was instituted.

[3, 4] Moreover, if the facts alleged in the rejoinder be true—and on demurrer they must be so considered—the plaintiff corporation had notice of the illegality of the contract and consideration upon which the note in question was founded; and it was therefore not a bona fide purchaser for value without notice.

It is insisted by the appellant, however, that knowledge of the defense to the note which was acquired by Bluthenthal & Bickart before they became stockholders or officers and managers of the plaintiff corporation was not knowledge or notice of the corporation of such defense. This question was fully considered and discussed in a recent opinion in the case of *Hall & Brown Co. v.*

Haley Co., 56 South. 726, in which the authorities are fully reviewed.

The rejoinder in the case brings the plaintiff corporation fully within the rule declared by this court in *Lea v. Mercantile Co.*, 147 Ala. 421, 42 South. 415, 8 L. R. A. (N. S.) 279, 119 Am. St. Rep. 93, and within the rule declared in *Goodbar, White & Co. v. Daniel*, 88 Ala. 590, 7 South. 254, 16 Am. St. Rep. 76, which is clearly pointed out in the opinion by Somerville, J., in the *Hall-Brown-Haley Case*, supra.

If the facts set up in the rejoinder be true, notice to the plaintiff corporation of this defense would have had to be communicated to it through *Bluthenthal & Bickart*; and certainly no rule of law would require a person to be notified of that of which he already has notice, and which would impart to him no information.

We therefore conclude that the trial court properly overruled the demurrer to the rejoinder, and the judgment appealed from must be affirmed.

Affirmed. All the Justices concur.

WHITLEY v. WILLINGHAM & BELL.

(Supreme Court of Alabama. Feb. 17, 1912.)

1. EQUITY (§ 232*)—BILL—DEMURRABILITY.

Where a bill in equity for the reformation of a contract and damages shows a right to a reformation, a demurrer to the whole bill for want of equity will be overruled, although the bill shows no right to damages.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 508; Dec. Dig. § 232.*]

2. SALES (§ 1*)—CONTRACT—INDEFINITENESS—VALIDITY.

A contract for the sale of cotton is not void because it does not specify the quality or grade of cotton to be delivered; the vendor being required to deliver a merchantable article.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1, 3-5; Dec. Dig. § 1.*]

3. REFORMATION OF INSTRUMENTS (§ 1*)—GROUNDS OF DENIAL.

A contract will not be reformed to permit complainant to recover nominal damages for its breach.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. § 1; Dec. Dig. § 1.*]

Appeal from Clay County Court; E. J. Garrison, Judge.

Action in equity by the members of the firm of *Willingham & Bell* against *J. S. Whitley* for reformation of a contract and damages for its breach. From a decree overruling demurrers to the bill, defendant appeals. Affirmed.

R. G. Rowland, for appellant. *Whitley & Cornelius*, for appellee.

SOMERVILLE, J. The bill is filed for the purpose of correcting mistakes and omissions in the written memorandum of a contract by which the respondent sold to the

complainant 15 bales of cotton of the average weight of 500 pounds per bale at the price of 10 cents per pound. Incidentally it prays for an enforcement of the agreement by the ascertainment and award of damages for the nondelivery of the cotton. The appeal is from a decree overruling demurrers to the bill. As a bill for the reformation of mutual mistakes and omissions in a written contract, the equity of the bill is unassailable.

With respect to the equity of the prayer for damages for breach of the contract by way of incidental relief, the general rule is thus stated: "Having acquired jurisdiction to reform an instrument, equity will retain it in order that full and proper relief may be granted, although incidental relief has been denied when the remedy at law was adequate. Where, however, reformation is sought as preliminary to some other principal relief, if such principal relief is denied, the ancillary relief of reformation will not be granted. The rights of the parties are usually measured by the instrument as reformed. Thus, after reforming a contract, specific performance of it may be decreed, or the contract may be enforced in the same action. * * * In an action for rectification of a contract plaintiff may be awarded damages." 34 Cyc. 994, c. To the same effect is 24 Am. & Eng. Ency. Law, 658, 12, and 1 Pom. Eq. Jur. (3d Ed.) pp. 341, 346.

Where the additional relief sought in a bill for reformation is of a purely legal nature, this court does not seem to have passed upon its propriety, although an instance of additional equitable relief will be found in *Bleier v. Dreher*, 129 Ala. 384, 30 South. 22. In dealing with a bill founded alone on the equity of discovery, this court has declared: "The general rule is that, when equitable jurisdiction attaches for a rightful purpose, the court will retain it, and proceed to settle and adjudicate all the matters in controversy, granting complete relief, though it may involve the adjudication of purely legal questions." *Virginia, etc., Co. v. Hale*, 93 Ala. 542, 545, 9 South. 256; *Scruggs v. Driver*, 81 Ala. 274, 291.

[1] However, the first demurrer, for want of equity in the bill, is addressed to the whole bill, and was in any case bad and properly overruled.

The other grounds of demurrer argued by appellant take the point that the contract sued on, both as originally written and as sought to be reformed, is void and unenforceable because it contains no specification as to the quality or grade of the cotton to be delivered to complainants by respondent, and hence affords no basis for the estimation of damages.

[2] The omission of such a specification is doubtless unfortunate for the purchasers,

but it certainly does not make the contract void, nor can it be complained of by the seller. Where any commodity is sold without express agreement as to quality, the vendor is nevertheless required to supply a merchantable article. "The purchaser cannot insist that the thing shall be of any particular quality or fineness, but he has a right to demand that it shall be a merchantable article, answering to the description of the contract." *Gachet v. Warren*, 72 Ala. 288, 292; *Frith v. Hollan*, 133 Ala. 586, 82 South. 494, 91 Am. St. Rep. 54.

[3] It may well be that the lowest grade of merchantable cotton during the period involved was worth less than the contract price. If so, complainants' damages would be but nominal, and a court of equity would not reform a contract to achieve so impotent a result. But this is a matter of evidence, and, as the contingency contemplated does not appear on the face of the bill, the demurrers were rightly disposed of by the chancellor.

Affirmed. All the Justices concur.

A. P. LOVEMAN & CO. v. ALABAMA, T. & N. R. CO.

(Supreme Court of Alabama. Dec. 22, 1911.
Rehearing Denied Feb. 15, 1912.)

CARRIERS (§ 113*)—LOSS OF GOODS—BILL OF LADING—ISSUANCE BEFORE DELIVERY.

H, a warehouseman, who was also cotton agent for defendant railroad company, issued bills of lading for defendant for the shipment of certain cotton still in his warehouse, and for which warehouse receipts were still outstanding, and delivered the bills to plaintiff's agent, who knew when he received them that the cotton was still in the warehouse, and that the warehouse receipts had not been surrendered. H. had no authority to issue bills of lading for cotton, as agent for carrier, until the cotton had been loaded on the cars, of which fact plaintiff's agent also had knowledge, and the cotton covered by the bills was burned while still in the warehouse, the night after the bills were issued. *Held*, that the carrier was not liable therefor, under the rule that delivery, actual or constructive, is necessary to impose responsibility or liability on the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 100, 101, 608-620; Dec. Dig. § 113.*]

Appeal from Circuit Court, Pickens County; S. H. Sprott, Judge.

Action by A. P. Loveman & Co. against the Alabama, Tennessee & Northern Railroad Company for failure to deliver cotton. Judgment for defendant, and plaintiffs appeal. Affirmed.

It appears from the evidence that the cotton was in a warehouse in Aliceville that was owned and operated by Arch Hood, who was also cotton agent for the defendant company for Aliceville. It also appeared that the bills of lading upon which the suit

was brought were issued by said Hood as such agent while the cotton was still in his warehouse; that the cotton was burned the night after the bill of lading was issued, and before it was ever loaded on the cars of the defendant; that the bills of lading were delivered to one Buntin, agent of the plaintiff, who knew, when he received the bills of lading, that the cotton was still in the warehouse, and that the warehouse receipts which had been issued for the cotton had not then or since been redelivered to the warehouseman, Hood; that Hood had no authority to issue bills of lading for cotton as the agent of defendant until the cotton had been loaded on the cars; and that plaintiff's agent, Buntin, knew that Hood had no authority to issue bills of lading in the name of the defendant until the cotton had been loaded. It further appeared that the fire which destroyed the cotton was not caused by any act of negligence of omission or commission on the part of the defendant or its servants and agents, and that the defendant had nothing to do whatever with the management or control of the warehouse, nor any interest therein, and that no train passed going towards Tuscaloosa after the bills of lading were issued that could have hauled the cotton from Aliceville to Tuscaloosa. There was also evidence as to the duty of the warehouseman to load the cotton, and as to the forms and bills of lading. There was evidence as to insurance, etc., not necessary to be here set out.

Daniel Collier and R. H. Scrivner, for appellant. Curry & Robison and Oliver, Verner & Rice, for appellee.

MCLELLAN, J. Mr. Hood's contemporary, yet wholly distinct and independent, relations of warehouseman and of "cotton agent" of the defendant, which was without interest, in any degree, in the warehouse business conducted by Mr. Hood individually, rendered it impossible, under doctrine of the decision in *Lehman, Durr & Co. v. Pritchett*, 84 Ala. 512, 4 South. 601, for Mr. Hood, as warehouseman, to deliver, actually or constructively, the cotton in question to the common carrier (the defendant, appellee) while there was outstanding, undelivered and uncanceled, warehouse receipts therefor, issued by him as warehouseman. Without delivery to the common carrier, no responsibility or liability, in respect of the cotton, could have or did exist against it. There is no statute obviating, or attempting to obviate, the necessity of delivery, actual or constructive, in order to impose responsibility or liability upon a carrier. Custom is impotent to avoid the requirements of positive statute law.

Upon this theory, independent of any others advanced or adopted by the trial court

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 57 SO.—52

in giving the affirmative charge for the defendant (appellee), that ruling was clearly justified.

Affirmed.

ANDERSON and MAYFIELD, JJ., concur in the opinion. SIMPSON, SAYRE, and SOMERVILLE, JJ., concur in conclusion.

LOWERY v. PETREE.

(Supreme Court of Alabama. Feb. 17, 1912.)

1. APPEAL AND ERROR (§ 627*)—DISMISSAL—GROUNDS.

In the absence of motion, an appeal will not be dismissed because the transcript was not filed in time, if it was filed during the term to which it was by law returnable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749, 3126; Dec. Dig. § 627.*]

2. ELECTIONS (§ 296*)—CONTESTS—BOND—AMENDMENT.

Though a bond by petitioner in an election contest to pay "to the person legally entitled to the same all of the costs of the afore-styled cause," provided the adversary should be successful, was insufficient, under Code 1907, § 470, because not conditioned to secure the "costs of the contest," it was error to refuse to set aside an order dismissing the petition, where petitioner immediately offered to perfect the security.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 800; Dec. Dig. § 296.*]

Appeal from Circuit Court, Franklin County; C. P. Almon, Judge.

Election contest by William J. Lowery against Sidney J. Petree for the office of judge of probate. From a judgment dismissing the petition, because of failure to give statutory bond, contestant appeals. Reversed and remanded.

The bond was as follows: "We, William J. Lowery [here follows list of sureties], hereby agree to pay to the person legally entitled to same all of the costs of the afore-styled cause, wherein William D. Lowery is contestant and Sidney J. Petree is contestee, provided such Sidney J. Petree be successful in said contest."

Williams & Jones, B. H. Sargent, R. T. Simpson, Jr., W. H. Key, and A. H. Carmichael, for appellant. Chenault & Chenault, for appellee.

MCCLELLAN, J. [1] There is no motion to dismiss the appeal. The transcript was filed, though belated, during the term to which, in term time, it was by law returnable. In the absence of a motion to dismiss the appeal, we will not, *under these circumstances*, consider its dismissal.

[2] The paper, purporting to be a bond, filed with the statement of contest, did not comply with the requirement of the statute in that particular. Code 1907, § 470. It should have been conditioned to secure the

"costs of the contest." Obviously, an attempt, though abortive, was made to comply with the statute as to security for costs. In such case the bond, if defective as a statutory obligation, was amendable. *Wilson v. Duncan*, 114 Ala. 659, 21 South 1017. The doctrine, in this particular, of that decision, was reiterated in *Ex parte Shephard*, 55 South. 627. The court, therefore, erred in declining to set aside its order of dismissal upon the immediate (thereupon) offer of contestant to perfect the security for costs of contest, to conform it to the requirement of the statute (section 470) therefor.

The judgment of dismissal is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur.

LORING v. GRUMMON et al.

(Supreme Court of Alabama. Jan. 9, 1912. Rehearing Denied Feb. 15, 1912.)

1. DEEDS (§ 59*)—DELIVERY—ACTS CONSTITUTING.

A deed without consideration not delivered to the grantee, who is sui juris, and recorded by the grantor with no intention to make a delivery but only to mislead his creditors, is not sufficiently delivered to operate as a conveyance.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 136-139; Dec. Dig. § 59.*]

2. DEEDS (§ 203*)—CANCELLATION—EVIDENCE—ADMISSIBILITY.

Where a widow suing the heirs of her deceased husband to annul deeds attacked the validity of the deeds, the heirs might show the whole source of title and offer all the deeds in evidence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 602, 604-611; Dec. Dig. § 203.*]

3. EQUITY (§ 418*)—PRO CONFESSO DECREE—VALIDITY.

The setting down of a case for a hearing and the submission thereof on the day of the rendition of a decree pro confesso against two of the several defendants violates Code 1907, § 3165, prohibiting a hearing on the day a decree pro confesso is taken, and, though the submission is not a waiver of the decree pro confesso, there can be no valid final decree rendered as on the default.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 952-971; Dec. Dig. § 418.*]

Appeal from Chancery Court, De Kalb County; W. H. Simpson, Chancellor.

Suit by Mary A. Loring against Sidnia Shaannon Grummon and others, as heirs of Charles A. Loring, to annul deeds and to have her title to land therein conveyed recognized and affirmed. From a decree for defendants, complainant appeals. Affirmed.

See, also, 57 South. 819.

Boykin & Bailey and A. G. Levy, for appellant. Howard & Hunt, for appellees.

ANDERSON, J. Chas. A. Loring purchased the property involved from J. F. Caldwell August 8th, in the year 1890, and got deeds

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

conveying title to himself. On December 24, 1891, Chas. A. Loring and wife, this complainant, made a deed to Samuel L. Grogan. On the same day December 24, 1891, the said Grogan made a deed conveying said property to Chas. A. Loring as trustee for his wife, and as he was a naked trustee, she took the legal title, in the event said deed was legally executed. On the same day, December 24, 1891, Chas. A. Loring, as trustee, and Chas. A. Loring and Mary A. Loring made a deed to said property to Thomas B. Davenport. This deed was not filed for record until February 7, 1905. On February 3, 1905, Davenport conveyed the property to Chas. A. Loring. The complainant attacks the deed made by herself and husband to Davenport, and the bill proceeds upon the theory: (1) That complainant purchased the property through her husband with her own funds; (2) That her husband, Chas. A. Loring, through fraud, caused her to sign or execute a deed conveying said property to Thos. B. Davenport, who subsequently conveyed to Chas. A. Loring. Regardless of the burden of proof, the evidence fails to establish either averment. Aside from her own statement as to having \$15,000 in gold in her name when she married Loring, the evidence shows that the complainant was in reduced circumstances, and refutes her earning capacity in art as a painter, or that she earned anything taking boarders until after the property was purchased. The proof is also clear and positive that the deed to Davenport was signed as it then and now existed; that she was familiar with it and all facts leading up to the execution of same; that she knew that her husband was merely endeavoring to get the record title into her for a certain purpose, but contemporaneously with the deed to her had her to execute the Davenport deed. On the other hand, if the Davenport deed was a nullity and never delivered, the record shows with an equal degree of certainty that the deed from Chas. A. Loring to Grogan was not delivered. So, if the subsequent deeds or any of them should be stricken, upon the same theory and facts would the deed to Grogan fall, thus leaving the legal title in Chas. A. Loring, where it is if the subsequent deeds are upheld.

[1] The evidence shows that the deed to S. L. Grogan was without consideration and was never delivered; that it and the subsequent ones were mere makeshifts to be placed upon the record by Loring to delude his creditors, and, if this was true, the title never passed out of Chas. A. Loring. It may be that the recordation of a deed is *prima facie* evidence of a delivery; but when the grantee is *sui juris* and it was never delivered to him and was recorded by the grantor with no intention that it was to be delivered, but for the mere purpose of making the records deceive or mislead his creditors, there would

be no delivery, and the deed would not operate as a conveyance. *Coulson v. Scott*, 167 Ala. 606, 52 South. 436. We concur with the chancellor in holding that the complainant failed to prove her bill, which was properly dismissed.

[2] We do not understand that the heirs are attacking the deeds, as the complainant is doing so, and after she did it was competent for the heirs to show the whole source of title, and to offer all the deeds in evidence. On the other hand, if the complainant can show that some of the deeds were null and void, the heirs could with equal propriety show that the one to Grogan was in the same condition. Whether the evidence of Grogan was competent or not as to the transaction with Chas. A. Loring, it would be governed by the same rule as applicable to that of Davenport, and the complainant would gain nothing by excluding both; nor is her case made out with the evidence of both of them before us.

[3] There was a decree *pro confesso* rendered against two of the respondents on November 15, 1910. The cause was set down for hearing and submitted on the same day. This was in violation of section 3165 of the Code of 1907, and if the submission on the same day was not a waiver of the decree *pro confesso*, still there could be no valid final decree rendered against them as upon said default decree. *McDonald v. McMahon*, 66 Ala. 115. The chancellor did not, therefore, err in not granting relief as against these two respondents.

The decree of the chancery court is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

LORING v. GRUMMON et al.

(Supreme Court of Alabama. Jan. 9, 1912.
Rehearing Denied Feb. 15, 1912.)

WITNESSES (§ 140*) — COMPETENCY — TESTIMONY OF WIDOW AS TO TRANSACTION WITH DECEASED HUSBAND.

A widow suing the heirs to her deceased husband to reform a deed taken by him in his own name, on the theory that the land was bought by him as trustee for her, is not competent to testify as to transactions with him.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 598-618; Dec. Dig. § 140.*]

Appeal from Chancery Court, De Kalb County; W. H. Simpson, Chancellor.

Suit by Mary A. Loring against Sidnia Shannón Grummon and others. From a decree of dismissal, complainant appeals. Affirmed.

See, also, 57 South. 818.

Boykin & Bailey and A. G. Levy, for appellant. Howard & Hunt, for appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ANDERSON, J. This bill seeks the reformation of a deed taken by Chas. A. Loring in his own name upon the theory that the land was bought by him as trustee for the complainant, his wife, and with her funds. With the testimony of the complainant as to the transaction with her deceased husband properly excluded, the only theory upon which she could support the bill is that she owned the hotel property; that this little strip was necessarily bought for the purpose of completing ownership to the spring and making it an inseparable part of the hotel property; and that it was paid for with funds earned by her in running the hotel. In a companion case to this one in 57 South. 818, we held that Chas. A. Loring, and not the respondent, owned the hotel property; therefore she has utterly failed to make out her case, and the chancery court properly dismissed her bill of complaint.

The decree of the chancery court is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

SCARBROUGH v. SCARBROUGH et al.
(Supreme Court of Alabama. Feb. 6, 1912.)
WILLS (§ 194*)—INTEREST DEVISED—SUBSTITUTION.

A testator owning one-half interest in a plantation devised it to appellant, and, after the execution of his will, sold it, accepting notes in payment. Before his death he acquired the entire property in the notes. Code 1907, § 6163, provides that when any testator, after making his will, makes any contract of the property devised and the purchase money remains unpaid, such contract is not a revocation to devise, and the property passes to the devisee, subject to the same remedies for specific performance that might be had against the heirs of the testator. *Held*, that the statute avoided the revocation of the will by the simple act of the sale of the property devised, and substituted for the property so contracted away the unpaid purchase money, and so the devisee in this case was entitled to one-half of the proceeds of the notes; the testator's acquisition of the entire interest not affecting her rights.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 481-489; Dec. Dig. § 194.*]

Appeal from Chancery Court, Calhoun County; W. W. Whiteside, Chancellor.

Suit between Mamie S. Scarbrough and A. Lee Scarbrough and others. From the decree, the first-named party appeals. Affirmed.

Willett & Willett and Charles D. Kline, for appellant. Lapsley & Arnold, for appellees.

MCCLELLAN, J. Eba Scarbrough owned, on January 9, 1909, when he executed his last will and testament, an undivided half interest in a tract of land called the "Whisenant Plantation," lying in Calhoun and Eto-

wah counties. William A. Scarbrough then owned the remaining undivided half interest therein. Subsequent to the execution of his will, Eba and William A. Scarbrough sold the land for \$20,000; the purchaser assuming the payment of a mortgage for \$4,000, and also paying, in cash, \$5,000. For the balance of the purchase money, viz., \$11,000, the purchaser gave three notes. Eba and William A. Scarbrough each had a one-half interest in these notes. Through dealings between Eba and William A., the former became the owner of the interest of William A. in these notes. By the second item of Eba Scarbrough's will, Mamie Scarbrough, wife of William A., was devised the one undivided half interest Eba Scarbrough owned in the "Whisenant Plantation." There being no writing evincing a purpose to revoke the devise, the question propounded is: What is the interest, in amount, of Mamie Scarbrough in the fund represented by the three notes mentioned?

Code, § 6163, is as follows: "When any testator, after making his will, makes any contract for the conveyance of any property devised in such will, and the whole or any part of the purchase money remains unpaid to such testator at his death, the disposition of the property by such contract is not a revocation of the devise, at law or in equity, unless it clearly appears by the contract, or some other instrument in writing, to be intended as a revocation; and such property passes to such devisee, subject to the same remedies for a specific performance thereof, in favor of the persons entitled thereto, against the person to whom such devise was made, as might be had at law or in equity against the heirs of the testator, had the same descended to them; and the purchase money, when recovered by the executor of the testator, must be paid to the devisee of such property."

It is not necessary at this time to take other particular note of the statute than to refer to the several decisions heretofore delivered with reference to it, namely: *Powell v. Powell*, 30 Ala. 697; *Welsh v. Pounders*, 36 Ala. 668; *Slaughter v. Stephens*, 81 Ala. 418, 2 South. 145.

One effect of the statute was and is to avoid the revocation of a will by the simple act of a contract to sell or a sale of the property devised thereby; and another was to *substitute*, for the property so contracted away by the will maker, the unpaid purchase money therefor, whether it be all or only a part. When recovered by the executor of the testator, the prescription of the statute is that it be paid to the devisee of such property; that is, the *devised* property that the testator, in life, had sold or contracted to sell.

Accordingly, the maximum measure of interest Mamie Scarbrough could have in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

unrecovered and unpaid purchase money is one-half of \$11,000—the sum found by the chancellor to be her due. The idea of substitution, dominant in the statute, fixes the maximum limit of this devisee's interest at one-half of the uncollected purchase money.

As the learned chancellor says, the purchase by Eba Scarbrough of the interest of William A. Scarbrough in the *three notes* did not, could not, enlarge the interest of Mrs. Scarbrough under the statute quoted. This transaction, of course, enlarged Eba Scarbrough's interest in the unpaid purchase money; but it did not enhance her interest under the statute, any more than it would have been enlarged if Eba Scarbrough had bought William A. Scarbrough's half interest in the land itself and had then died without selling it. In that event, Mamie Scarbrough would have taken a half interest only, under item 2 of the will. Certainly it was not the purpose, and cannot be the effect, of the statute to enhance the devisee's right or interest beyond that the *substitution*, in proportion, the unpaid purchase money affords. The maximum proportion becomes fixed, for the purposes of this statute, when the testator, in life, contracts or conveys that which he has devised; and no other transaction or dealing, whatever the moment of its consummation, operates to change the status upon which the statute has its clear influence. It is the property devised, the sale thereof, and the death of the testator with all or a part of the purchase money for the property devised unpaid (and not that otherwise acquired), that makes the factors for the statute's control (its disposition).

The decree is affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

JOHN DEERE PLOW CO. v. CITY HARDWARE CO.

(Supreme Court of Alabama. Feb. 8, 1912.)

1. CONTRACTS (§ 163*)—CONSTRUCTION—WRITTEN AND PRINTED PROVISION.

In construing a contract, partly written and partly printed, the court should construe the whole instrument with a view of ascertaining the object of the parties, giving to the written provisions precedence over those printed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 745; Dec. Dig. § 163.*]

2. SALES (§ 479*)—CONDITION OF CONTRACT—RIGHTS OF SELLER—RETAKEING POSSESSION—TIME.

A conditional contract for the sale of farming implements provided that the terms of payment named therein, which "held good until October 1, 1910," were not to be considered a precedent for the future. Another clause declared that it was agreed that the title and right to exclusive possession, on demand, either oral or written, to all goods which might be shipped, should remain in, and their proceeds

in case of sale should be the property of, the seller, until full payment by the buyer; but nothing in the clause would release the buyer from making payment as agreed. *Held*, that the seller's right to resume possession was limited by the provision extending credit to October 1, 1910, and that the seller could not enforce its right to retake the property prior to that date.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1438; Dec. Dig. § 479.*]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Detinue by the John Deere Plow Company against the City Hardware Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The contract referred to was a regular contract of sale of certain farming implements manufactured by plaintiff, and contained a great many conditions, but with a retention of title in the John Deere Plow Company, and a right to retake. The body of the contract contains this agreement: "It is expressly agreed and understood that the terms named therein, which hold good until October 1, 1910, are not to be considered a precedent for the future." The seventh clause, referred to in the opinion, is as follows: "It is also agreed that the title to, the ownership of, and the right to immediate and exclusive possession, upon demand, either oral or written, to all goods which may be shipped as herein provided, or during the current season shall remain in, and their proceeds in case of sale shall be the property of, said plow company, and subject to its order until full payment shall have been made for the same by the undersigned in money; but nothing in this clause will release the undersigned from making payment as herein agreed." The payments referred to were to be made in cash when any of the goods were sold for cash, and when the goods were sold on time they were to be settled for by note, due at regular maturity date, and the notes taken for the machinery or implements sold were to be sent to the plaintiff as collateral, listed by them, and returned to the defendant for collection. The suit was filed on the 22d day of April, 1910.

Lapsley & Arnold, for appellant. Tate & Walker, Willett & Willett, and Knox, Acker, Dixon & Sterne, for appellee.

MAYFIELD, J. This is an action of detinue by appellant against appellee, to recover certain chattels mentioned in the complaint. The right of the respective parties to maintain or defend the action depends solely upon the construction to be given a certain contract of sale, by which appellant sold to appellee the chattels in question. The contract in question is a conditional one of sale, by which the vendor, appellant here, retained the title to the chattels sold upon certain

conditions specified in the contract of sale. The real difference between the contentions of the parties is as to whether or not the vendor had the right to retake the possession of the property sold and delivered, at the time the action was brought, or whether the time at which it could retake possession, on account of the breach of the conditions of the contract, was postponed to a later date than that at which the suit was brought.

It is not denied by the vendee, appellee here, that the sale was a conditional one, and that under certain provisions of the contract the vendor could retake possession of the property sold; but it contends that the time at which the contract provided the vendee might retake possession was fixed at October 1, 1910, while the action was brought in April, 1910. If this be true, of course, the plaintiff had no right to recover, at the time it brought the action, and therefore must fail.

On the other hand, it is contended, by the vendor that by paragraph 7 of the contract of sale (which the reporter will set out), the plaintiff was entitled to possession, upon demand, either oral or written, of all the goods which might be shipped under the provisions of the contract, or during the current season.

The trial court construed the contract in accordance with the contention of the vendee, to the effect that the plaintiff had no right, under the written and printed contract, to the possession of the property at the time the action was brought, but further ruled that the parol evidence was in dispute as to whether or not there was a subsequent agreement between the parties by which the plaintiff was entitled to possession at the time the suit was brought, and, accordingly, submitted this question to the jury, which found in favor of the defendant, appellee here.

As to the rulings of the court upon the question of the subsequent parol agreement, and as to the finding of the jury of the facts as to such agreement, no error is assigned, and no objection is here made by appellant.

The trial court, in its oral charge to the jury, instructed them to the effect that under the terms of the written and printed contract the plaintiff was not entitled to the possession of the property at the time the suit was brought, and for this reason refused a written requested charge to the plaintiff, asserting the reverse of the proposition. It is conceded that the same question of law is raised by both rulings, and that the correctness or incorrectness of the one necessarily determines the propriety or impropriety of the other.

We agree with the trial court as to the construction placed upon the written and printed contract. To give clause 7 construc-

tion and effect intended by appellant would make it wholly inconsistent with the other provisions and conditions of the contract. On the other hand, with the construction placed upon it by the trial court, this provision of the contract can be reconciled with the other provisions thereof.

The contract in question is quite lengthy, and is conceded to have been partly written and partly printed; and section 7 thereof is one of a great number of provisions printed on the back of the contract, but referred to and made a part of it by provisions in the body of the instrument, which were in writing.

[1] It is a sound and well-settled rule of construction of contracts that, in arriving at a proper interpretation, the court should examine the whole instrument with a view of ascertaining and carrying into effect the purpose and object the parties had in view, and thus give some effect to each clause, and reconcile apparent discrepancies if practicable. Courts will never presume that parties intended to insert in their contracts provisions wholly incompatible and irreconcilable one with another. It is likewise a well-settled rule of construction that as to instruments which are partly printed and partly written, that which is written shall have the greater weight, because of the presumption that greater attention has been bestowed upon the written parts of the contract.

As was said by this court in *Bolman v. Lohman*, 79 Ala. 67, per Stone, C. J.: "The printed form is intended for general use without reference to particular objects and aims. That which is written is supposed to be dictated by the particular intention and purpose of the parties contracting."

[2] Applying these rules of construction to the contract in question, we have no hesitancy in agreeing with the trial court as to the construction proper to be placed upon this contract. We find one of the written provisions of the contract to be as follows: "It is expressly agreed and understood that the terms made herein shall hold good until October 1, 1910, and are not to be considered a precedent for the future." This being written into a printed form of contract used by the vendor in making such sales is suggestive, at least, of the idea that the contract in question was somewhat different from the usual contracts made by it in such cases. It was provided by the last clause of section 7, of the printed conditions, after stipulating that the vendor should have the right to the immediate and exclusive possession upon demand, as follows: "But nothing in this clause will release the undersigned (the vendee) from making payment as herein agreed." It was agreed in the contract that the vendee would make payments thereon until October 1, 1910, and it would be inconsistent to hold that the vendor could retake the property, and yet hold

the vendee to the payment of the purchase price.

No error appearing in the record, the judgment of the trial court is affirmed.

Affirmed. All the Justices concur.

MONTGOMERY COUNTY v. PRUETT.

(Supreme Court of Alabama. Nov. 21, 1911.

Rehearing Denied Feb. 15, 1912.)

1. COUNTIES (§ 125*)—IMPLIED CONTRACTS.

General assumpsit on an implied contract will lie against a county, if the contract is within the range of its contractual powers.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 186; Dec. Dig. § 125.*]

2. WORK AND LABOR (§ 23*)—GENERAL ISSUE—PLEA.

As under the common counts to which the general issue is pleaded, plaintiff is required to prove either an express contract with which he had fully complied, or the furnishing of labor and materials which were of benefit to the defendant, and which were voluntarily accepted, a plea setting up a breach of a provision of the contract was no answer to such counts, and a demurrer thereto was properly sustained.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 42; Dec. Dig. § 23.*]

3. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—SUSTAINING DEMURRER.

Error in sustaining a demurrer which did not specify the inaptness of a plea as an answer to the common counts of a complaint is harmless where the plea could not have been amended without introducing matter wholly foreign to it as framed so as to meet those counts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

4. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—SUSTAINING DEMURRER.

A general denial to counts in an action against a county declaring on a special contract, and containing averments that the plaintiff had complied with all the provisions of the contract, placed on the plaintiff the burden of proving performance of all obligations resting on him under the agreement, and permitted defendant to show nonperformance, so that the sustaining of the demurrer to a plea setting up nonperformance of a condition precedent was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

5. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—SUSTAINING DEMURRER.

To render harmless the sustaining of a demurrer to a special plea, the record need not affirmatively show that the defendant actually received the benefit under the general issue of the matter specially pleaded; the burden being on the defendant to show that such benefit was denied him, to entitle him to a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

Appeal from City Court of Montgomery; William H. Thomas, Judge.

Action by O. J. Pruett against the County

of Montgomery. From a judgment for plaintiff, defendant appeals. Affirmed.

Edward S. Watts and J. M. Chilton, for appellant. Hill, Hill & Whiting, for appellee.

SOMERVILLE, J. O. J. Pruett sued the county of Montgomery in the city court; the original complaint containing seven counts. Count 1 is on account stated; counts 2 and 6 for work and labor done, and materials furnished; counts 3 and 5 and 7 on accounts due December 1, 1908; and count 4 claims damages for breach of a contract by which plaintiff was to do certain work and furnish certain materials in the construction of three public county roads. It sets forth the specifications, avers full performance by plaintiff, and alleges defendant's failure to pay plaintiff therefor.

To the entire complaint defendant filed three special pleas. Plea 1 sets up an alleged provision in the contract upon which plaintiff's claims are founded, to the effect that the contractor was specifically bound to furnish the engineer with satisfactory evidence that all persons who did work or furnished material for said road construction, or who sustained damage or injury therein, or from, had been duly paid or secured, and that within 10 days after completion of the work, and before a final estimate was made, notice should be given the engineer that any balance due for said causes had been paid or released, and avers that said provisions are conditions precedent to the defendant's liability, and plaintiff has failed to comply therewith.

Pleas 2 and 3 are in set-off.

Plea 4, filed to count 4 only, denies that defendant ever entered into any such contract as set out therein; but avers that there was a separate and independent contract for each of the three roads specified.

Plea 5 is the general issue to the entire complaint.

Plaintiff demurred on variously assigned grounds to pleas 1, 2, 3, and 4. The demurrer to plea 1 was sustained, and the demurrers to pleas 2, 3, and 4 were overruled.

Plaintiff then amended his complaint by adding counts 8, 9, and 10, which do not differ from count 4, except that each count is confined to a single one of the three roads set out inclusively in count 4.

The defendant then refiled its pleas 1, 2, 3, 4, and 5 to the complaint as amended; and plaintiff refiled his demurrers to pleas 1, 2, 3, and 4. The court sustained the demurrers to pleas 1 and 4; and overruled the demurrers to pleas 2 and 3. Thus to the 10 counts of the complaint there remained the two pleas of set-off and the general issue, and upon these there was trial and verdict for the plaintiff.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & R&P'r Indexes

Plea 4 was clearly but an amplified form of the general issue; or, if its special averments are considered as an attempted answer to counts 8, 9, and 10, it may well be denominated frivolous, as charged in the demurrer. And, as the general issue was otherwise pleaded, the elimination of this plea could not in any case have prejudiced the defendant, although erroneously effected by general demurrer.

With respect to plea 1 and the defense it presents, it is insisted for the appellee that, even if the demurrer was erroneously sustained, there was no injury to appellant, because the facts pleaded therein were just as available, and would have been equally advantageous, under the plea of the general issue.

[1] It is a mistake to suppose, as argued for the appellant, that a county may not be liable on an implied contract, although it is true that no contract can be implied against a county unless it is one which the county is by law empowered to make. And so, ratification of an unauthorized—if legally permissible—contract may be implied. 11 Cyc. 478, D. There are no decisions in this state holding a contrary view. *Naftel v. County of Montgomery*, 127 Ala. 563, 567, 29 South. 29, simply declares that a county is only liable for a debt which the law allows it to contract, and which it has actually contracted, but not necessarily by express contract. On the other hand, *Scarborough v. Watson*, 140 Ala. 351, 37 South. 281, by implication concedes the propriety of the common counts in an action against a county. And it is well settled that general assumpsit lies against municipal corporations. *Allen v. Lafayette*, 89 Ala. 649, 8 South. 30, 9 L. R. A. 497; *B. E. L. & P. Co. v. Montgomery*, 114 Ala. 445, 21 South. 960.

We conclude, therefore, that general assumpsit lies against a county within the range of its contractual powers, just as it does against an individual.

[2] Under the common counts (1, 2, 3, 5, 6, and 7), the plaintiff was required by the plea of the general issue either to prove an express contract with all the terms of which he had fully complied (*Stafford v. Sibley*, 106 Ala. 189, 17 South. 324; *Abercrombie v. Vandiver*, 126 Ala. 513, 532, 28 South. 491); or else that he had furnished labor or materials which were of benefit to the defendant, and which were voluntarily accepted by it (*Davis v. Badders*, 95 Ala. 348, 10 South. 422; *Florence Co. v. Hanby*, 101 Ala. 15, 13 South. 343; *Bell v. Teague*, 85 Ala. 211, 3 South. 861; *Andrews v. Tucker*, 127 Ala. 602, 29 South. 34; *Martin v. Massie*, 127 Ala. 504, 29 South. 31; *Aarnes v. Windham*, 137 Ala. 513, 34 South. 816; *Henderson-Boyd Lumber Co. v. Cook*, 149 Ala. 227, 42 South. 838; 6 Cyc. 111). In either case, defendant's special plea 1, if true, would be wholly irrelevant and inappropriate as an answer to these counts; and hence the rule that a plea set-

ting up plaintiff's breach of a special provision of a contract is not a sufficient answer to the common counts, though it may be to a count on the contract. *Everrood v. Schwartzkopf*, 123 Ind. 35, 23 N. E. 969. Nor could the plea have been amended so as to make it pertinent to these counts without introducing matter wholly foreign to the plea as framed.

[3] Hence, so far as these common counts are concerned, although the demurrer did not specify the inaptness of the plea as an answer to them, the sustaining of the demurrer was error without injury, and cannot be complained of by appellant. *Ryall v. Allen*, 143 Ala. 222, 227, 38 South. 851; *De Leon v. Walters*, 163 Ala. 502, 50 South. 934, 19 Ann. Cas. 914; *S. L. & S. F. R. R. Co. v. Phillips*, 165 Ala. 504, 51 South. 638; *Schuler v. Fisher*, 167 Ala. 184, 52 South. 390; *McGehee v. W. U. T. Co.*, 169 Ala. 109, 53 South. 211.

[4] If, however, the elimination of the plea be considered with respect to counts 4, 8, 9, and 10, which declare specially on the contract, and it be conceded that the plea was not subject to any ground of demurrer specified, we must still conclude that the error in sustaining the demurrer was not injurious to appellant.

Each one of these counts contains the averment that plaintiff had complied with all the provisions of the contract sued on. Defendant's plea 5 denied "each and every averment thereof." Under the issue thus framed, the plaintiff was bound to prove his performance of every obligation devolved on him by the terms of the contract, especially one which was a condition precedent to his right to demand payment for work and materials furnished, and equally it was open to the defendant to show plaintiff's nonperformance of any condition or stipulation essential to his right of action therefor. *Abercrombie v. Vandiver*, 126 Ala. 513, 531, 28 South. 491; *Aarnes v. Windham*, 137 Ala. 513, 518, 34 South. 816. Such being the scope of the issue actually submitted to the jury, the erroneous elimination of the special plea 1 cannot, under the decisions of this court, be regarded as prejudicial. *L. & N. R. R. Co. v. Hall*, 131 Ala. 161, 32 South. 603; *N. C. & St. L. Ry. v. Bates*, 133 Ala. 447, 32 South. 589; *U. S. F. & G. Co. v. Damskib. Habil*, 138 Ala. 348, 35 South. 344; *Western Ry. v. Russell*, 144 Ala. 142, 39 South. 311, 113 Am. St. Rep. 24; *Metcalf v. St. L.*, etc., R. R. Co., 156 Ala. 240, 47 South. 158. [5] These cases, whether wisely or not, have changed the rule announced in some of the older cases (e. g., *Rice v. Drennen*, 75 Ala. 335; *Graham v. Woodall*, 86 Ala. 313, 5 South. 687) that the record must affirmatively show that the defendant actually received the benefit under the general issue of the matter specially pleaded. As the rule now stands, he must show that such benefit was denied him.

We are not unmindful of the rule of pleading in actions on special contracts which was announced in *American Oak Extract Co. v. Ryan*, 112 Ala. 337, 20 South. 644, to the effect that, in an action for breach of contract, the defendant cannot, under the general issue, defeat the plaintiff's cause of action by proving other stipulations relied on to excuse performance, which were not set out in the complaint. In that case, however, there was no allusion in the complaint to any other stipulations, and no averment that plaintiff had complied with all the provisions of the contract; and hence his noncompliance was not within the issue made by the pleadings. Perhaps, also, *American O. E. Co. v. Ryan* should be distinguished from *Abercrombie v. Vandiver*, 128 Ala. 513, 531, 28 South. 491, where, under the general issue to counts in special and general assumption, proof of noncompliance with a condition precedent was held to defeat plaintiff's recovery for certain extra work.

This view of the case renders it unnecessary to consider whether the plea was obnoxious to any of the special grounds of demurrer assigned thereto. Let the judgment be affirmed.

Affirmed. All the Justices concur. ANDERSON, J., without dissenting from the opinion, prefers to place his concurrence on the ground that the demurrers to defendant's pleas were properly sustained.

KILLIAN v. KILLIAN et al.

(Supreme Court of Alabama. Feb. 8, 1912.)

1. WATERS AND WATER COURSES (§§ 126, 179*)—SURFACE WATERS—EVIDENCE.

In an action for damages from deflection of surface water, evidence held insufficient to sustain counts charging wrongful diversion of a stream from its natural course, causing it to flow over and across plaintiff's land, or that the flow of surface water was changed.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 139, 141, 142; Dec. Dig. §§ 126, 179.*]

2. WATERS AND WATER COURSES (§ 107*)—DIVERSION—INJURIES TO SERVIENT TENEMENTS.

Evidence in an action for damages from deflection of water held insufficient to sustain a count of complaint charging injury to a spring and water and to plaintiff's farm.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 116, 117; Dec. Dig. § 107.*]

3. WATERS AND WATER COURSES (§§ 120, 104*)—POLLUTION.

A landholder may not place anything in either percolating water or that which is gathered in definite and known surface streams which will pollute the wells or springs of his neighbors.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 135, 114; Dec. Dig. §§ 120, 104.*]

4. WATERS AND WATER COURSES (§ 126*)—SURFACE WATERS—DRAINAGE—QUESTION FOR JURY.

An upper owner of land may ditch his lands and drain them, provided he do so with a prudent regard for the welfare of lower owners, and that he do no more than concentrate the water and cause it to flow more rapidly and in greater volume on the inferior heritage, and it is a question for the jury whether the use made was reasonable.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 139, 141, 142; Dec. Dig. § 126.*]

5. WATERS AND WATER COURSES (§ 107*)—SURFACE WATERS—DRAINAGE—QUESTION FOR JURY.

In an action for deflecting water into a sink hole, whence it flowed by underground channels into plaintiff's spring, it was a question for the jury whether the disposition of the water by the defendant was a prudent and proper one to protect his own property, and whether it was with a proper regard for the interests of the plaintiff, who was a lower owner.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 116, 117; Dec. Dig. § 107.*]

6. WATERS AND WATER COURSES (§ 38*)—NATURAL WATER COURSES—WHAT CONSTITUTES—"KNOWN AND WELL-DEFINED CHANNEL."

That water flows naturally through a channel will not make it a known and well-defined channel.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 30; Dec. Dig. § 38.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 8948, 8944.]

7. TRIAL (§ 248*)—ACTIONS—INSTRUCTIONS—ABSTRACTNESS.

In an action for the deflection of surface water into a sink hole, causing alleged injury to the plaintiff's spring, an instruction submitting that in law a known and well-defined channel is a channel through which water naturally flows was properly refused, as abstract.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 582, 583; Dec. Dig. § 248.*]

8. WATERS AND WATER COURSES (§ 107*)—ACTIONS—INSTRUCTIONS.

Whether defendant, in an action for diverting surface water into a sink hole, knew that the water diverted would flow into the plaintiff's spring, was for the jury in determining whether the disposition of the water was prudent and with due regard for the interests of the plaintiff, and an instruction submitting that a lack of knowledge would not relieve the defendant from liability was misleading.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 116, 117; Dec. Dig. § 107.*]

9. WATERS AND WATER COURSES (§ 104*)—POLLUTION—ACTS OF DOMINANT OWNER.

To render an upper owner liable to the owner of land lying lower for the pollution of a spring by diverting waters into a sink hole, it must be shown that the water falling into the hole passed through the spring, and that the water would not pass into the sink hole but for the acts of such upper owner.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 114; Dec. Dig. § 104.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

10. WATERS AND WATER COURSES (§ 104*)—ACTIONS—PARTIES.

No recovery may be had in an action for diverting surface waters and polluting a spring of the plaintiff against a person who neither owned an interest in the lands on which the sink hole, into which the waters were claimed to have been diverted, was located, nor directed or authorized the act in question.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 114; Dec. Dig. § 104.*]

11. DAMAGES (§ 225*)—POLLUTION—DAMAGES RECOVERABLE.

A plaintiff in an action for damages for the pollution of a spring alleged to have been caused by the diversion of surface waters into a sink hole may not recover damages to his farm or spring which accrued since the commencement of the action.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 567; Dec. Dig. § 225.*]

12. WATERS AND WATER COURSES (§ 107*)—POLLUTIONS—ACTIONS—BURDEN OF PROOF.

In an action for diverting waters into a sink hole, causing the alleged pollution of the plaintiff's spring, the burden of showing that the spring was damaged by the act or agency of the defendant is upon the plaintiff.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 116, 117; Dec. Dig. § 107.*]

Appeal from Circuit Court, De Kalb County; W. W. Haralson, Judge.

Action by W. E. Killian against G. W. Killian and another. Judgment for defendants, and plaintiff appeals. Affirmed.

The facts sufficiently appear from the opinion of the court. The following is the oral charge of the court excepted to: "If Kenneth Killian, by building a rock wall or doing any other act, caused more water to flow into the hole than otherwise would have done so, and he knew, or had knowledge to lead him to believe, at the time, that the water would go into an underground channel leading to plaintiff's spring, and that it would flow into plaintiff's spring and injure it, and did so injure it, then the defendant Kenneth Killian would be liable; otherwise not."

The following charges were refused to the plaintiff: (1) "The court charges the jury that in law a known and well-defined channel is a channel through which water naturally flows." (2) "The court charges the jury that the fact, if it be a fact, that defendant Kenneth Killian did not know that the water, diverted from the natural channel and caused to run into the sink hole, flowed or would flow into plaintiff's spring, does not relieve him from liability, if the water was thus diverted to an underground channel, which connected with plaintiff's spring." (3) "The court charges the jury that if defendant Kenneth Killian, by constructing a stone wall or other means, diverted a stream from its natural channel, or a part of a stream, and this water flowed through an underground channel and into plaintiff's spring,

and that if this caused injury and damage to the spring, then the plaintiff is entitled to a verdict for such damages as the evidence may show he is entitled to." (4) "If you are satisfied from the evidence that the defendant knowingly diverted the water from his land into a subterranean stream forming plaintiff's spring, and that said spring was thereby damaged or impaired, the defendant would be liable in such damages in such sum as you may determine the evidence warrants, not exceeding the sum claimed in the complaint."

The following charges were given for the defendants: (1) "The court charges the jury that, before they can find for the plaintiff, they must believe from the evidence that the water which flows into the sink hole passes through Killian's spring, and that the water would not have passed into the sink hole, had it not been for the work done on said sink hole by the defendants, or because of the rock wall or levee constructed by defendants." (2) "The court charges the jury that, if they believe the evidence in this case, they cannot find for the plaintiff under count 2 of the complaint." (3) "The court charges the jury that, if they believe from the evidence that at the time of the building of the wall, or the removal of the stone or other substance from the sink hole, G. W. Killian owned no interest in the lands on which they were situated, and did not direct or authorize said act, you cannot find for the plaintiff as against said G. W. Killian." (4) "The court charges the jury that the plaintiff cannot recover damages to his farm or spring which have accrued since this suit was commenced." (5) "The law holds a man liable for the consequences of his acts only, and if you should find from the evidence that the defendant's work upon the sink, and the removal of the stone and other debris, had not the effect reasonably to add to the volume of water finding its way into said sink, and to damage and injure plaintiff's spring, then you must find your verdict for the defendant." (6) Affirmative charge not to find for plaintiff under count 1. (7) "Before the plaintiff is entitled to recover damages of the defendant at your hands, he must reasonably satisfy you from the evidence that plaintiff's spring has been damaged by the act or agency of the defendant, and if, after you have considered all the evidence in the case, your mind is left in such doubt and uncertainty as to what the truth of the transaction inquired about reasonably is, then the plaintiff has failed to carry the burden the law imposes upon him, and your verdict must be for the defendant."

Howard & Hunt, for appellant. Davis & Pope, for appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

SIMPSON, J. This action is by the appellant against the appellees.

The first count is for wrongfully diverting "a stream of water from its natural course, causing it to flow over and across the lands of plaintiff, thereby injuring his lands and crops." The second count is for changing "the flow of surface water" on the land of defendants, "so that it overflowed plaintiff's land and spring, in an artificial channel, doing great damage to his land and crops." The third is for changing or diverting a stream from its natural channel, "so that it ran into plaintiff's spring, through an underground channel, thereby injuring the spring and water and plaintiff's farm." The fourth count is for building "a wall that diverted a stream of water from its natural channel, and caused it to flow into an underground channel that connected with plaintiff's spring, thereby overflowing and injuring said spring"; and it is alleged that, "after defendant knew this or was in possession of facts and circumstances, which, if followed up, would have led to such knowledge, he refused or failed to remove said wall, and put the water thus directed back into its natural channel."

The testimony on the part of the plaintiff is that the farm of plaintiff is south of, and adjoining, the farm of defendant; that there was a spring on the land of plaintiff at the foot of a mountain; that a hole or sink, a little north of east and about one-fourth of a mile from said spring, made its appearance in a field of defendant during a wet season; that rock "was bursted up in the hole, brush torn out, and gravel turned loose"; that the large rocks were taken out, and small rocks and gravel fell through out of sight; that "they [defendant's employes] took a right smart of stuff out of the hole"; "that there was a waterway coming down the mountain hollow, and one channel of this waterway came within 10 or 12 feet of the hole, and another one came a little closer; that about one-third of the water was going into the hole at the time he worked in it"; that a rock wall was built by defendant's employes across the channel, the effect of which was to throw about one-third more water into the hole than was already going in; that a levee was built in defendant's field, and a ditch dug leading towards the sink hole, the effect of which was to drain the field and carry the water towards the hole; that the spring "would never get muddy before the sink hole came, and that, after it came, it would get muddy every time it rained, and that the same kind or color of water would come out of the spring as went into the hole"; that, before the hole came, the spring was always clear, except that it would sometimes get a little milky after a big rain; that tests had been made by putting various articles in at the hole, and that they or similar articles would afterwards be found in the

spring; that the water that went into the hole would pour down into an underground cave or channel, out of sight.

The testimony on the part of the defendant tended to show that the spring would, at times, get muddy before the hole came, the same as it did afterwards; that the spring had not been damaged at all; that there was a large cave near the top of the mountain known as "Killian's Cave," about a half mile from the spring, and there were mud and trash on the sides of the walls of said cave, tending to show that the water would rise and fall therein; that tests had been made by putting oil and bran in said cave, which would come out at the spring; that one night, about the time testified to by plaintiff's witness, during a heavy rain, the bottom or bed of the mountain stream fell in at a point just at the foot of the mountain, making a hole eight or ten feet wide; that defendant, Kenneth Killian, had some rock and other things that had drifted into the hole taken out; that the great bulk of the water was running into the hole, before anything was done to clean out the hole or build the dam, etc.; that, after the sink hole fell in, a small cave was found underneath it, into which the water poured, and from the cave flowed in an underground channel, which was in places 30 or 40 feet high; that defendant's witnesses went down into said cave, and followed the stream for 200 or 300 feet in a northwestwardly direction; that the water from the sink hole went into said channel; that the point to which this channel was traced was 27 feet lower than plaintiff's spring (said spring being more than a quarter of a mile from the sink hole), and going in a direction opposite from the spring; that various tests were made by putting light articles into the sink hole, which never came out at the spring, also muddying the water at the sink hole, which had no effect on the spring; also that about 30 or 40 feet above the spring in question there is a hole, and, if light substances are placed in this hole, they come out in the spring; also, that there are indications of coal oil in said hole; that there is a hill or spur of the mountain between the sink hole and the spring. It is admitted by the plaintiff that said spring is not his only source of water for domestic purposes. It is also shown that the stream in which the sink hole occurred is only a wet-weather stream, running only in wet seasons.

[1, 2] It is evident that there was no testimony to sustain the first and second counts, nor is there any evidence to sustain the allegation in the third count, that plaintiff's farm was injured. Counsel for both parties cite a number of authorities on the subject of the rights of landholders in percolating waters, and in subterranean streams, and the liability for diverting the same so as to cut off the source of supply in adja-

cent lands. There are a vast number of decisions on these subjects, which we do not deem it necessary to consider, as there is no such claim in this case. While it is true that, as to percolating water (that which merely filters or oozes through the soil), the owner of the soil may use or divert the same so as to deprive the adjacent owner entirely of it, while he may not divert an underground stream flowing in a definite known channel, though he may use it just as he may use a surface stream, yet the question here is what he may do with that part of the surface water which is collected in a definite channel. The maxim of the law is, "Aqua currit, et debet currere, ut currere solebat," so that a man may not gather the surface water, or change the channels which it has made, in such a way as to throw it in a body upon his neighbor's land, to his injury (3 Farnham on Waters & Waterways, p. 2574, § 885 et seq.; page 2710, § 935 et seq.); yet there is no evidence in this case to show that such a thing has been done. The claim here under the evidence is not that the water was collected or turned in such a way as to overflow and injure the adjoining lands, but only that, by turning the water into a natural hole in the ground, it found its way to the plaintiff's spring, and caused it to be muddy at times.

[3] The question here is, Did the defendant, by the acts complained of, pollute the water in the spring of the plaintiff, and, if so, has the evidence furnished any criteria by which the liability of the defendant can be declared and the amount of the damage estimated; for the authorities recognize the principle that whatever may be the rights of a landholder in either the percolating water, or that which is gathered in defined and known subsurface streams, he cannot place anything in either which will pollute the springs or wells of his neighbors. 3 Farnham on Waters & Water Rights, p. 2730, § 945 et seq., and cases cited in notes.

In a case in Pennsylvania, where parties boring gas wells brought up salt water from a lower stratum, which injured fresh-water wells by rising therein, the Supreme Court of that state, after citing a number of cases on the rights in subsurface waters, held that: "If the existence of a stratum of clear water, and its flow into wells and springs of the vicinity, and the existence of a separate and deeper stratum of salt water which is likely to rise and mingle with the fresh, when penetrated, in boring for oil or gas, are known, and the means of preventing the mixing are available at reasonable expense, then clearly it would be a violation of the living spirit of the law not to recognize the change, and apply the immutable principles of right to the altered conditions of fact." Collins v. Chartiers Valley Gas Co., 131 Pa. 143, 159, 18 Atl. 1012, 1014, 6 L. R. A. 280,

283, 17 Am. St. Rep. 791, 795. In other words, that court held that it was a matter whether the party boring was guilty of negligence under the facts as known.

Some cases hold that the party is not liable unless the act is done maliciously, it being *damnum absque injuria*; but the Supreme Court of Nebraska, after an exhaustive examination and classification of the authorities, concludes: "The most that can be said is that the defendant would not be liable for damages unless the injury was one which was the natural and probable consequence of his acts." Beatrice Gas Co. v. Thomas, 41 Neb. 662, 671, 59 N. W. 925, 928, 48 Am. St. Rep. 711, 717.

The Supreme Court of Pennsylvania holds that "damages resulting to another from the natural and lawful use of his land by the owner thereof are, in the absence of malice or negligence, *damnum absque injuria*, and that consequently one who mines coal on his land is not liable, though the water which percolates or flows therefrom may render the water of his neighbor totally unfit for domestic purposes." Penna. Coal Co. v. Sanderson, 118 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445.

An English case holds that merely making the water of a well temporarily muddy is too minute a damage to authorize a recovery. Taylor v. Bennett, 7 Carrington & Payne (before Justice Coleridge), 329.

We find no cases in our own decisions directly on the facts of this case, but our court has held that the distinction between the diversion of streams and of surface water does not prevail in this state, and that if one changes the flow of surface water so as to discharge it injuriously on his neighbor's land, through a channel other than that through which it naturally flows, he is liable in an action of damages, but that the damages recoverable are only those which have accrued up to the commencement of the suit. 4 Mayf. Dig. 1131; Central of Georgia Railway Co. v. Windham, 126 Ala. 552, 28 South. 392, and cases cited; Hughes v. Anderson, 68 Ala. 280, 44 Am. Rep. 147.

Our court also holds that an action lies for "the casting upon one's land of dirt and foul water, or substances which reach the stream by percolation; * * * the letting off of water made noxious by the precipitation of minerals, * * * or rendering the water unfit for domestic, culinary, or mining purposes, or for cattle to drink of or for fish to swim in, or for manufacturing purposes." Atlanta & Birmingham Air Line Ry. v. Wood, 160 Ala. 657, 663, 49 South. 428, 428.

[4] As said by Stone, J., in the Hughes-Anderson Case, 68 Ala. 285, 286 (44 Am. Rep. 147), "this rule cannot be enforced in its strict letter," and due regard must be had to the right of the defendant to properly

for his own property. "It is not, however, to be understood that, because the flow of water must not be caused by the act of man, that, therefore, the proprietor who transmits water to the inferior heritage is not permitted to do anything on his own land—that he is condemned to abandon it to perpetual sterility, or never vary the course of cultivation, simply because such acts would produce some change in the manner of discharging the water. The law intends not this. * * * It is not more agreeable to the laws of nature that water should descend than it is that lands should be farmed and mined; but in many cases they cannot be, if an increased volume of water may not be discharged through natural channels and outlets. * * * Under these rules, the defendant had no right by ditches or otherwise to cause water to flow on the lands of plaintiffs, which, in the absence of such ditches, would have flowed in a different direction. As to the water theretofore accustomed to flow on the lands of the plaintiff, defendant was not bound to remain inactive. He was permitted to so ditch his own lands as to drain them, provided he did so with a prudent regard to the welfare of his neighbor, and provided he did no more than concentrate the water, and cause it to flow more rapidly, and in greater volume on the inferior heritage. * * * It is a question for the jury to determine, on the facts of each particular case, under proper instructions from the court."

[5] Under these authorities, we hold that in this case it was a question for the jury to decide whether the disposition of the water by the defendant was a prudent and proper disposition of the water for the protection of his own property, with a proper regard for the interests of his neighbor, in view of the improbability of said water's reaching the spring of his neighbor and injuring it.

[6, 7] There was no error in the refusal to give charge 1, requested by the plaintiff, because "water naturally" flowing through a channel is not necessarily "a known and well-defined channel," and for the further reason that, under the principles laid down, it is abstract.

[8] There was no error in refusing to give charge 2, as, if not otherwise bad, it was misleading. The question as to whether the defendant knew that the water would flow into plaintiff's spring was a matter for the jury to consider in determining whether it was a prudent disposition of the water, with due regard to the interests of his neighbor.

Charges 3 and 4 took from the jury the determination of the prudence and propriety of the action of the defendant under the principles laid down.

[9-12] Charges 1, 2, 3, 4, 5, 6, and 7, given

at the request of the defendant, are evidently correct.

There was no error in that part of the oral charge excepted to.

The judgment of the court is affirmed.

Affirmed. All the Justices concur.

ROBERSON v. STATE.

(Supreme Court of Alabama. Feb. 8, 1912.)

1. HOMICIDE (§ 313*) — VERDICT—DEGREE OF HOMICIDE.

Under Code 1907, § 7087, providing that on a conviction of murder the jury must ascertain "by their verdict" whether it is murder in the first or second degree, a conviction cannot stand unless the verdict expressly finds the degree of the crime, though such requirement is not necessary where the conviction is of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 671-675; Dec. Dig. § 813.*]

2. WITNESSES (§ 87*)—OPINION OF WITNESS—CHARACTER OF DECEDENT.

A witness could testify that decedent was of a violent character, though he had never heard any one else expressly state that he was of that character; being entitled to give his opinion of decedent's character in his own language, especially as it appeared to be based in part upon the estimate of decedent's neighbors.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 87.*]

3. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

A request to charge that one single fact proved to the satisfaction of the jury, which is inconsistent with accused's guilt, is sufficient to raise a reasonable doubt requiring acquittal, should have been given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. § 789.*]

4. HOMICIDE (§ 300*) — INSTRUCTIONS—SELF-DEFENSE.

Requested charges on self-defense were properly refused, where they were not hypothecated on the ground that the belief of imminent danger and necessity to kill must be "honestly and reasonably" held by accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

5. CRIMINAL LAW (§ 811*)—INSTRUCTIONS—UNDUE PROMINENCE.

A charge that the jury should consider that accused was interested in the result, and that if he was convicted he would be punished, was erroneous as singling out for comment a particular matter affecting the credibility of accused as a witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. § 811.*]

6. CRIMINAL LAW (§ 1104*)—APPEAL—TRANSCRIPT.

The transcript should not be lettered in red ink.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2776, 2885, 2886; Dec. Dig. § 1104.*]

Appeal from Circuit Court, Marion County; C. P. Almon, Judge.

Bart Roberson was convicted of murder, and he appeals. Reversed and remanded.

The rulings as to evidence sufficiently appear from the opinion of the court.

The following charges were refused to the defendant: (C) "I charge you, gentlemen of the jury, that if there is one single fact proved to the satisfaction of the jury which is inconsistent with defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit." (7) "If the defendant was without fault in bringing on the difficulty, and was in imminent peril, or reasonably appeared to be, of loss of life, or of suffering great bodily harm, and if he could not retreat and avoid the combat in safety to himself, then he had the right to defend himself against an attack made on him by the deceased, even to the taking of his life, if it reasonably appeared to the defendant under all the circumstances to be necessary." (F) "The court charges the jury that if the defendant was without fault in bringing on the difficulty, and if at the time of the homicide there appeared, so apparently as to lead a reasonable man to the belief that it actually existed, a present, impending, and imperious necessity in order to save his own life, or in order to save himself from fatal bodily harm, to kill the deceased, then he had a right to shoot the deceased, and the jury must acquit him, on the grounds of self-defense."

In his oral charge to the jury the court said: "The defendant was examined in his own behalf. You should weigh and pass on his evidence, as you do that of the other witnesses in the case; but in so doing you should take into consideration that he is the defendant, and interested in the result of the case; that if he is convicted he will suffer the punishment fixed by the jury, and if he is acquitted he goes free, and has no punishment to suffer."

E. B. & K. V. Fite and A. H. Carmichael, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

SAYRE, J. [1] Appellant was indicted for murder in the first degree. The jury returned a verdict in the following form: "We, the jury, find the defendant guilty as charged in the indictment, and fix his punishment at imprisonment in the state's penitentiary for life." For many years the law has required of this court in the consideration of criminal appeals that it "must consider all questions apparent on the record or reserved by bill of exceptions, and must render such judgment as the law demands." Code, § 6264. For many years, also, the statute of this state has required that, "when the jury find the defendant guilty under an indictment for murder, they must ascertain, by their verdict, whether it is murder in the first or second degree." Code, § 7087. And the further provision is that, "if the defendant on arraignment confesses his guilt, the court must proceed to deter-

mine the degree of the crime, by the verdict of a jury, upon an examination of the testimony, and pass sentence accordingly." *Id.* The reason for this is found in the fact that the statute, for the purpose of adjusting the punishment, makes murders at the common law of a certain class, murders in the first degree, and all others murders in the second degree, affixing different punishments to the different degrees. *Watkins v. State*, 133 Ala. 88, 32 South. 627. And this court, in the observance of these statutory requirements, has frequently and uniformly held that no judgment of conviction, under an indictment for murder, can be sustained, unless the verdict of the jury expressly finds the degree of the crime of which the defendant is convicted. *Storey v. State*, 71 Ala. 329, and cases there cited; *Fuller v. State*, 110 Ala. 655, 20 South. 1020. But where the conviction is of manslaughter the statute makes no such requirement. *Watkins v. State*, *supra*. The trial court clearly and correctly stated this law to the jury in its charge, but must have overlooked it when receiving the verdict. Under the statute and the decisions the judgment of conviction in this case is fatally defective and must be reversed.

[2] It having become proper under the circumstances of the case to prove the character of the deceased for peace and quiet or for turbulence and violence, Kite Scott, a witness for the defendant, after he had testified that he had lived for a number of years in the same neighborhood with deceased, that he knew the character of the deceased, and that his character was that of a violent, turbulent man, when drinking, on cross-examination, in answer to the solicitor's question, "Who did you hear say that?": "I don't know as any one ever said them very words. He was supposed to be. I called him that kind of a man. I didn't know what they called him." Further, he said that he was not basing his judgment on what people said. Thereupon, on motion of the solicitor, the court excluded all the witness had said relative to the character of deceased, and to this action of the court there was exception. The defendant was entitled to the benefit of the witness' opinion as to the character of deceased. One may form a valuable opinion of the character of another without hearing any specific discussion or mention of that character. *Hadjo v. Gooden*, 13 Ala. 718; *Dave v. State*, 22 Ala. 23. We learn a man's general reputation and character from the bearing of his neighbors and acquaintances towards him. Their attitude unconsciously reflects their opinion, though nothing be said. To this, in forming a competent opinion as to character, a witness may add his own knowledge. In this case the opinion of the witness appears to have been based in part at least upon the estimate of the neighbors of deceased, and should have gone to the jury.

There were, however, a number of witnesses who testified to the violent and turbulent character of the deceased, when drinking; indeed, that question was not contested in the evidence, and it may be that on the state of the record thus shown we would not consider the particular bit of evidence in question of such importance as that error in its rejection, standing alone, would require a reversal.

[3] The court erred in refusing charge C requested by defendant. This court has held that the charge ought to be given. *Simmons v. State*, 158 Ala. 8, 48 South. 606; *Walker v. State*, 153 Ala. 31, 45 South. 640.

[4] Charges 7 and F were properly refused because they omitted the postulate, necessary to an acquittal on the ground of self-defense, that the belief of imminent danger and necessity to kill must be honestly entertained by the defendant as well as reasonable. *Griffin v. State*, 165 Ala. 29, 50 South. 962. "The law requires that such belief must be reasonable and honestly entertained." *Jackson v. State*, 78 Ala. 471; *Gaston v. State*, 161 Ala. 37, 49 South. 876, wherein it differs, is not to be followed. The charge of somewhat similar import, condemned in *Watkins v. State*, supra, was open to more than one objection. The court, having stated one sufficient objection, did not think it worth while to state others.

[5] As to that part of the court's oral charge which singled out for comment defendant's interest in the result of the prosecution as affecting his credibility, see *Tucker v. State*, 167 Ala. 1, 52 South. 464.

[6] This transcript of 67 pages is lettered throughout in red ink. It may be considered to have a certain element of barbaric beauty in it; but to the judicial eye it is distasteful and discomfoting, if not positively harmful. We would suggest that the taste for bright color be not indulged in the preparation of transcripts to be studied in this court.

Reversed and remanded. All the Justices concur.

WILDMAN v. EVANS BROS. CONST. CO. et al.

(Supreme Court of Alabama. Jan. 16, 1912.
Rehearing Denied Feb. 15, 1912.)

1. TRESPASS (§ 81*)—APPEAL AND ERROR (§ 1180*)—EFFECT OF REVERSAL — CRIMINAL PROSECUTION—TRESPASS AFTER WARNING.

Under Code 1907, § 4756, which provides that a lienholder on a building erected by a lessee in possession may, within 60 days from a sale to him at a sale to enforce the lien, remove the building from the premises, an entry to remove a building purchased, which was accomplished in a reasonable manner and with due regard for the rights of the occupant, cannot be considered a violation of a criminal statute denouncing trespass after warning, nor will the subsequent reversal of the judgment

giving the lien relate back so as to make the entry a trespass; the judgment not having been superseded on appeal.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 171; Dec. Dig. § 81; * *Appeal and Error*, Dec. Dig. § 1180.*]

2. MECHANICS' LIENS (§ 298*)—SALE OF BUILDING—ENTRY TO REMOVE—EXPIRATION OF LEASE.

Under Code 1907, § 4756, which provides that a lienholder on a building erected by a lessee may within 60 days after a sale under the lien enter and remove the building, no exception is made where the entry and removal were after the lease had expired and the premises passed into possession of the owner or another lessee, and such a condition would not render the purchaser a trespasser.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 622, 623; Dec. Dig. § 298.*]

3. MECHANICS' LIENS (§ 299*)—ENFORCEMENT—REDEMPTION—WHO MAY REDEEM.

Code 1907, § 4757, which provides that, when a lien attaches to buildings or improvements on leasehold property, under section 4756, the lessor may retain the building before sale to enforce the lien by payment of the amount secured, or after sale by paying the value of the building, gives the right only to the lessor, so that he may preserve his premises in their improved condition, and a lessee with no showing of special authority has no right to redeem.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 624, 625; Dec. Dig. § 299.*]

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by Thomas H. Wildman against the Evans Bros. Construction Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

F. S. Ferguson and Sterling A. Wood, for appellant. A. Latady, for appellees.

SAYRE, J. [1] Appellant sued appellees in an action of trespass to land. In the second count of his complaint he added to the Code form for such cases an averment that the alleged trespass was committed after defendants had been warned in writing not to go upon the premises. Appellees defended on the ground that the Evans Bros. Construction Company had recovered a judgment in a court of competent jurisdiction against Louis B. Lavergne, as administrator of L. N. Archer, deceased, who had been in possession under a lease from the owner, by which judgment a lien was declared in the company's favor upon the building described in the complaint and the unexpired term of Archer's lease of the premises; that he had bought the unexpired term and the building at execution sale had for the satisfaction of his judgment; and that thereafter the defendant Evans acting as the agent of the company, and electing to remove the building from the premises, as provided by section 4756 of the Code of 1907, had entered for that purpose, and had re-

moved the building to the same extent exactly as alleged in the complaint, as he had a right to do, and that without this defendants were guilty of the wrong and injury complained of by the plaintiff. If so much of section 4756 as provides that the purchaser in such case "may, within sixty days after the sale, remove such building or improvement from the premises," is to be given effect, it means that the purchaser, in a reasonable manner and in the due observance of the rights of the occupant, may enter and remove the building or improvement. "Nullus videtur dolo facere qui suo jure utitur." The fact that defendants had been warned not to go upon the premises puts no different aspect upon the rights of the parties. The statute conferring the lien and right to remove gave defendants legal cause or good excuse for entering, so that they did not thereby violate the criminal statute against trespass after warning. And this was the view taken by the court below.

[2] By special replications plaintiff sought advantage of several matters in avoidance of the defense interposed. He set up that the judgment under which the construction company claimed a lien, and in execution of which it had bought the building, had been reversed and annulled by the Supreme Court. 166 Ala. 289, 52 South. 318. But the fact appeared to be, and nothing to the contrary was averred in the replications, that the judgment was reversed after the trespass complained of. That judgment had not been superseded on appeal, and, though the appeal was pending at the time, plaintiff there, defendant here, was entitled to have it executed, and by purchasing the building became vested with the rights afforded by section 4756 of the Code, subject to the right of defendant in that case to restitution in the event of a reversal. In entering for the reasonable assertion of rights conferred by the judgment while yet it was in force and unreversed, defendant company and its agent were not guilty of a trespass, even though the leasehold of the defendant had expired and the premises had passed into the possession of the owner of the fee or another lessee. No exception is made of the purchaser's right in such case, nor can we in-graft exception upon the statute.

[3] Plaintiff also sought to show that, after the sale, he had tendered to the defendant company the value of the building as provided by section 4757 of the Code of Alabama. But section 4757 of the Code gives that right to the lessor, because, no doubt, presumably he is the owner of the premises and interested in preserving the premises in their improved condition. Plaintiff had no right under the statute as against the defendant, and in tendering the value of the building was a volunteer. Nor did the averment of the third special replication that

plaintiff made the tender "as the representative of the lessor" put a different aspect upon the case. The context goes to show that plaintiff's claim to represent the lessor was grounded upon the fact that he (plaintiff) was at the time lessee of the premises, nor does it otherwise appear in the replication that plaintiff had authority to act for the lessor except as a lessee may act for his lessor by virtue of the relation without more. The plaintiff's replication did not put him within the statute. Certainly the plaintiff had no right under the statute nor by any principle of general law to acquire the ownership of the building from the defendant company unless with the defendant's consent. Nor, without express power of attorney to that end or an agency to be implied from facts, the bare relation of lessor and lessee being insufficient for that purpose, could plaintiff rightfully demand that he be allowed to redeem the building for his lessor.

The trial court held to these views. The evidence as to controlling facts was without contradiction, and the court properly gave the general charge for the defendant. All else was of no consequence. The judgment was correct, and will be affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

MCBRIDE v. LOWE et al.

(Supreme Court of Alabama. Feb. 8, 1912.)

1. ADVERSE POSSESSION (§ 71*)—DEED—COLOR OF TITLE.

A record of a deed is color of title, though not sufficient to pass title, because, though acknowledged by a notary, there was no notarial seal attached.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 415-429; Dec. Dig. § 71.*]

2. ADVERSE POSSESSION (§ 71*)—DEED—COLOR OF TITLE.

To render the record of a deed color of title, the purported grantor need not have been in possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 415-429; Dec. Dig. § 71.*]

3. EVIDENCE (§ 186*)—DOCUMENTARY—DEEDS—STATUTORY PROVISIONS.

Under Code 1907, § 3374, which renders admissible a duly certified transcript upon a showing that an original conveyance has been lost or destroyed, or that a party has not the custody or control thereof, the original record is admissible, though the statute mentions only the transcript.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 661-673; Dec. Dig. § 186.*]

4. EVIDENCE (§ 184*)—DOCUMENTARY—DEEDS—STATUTORY PROVISIONS.

Under Code 1907, § 3374, which provides for the admissibility of a transcript of a deed upon a showing that the original was destroyed or without the custody or control of a party, a showing by one of the plaintiffs in ejectment that he did not have possession or cus-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tody of a deed was sufficient to permit the introduction of the record thereof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 638-641; Dec. Dig. § 184.*]

5. ADVERSE POSSESSION (§ 85*)—EVIDENCE.

Where, in ejectment, the record of a deed was in evidence as color of title, a witness was properly permitted to testify that he went into possession thereunder.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 498-503, 656, 660, 668; Dec. Dig. § 85.*]

6. EVIDENCE (§ 273*)—DECLARATIONS—STATEMENT OF PERSON CLAIMING LAND.

While statements explanatory of a possession proven are admissible, the possession itself cannot be proven by a statement of the person claiming it, so that a question put to a witness in ejectment as to whether the defendant showed him a deed, and stated that he was in possession of the land embraced, was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273; * Adverse Possession, Cent. Dig. § 670.]

7. ADVERSE POSSESSION (§ 33*) — EVIDENCE—STATEMENT OF PERSON CLAIMING.

Such statements are insufficient as they do not prove that the person was in open, notorious adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 134, 135; Dec. Dig. § 33.*]

8. ADVERSE POSSESSION (§ 80*) — COLOR OF TITLE—TAX DEED—SUFFICIENCY OF DEED.

A deed which does not describe the land is not color of title, so that, where a tax deed described the land embraced as "100 acres in E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ Sec. 20, T. 5, R. 6, lying and being in said county and state," it was properly rejected as evidence of title in ejectment.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 463-467; Dec. Dig. § 80.*]

Appeal from Circuit Court, Lawrence County; D. W. Speake, Judge.

Ejectment by W. T. Lowe and another against S. A. McBride. From a judgment for plaintiffs, defendant appeals. Affirmed.

D. C. Almon, for appellant. W. T. Lowe and Tidwell & Sample, for appellees.

SIMPSON, J. This suit was brought, as shown by the summons and complaint, by "W. T. Lowe and Tennis Tidwell, partners doing business under the firm name and style of Lowe & Tidwell," against S. A. McBride (it being statutory ejectment to recover lands).

[1, 2] Defendant objected to the introduction of the record of a deed from J. F. Graham and G. F. Graham to T. L. Ready, the record showing that said deed was acknowledged in Tennessee, before a notary public, but not showing that any notarial seal was attached. The court admitted the deed only as color of title. In this there was no error. It is not necessary that the deed be sufficient to pass title to be admitted as color of title (Henry v. Brown, 143 Ala. 454-455, 39 South.

325), nor is it necessary to show that the purported grantor was in possession of the land (Id.).

[3] The original record is admissible, although the statute mentions only a transcript of it.

[4] Secondary evidence can be introduced when "it appears to the court that the original conveyance has been lost, or destroyed, or that the party offering the transcript had not the custody or control thereof." Code of 1907, § 3374. One of the plaintiffs testified that he did not have possession or custody of the deed.

[5] There was no error in allowing the witness, Ready, to testify that he went into possession of the land under the deed.

[6] There was no error in sustaining plaintiff's objection to the question to Ready as a witness—"Did you not have a conversation with Mr. McBride * * * in which he showed you a deed to 100 acres of this land, and told you that he owned it, and was in possession of it?"

If the object was (as it seems) to prove that at the time Ready bought said McBride was in possession, while it is true that statements explanatory of a possession proven are admissible, yet that is a different thing from proving the possession itself by a statement.

[7] The fact that McBride said he was in possession would not prove that he was in fact in open, notorious adverse possession.

[8] There was no error in refusing to allow the tax deed offered by the defendant to be introduced in evidence, as the description of the land therein is insufficient; being as follows: "One hundred acres in E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, Sec. 29, T. 5, R. 6, lying and being in said county and state." Even as color of title, a deed which does not describe any land is not admissible. Rogers v. Keith et al., 148 Ala. 225, 228, 42 South. 446.

The judgment of the court is affirmed. Affirmed. All the Justices concur.

COLLINS et al. v. LOUISVILLE & N. R. CO. et al.

(Supreme Court of Alabama. Jan. 9, 1912.)

1. WATERS AND WATER COURSES (§ 119*)—CONSTRUCTION—RAILROAD CONSTRUCTION.

Railroad companies in constructing their embankments must provide adequate waterways, so that water flowing from adjoining premises shall not be dammed up and thrown back in unnatural and harmful quantities.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 131-134; Dec. Dig. § 119.*]

2. WATERS AND WATER COURSES (§ 119*)—CONSTRUCTION—FLOODING ADJOINING LANDS.

That a railroad company maintained an adequate waterway under its embankments for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the natural flow of water does not make it liable for flooding of adjoining lands which on account of an unprecedented flood would have overflowed if adequate provision for ordinary floods had been made.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 131-134; Dec. Dig. § 119.*]

3. NUISANCE (§ 21*)—NOMINAL DAMAGES.

A bill to abate a nuisance created by privies at a railroad station was properly dismissed with costs against defendants where it appeared that adequate closets had been provided after bringing of the suit, and that plaintiffs' damages were merely nominal.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 55-59; Dec. Dig. § 21.*]

Appeal from Chancery Court, Shelby County; W. W. Whiteside, Chancellor.

Bills by J. M. Collins and another against the Louisville & Nashville Railroad Company and another. Judgment dismissing the bills, and plaintiffs appeal. Affirmed.

Sam Will John, for appellants. Whitson & Harrison and John W. Lapsley, for appellees.

SAYRE, J. Collins and Bulke filed their separate bills against the Southern Railway Company and the Louisville & Nashville Railroad Company jointly, were alike unsuccessful in the court below, and each prosecuted his appeal; but, because their cases were in all substantial particulars alike, the evidence was taken in one case for both, and so, by agreement, one transcript is made to serve the purpose of both appeals. The cases will be considered as one.

The lines of the Southern Railway, constructed about 60 years ago, and the Louisville & Nashville Railroad, constructed about 40 years ago, intersect at Calera. Across the northwest angle the Louisville & Nashville Company for many years has maintained a Y track connecting the two lines, and inclosing an area of five acres. All these tracks are laid upon embankments eight to ten feet above the natural surface of the earth. Prior to the wrongs complained of a double rock culvert, each division of which measured four by four feet, passed under the Southern Company's embankment about 100 feet west of the intersection of the two lines, and through this culvert passed all the water naturally flowing in that direction from the territory in the northwest angle of the two roads, comprising a natural drainage area of approximately 200 acres, and the water from an area of $5\frac{1}{2}$ acres in the northeast angle, also a part of the same natural watershed, let through the embankment of the Louisville & Nashville Company's main line, and into the triangle by a 15-inch pipe. Water falling northwest of the Y passed through a culvert under that track, and across the triangle down to the double culvert under the Southern line. There is no complaint of the concentration of water ef-

fect by the culvert under the Y, and for many years before these bills were filed, as we infer, a ditch with raised banks was maintained by complainants and their predecessors in title, which carried this water directly to the mouths of the double culvert under the Southern track, and, so long as this last-mentioned culvert was sufficient to discharge promptly the water carried to it, there can be no doubt that the culvert under the Y and the ditch constituted a means of disposing of the surface water most advantageous to the owners of property situate within the triangle. When the houses now owned and occupied by complainants were built by their vendor, who owned the land at that time, the course of this ditch was somewhat changed so as to lead the water coming under the Y track alongside the western edge of Collins' lot—Bulke's lot being still further to the east—instead of diagonally across as theretofore. This ditch, as thus changed, runs directly to a concrete culvert under the embankment of the Southern Railway, opened since these bills were filed as will be noticed presently, and thence alongside the embankment to an additional avenue of discharge through the mouths of iron pipes which have been substituted for the double rock culvert, under conditions to be stated in a moment. The surface of the drainage area forms the segment of a shallow basin which declines gradually to the neighborhood of the culverts under the Southern track, and complainants assert by bills and briefs that prior to the overflows complained of, and for many years, the double rock culvert was sufficient to properly carry off the water naturally seeking that point. The properties owned by complainants, one a hotel, the other a storehouse, are located in the triangle and face the Southern track just opposite the mouths of the double culvert which open about 40 feet from the property line. There is evidence to the effect that a six-inch head of water will cover the entire properties of these complainants, so nearly level are they. In the spring of 1906 the Louisville & Nashville Company, having some sort of arrangement with the Southern Company to that end, began preparation for the erection of a passenger station for their joint use and occupancy in the southeast angle of the two lines by laying two 36-inch iron pipes opposite to and in line with the mouths of the double rock culvert, but leaving a small interval between, the expectation being that the rock culverts under the Southern track would be replaced by similar pipes to be connected. Afterwards the Louisville & Nashville Company began the foundation for its station, which would stand over the iron pipes, and in so doing filled a ditch which would carry away any water discharged by the double rock culvert in excess of the quantity the iron pipes

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

would accommodate. While things were in this shape, heavy rains in March and September, 1906, flooded the northwest angle between the roads, doing damage to complainants' properties. Thereafter the station was completed, earth being filled in up to the level of the embankments upon which are the tracks; also the Southern Company replaced the double rock culvert under its track with iron pipes similar to and connecting with the pipes put down by the other company. Still later the Southern Company carried materials to the spot, and was preparing in a leisurely way to construct an additional culvert of concrete under its track at the point where the ditch we have mentioned first touches its embankment, but, before much was done, Collins and Bulke filed these bills on September 14 and 24, 1907, respectively. In November following the additional culvert was completed providing a waterway equal in capacity, however estimated, to a culvert measuring 4 feet in width by $3\frac{1}{2}$ in height.

In the bills it is averred that the two iron pipes were not equal to the burden of carrying off promptly the water from the triangle in which complainants' properties are located, and relief is sought by way of mandatory injunction requiring defendants to provide additional waterways through their embankments. Incidentally complainants seek to recover damages alleged to have been caused by overflows at various times since the Louisville & Nashville Company laid its iron pipes. [1] It was the duty of defendants in the construction of their works to provide adequate waterways so that the water naturally flowing from complainants' premises across land occupied by the defendants should not be dammed up and thrown back upon complainants' premises in unnatural and harmful quantity, and we agree with the chancellor in holding that the iron pipes alone seem to have been inadequate for the purpose, but that these pipes, in conjunction with the concrete culvert, put in since these bills were filed, are sufficient to carry away the water as fast as delivered to them, and that no relief in the matter of providing for the flow of water is now necessary. We also agree with his conclusion, as we read the decree, that no recoverable damages have been shown. Such damage as was caused by the rainfall of March, 1906, was at the time these bills were filed barred by the statute of limitations of one year duly pleaded. The damage suffered in September, 1906, was probably caused by an unprecedented flood. [2] Question is made in briefs whether the circumstance that the flood was unprecedented ought to have any influence in a decision respecting the rights and obligations of the parties. In *Joyce on Nuisances* the rule is stated as follows: "Negligence of the defendant is not ordinarily an essential element in an action for damages sustained by reason of a nuisance. The action is founded on the

wrongful act in creating or maintaining it, and the negligence of the defendant, unless in exceptional cases, is not material." Section 44. The general rule here stated is in accord with the rulings of this court in a number of cases. *Savannah, Americus & Montgomery Ry. v. Buford*, 106 Ala. 303, 17 South. 395; *Central of Georgia Ry. Co. v. Windham*, 126 Ala. 559, 28 South. 392; *Lindsey v. Southern Ry.*, 149 Ala. 349, 43 South. 139. The rule and authorities have been recently considered by the Court of Appeals of this state in an interesting case (*Alabama Western R. R. Co. v. Wilson*, 1 Ala. App. 306, 55 South. 932) in which appellant sought to establish an exception on grounds different from that here urged. We are not advised of any case in which the precise question here mooted has been decided. There may be merit in appellee's contention, and such seems to be the intimation of *Lindsey v. Southern Ry.*, *supra*, and *Southern Ry. v. Lewis*, 165 Ala. 555, 51 South. 746, 138 Am. St. Rep. 77, though in the first named of these cases the court's expression is dictum, and in the second the existence of the exception was denied for the reason that, although the damage complained of was caused by unprecedented rains, the defendant had been guilty of a wrong as things appeared at the time of the construction of its track by so constructing it as to cause water to flow over plaintiff's land which in the course of nature would have flowed elsewhere. The same initial wrong was committed by the defendants in *Central of Georgia v. Windham*, *supra*, *Alabama Great Southern v. Prouty*, 149 Ala. 71, 43 South. 352, and *Central of Georgia v. Champlin*, 160 Ala. 517, 49 South. 415, cases to which we are referred by appellants. These cases involved no question concerning unprecedented rainfalls. In the first named (*Windham's Case*) defendant sought to be excused on the ground that the rainfall was unusual merely. Its excuse was denied. In the case at hand there was no means of determining at the time that the act of the Southern Company in providing the double rock culvert was wrongful, for there was no artificial enlargement of the drainage area discharging its water over the land upon which that defendant constructed its embankment, nor did the climatic history of the country give any premonition of the exigency created by the rains of September, 1906. Having made in the beginning, and subsequently maintained, adequate provision for every exigency to be anticipated, in such case, at least, it seems that the Southern Company should be acquitted of responsibility for the results of an unprecedented flood. We need not, however, state any definite conclusion as to this for the reason that the chancellor's decrees in respect to damages suffered in September may be sustained with entire propriety, we think, upon the ground on which he put them, to wit, as long as defendants were required to provide for the

flow of water under their tracks, they could not have provided against the consequences of that extraordinary flood, because the uncontradicted testimony is that on that occasion the creek, flowing a short distance south of the point in question and draining a large area of country, and into which all the water from the circumscribed area in question naturally flowed, was so swollen that its water reached the level shown to have been reached by the water inside the triangle. Against such a contingency the defendants were not required to provide, for no rule of reason would require them to so provide for complainants' benefit as to restrain the creek within its banks in the event of an unprecedented flood.

There was testimony tending to show that on two other occasions water found its way into the cellar under Collins' store and covered the soil under Bulke's hotel. But we are confident that these results followed from the nature of the place in which these buildings stood in connection with some negligence in keeping the ditch leading from the Y track, rather than from any incapacity of the double culvert or iron pipes to carry off the rainfall.

As for the drainage of water from the premises of complainants, we are of opinion that at the time of the submission of the cause for decree the defendants had made adequate provision for it, and that, in consequence, the bill was properly dismissed, defendants being taxed with the cost for the reason that they did not apply the remedy before these bills were filed.

These bills further show that privies or closets had been constructed inside the station, and that their droppings were deposited in the iron pipes, whence they were washed away only when rains furnished water enough for that purpose. From these pipes a stench arose in times of dry weather, causing annoyance to complainants. One purpose of the bills was to have this arrangement declared a nuisance and abated. There is really some difficulty in determining just how much of the stench complained of, and which was undoubtedly present at times, arose from the closets and pipes maintained by defendants, and how much was contributed by a privy set over the ditch by complainants, or even by other causes indicated in parts of the evidence. Conceding, as the better course, that the defendants' closets and pipes, as originally constructed, were a nuisance, it appears that pending a final decree in these causes defendants have arranged for the flushing of these closets as often as used by connecting them with a standpipe near at hand. Bulke, in his testimony, concedes that the odor is not as bad as formerly, while Collins, who has been at his place of business in his storehouse steadily since these bills were filed, testifies that

he has not smelled any odor since that time. The testimony of other witnesses makes it reasonably clear that, so long as these closets are properly cared for, there will be no occasion for complaint on their account. If they should hereafter be so used as to become a nuisance, complainants will have their remedy at law or in equity; and this, in part at least, is what we understand the chancellor to have intended when he said in his opinion in Collins' case: "Under all the facts of this case as they now stand, complainant should be left to his action at law to recover any such damages as may result to him by reason of the actions of the respondents."

[3] The only remaining question is whether the cause ought to be retained for the assessment of damages alleged to have accrued to complainants by reason of odors during the interval between the erection of the station with its closets and the introduction of the flushing apparatus. It cannot be said on the record presented that complainants suffered in health, in business, or in the permanent or rental value of their property. They endured the occasional annoyance of a bad smell. Theoretically a right of action exists for every wrong and injury, however slight. But some injuries are so slight as to be compensated by damages merely nominal, and we are of opinion that the injury here shown must be assigned to that class. Complainants' right to the intervention of equity in the case presented has been vindicated by the decrees rendered. The chancellor we therefore hold correctly dismissed the bills, after charging defendants with the costs, refusing to retain them for any purpose, and his decrees ought to be affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

BELL et al. v. LEGGETT et al.

(Supreme Court of Alabama. Feb. 6, 1912.)

MORTGAGES (§ 48*)—VALIDITY—DESCRIPTION.

Though the first call of the description of land mortgaged be uncertain and ambiguous, other calls which are definite and can be located will govern, and the mortgage will not be invalid for ambiguity.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 125-132; Dec. Dig. § 48.*]

Appeal from Circuit Court, Calhoun County; Hugh D. Merrill, Judge.

Ejectment by Julia A. Bell and others against A. D. Leggett and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

O. M. Alexander, for appellants. Willett & Willett, for appellees.

SAYRE, J. Action of statutory ejectment by appellants against appellees. Plaintiffs

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

claimed as heirs at law of one Bell. Defendants claimed under a mortgage deed of trust from Bell to one Hughes, foreclosure by bill in equity with due process, and mesne conveyances from the purchaser. In the mortgage the land in controversy was described as follows: Beginning 80 rods west of the south of the southeast corner of section 7, township 16, range 9, in about one rod north of Oxford road in section 18, running north within 173 rods of north line of section 7; thence west within 49 rods of west line of said section; thence south to one rod of mill ditch; thence east one rod from said ditch to where fence crosses same; thence with the meanderings of said fence to the corner east; thence east to the beginning corner near the road—making 180 acres, more or less. A copy of the mortgage deed of trust was made an exhibit to the bill for foreclosure, but in the body of the bill the land was described as “beginning eighty rods west of south of the southwest corner of section seven, township sixteen, range nine, in about one rod north of Oxford road in section eighteen, running north,” and so on. In the subsequent proceedings in the equity court, including the decree of foreclosure, deed to the purchaser, writ of possession, and in the purchaser's deed to the defendants, the descriptions followed that in the body of the bill. The description of land sued for in the complaint followed that in the mortgage deed of trust. The argument for appellants is that “there was a patent ambiguity in the descriptions of the lands in controversy, that said descriptions are uncertain and vague, and that the foreclosure was void.” This argument is elaborated, of course, and thought to be sustained by the citation of authorities; but to no effect. The description found in the court proceedings and in later deeds is not only ambiguous; it is impossible. There is in section 18 no point 80 rods or any other distance west, or south, or southwest, of the southwest corner of section 7. There may be also innumerable points about one rod north of the Oxford road in section 18 and in other sections. And, since there is no authority for singling out any one term in the description of the starting point and locating the error there rather than elsewhere, it must be conceded that the location of the starting point, within itself considered, is defective, obscure, and insensible. But that is not necessarily fatal to the description. The other calls of these several monuments make it clear what the mistake is, and put the description, properly considered as a whole, into harmony with that of the mortgage deed of trust and the complaint. On the authority of *Walsh v. Hill*, 38 Cal. 481, a case closely similar in fact and principle to the case at hand, it is stated in 2 Devlin on

Real Estate (3d Ed.) that: “When a conflict arises between the starting point and other calls, the starting point, if it is fixed, certain, and notorious, will generally prevail. But if the other calls may as readily be ascertained, and are as little liable to mistake, they are entitled to as much consideration as the first. If they all agree, they control.” Section 1033. This is a reasonable rule of construction, and comports with the other rule which requires that instruments be liberally construed for the purpose of giving them some effect. In this case the starting point is not certain; it is ambiguous. However, other calls of the several descriptions in question fix the north line of the property as an east and west line 173 rods south of the north line of section 7. The west boundary is fixed as a north and south line 49 rods east of the west line of the same section. This line runs to a point one rod distant from a mill ditch. Thence, following in part a fence located by the competent testimony of the surveyor, and in other part courses the points of departure of which are fixed by reference to the ditch and the fence, the boundaries are brought to a point 80 rods south of west of the southeast corner of section 7, from which point a north and south line, as called for in the first line of the description, extended to a point 173 rods south of the north line of section 7 incloses an area of approximately 180 acres. Thus the land, notwithstanding the ambiguity of the language used in describing the initial point of departure, is made certain by all other calls conspiring to the same end, and is identified as the land disposed of in the mortgage deed of trust as well as that described in the foreclosure proceeding and subsequent deeds. That proceeding and those deeds were not, therefore, lacking in validity on account of any ambiguity in the descriptions of the property involved and conveyed.

This disposes of the case. The action of the circuit court in giving the general affirmative charge for the defendants was correct, and the judgment will be affirmed.

Affirmed. All the Justices concur except DOWDELL, C. J., not sitting.

CHRISTOPHER et al. v. CURTIS-ATTALLA LUMBER CO.

(Supreme Court of Alabama. Jan. 16, 1912.)

1. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE.

The possession of real estate by a purchaser under an unrecorded deed is constructive notice only when its possession is open, notorious, and exclusive, and his possession jointly with his vendor is not such notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

2. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE.

A prior possession, which has been terminated before the acquisition by a second purchaser of his rights, is not constructive notice to him, though such prior possession, when actually known to the second purchaser, may, in connection with other evidence, show actual notice of the antecedent claim.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

3. LOGS AND LOGGING (§ 3*)—STANDING TIMBER—SALES.

A sale of standing timber, without more, passes no interest in the soil generally, and confers no right of possession exclusive of the general owner's possession, and, until the purchaser enters on the land and severs the timber, the actual possession of the timber remains in the general owner.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3; Contracts, Cent. Dig. § 890.]

4. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE.

A purchaser of land from a vendor in possession, who had previously sold the standing timber to a third person, who had never been in possession, but had merely cut and hauled away timber at intervals, is not chargeable with constructive notice of the rights of the third person.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

5. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASER—ACTUAL NOTICE.

A purchaser of land in possession of the vendor with notice of the cutting and removal of timber thereon by a third person does not have notice that the cutting and removal is under a contract of purchase of the standing timber, unless the facts reasonably impress the mind of a reasonable man that the cutting and removal was by the third person as owner and not merely by permission of the vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

6. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where the instructions are conflicting, and the court on appeal cannot know which of the instructions the jury followed, the erroneous contradiction is prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

7. EJECTMENT (§ 110*)—INSTRUCTIONS—CONSTRUCTIVE NOTICE.

An instruction on the issue of constructive notice of a purchaser must qualify the word "notice" by referring to it as constructive notice.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 319-326; Dec. Dig. § 110.*]

8. EVIDENCE (§ 471*)—CONCLUSION OF WITNESS.

A statement by a witness that he, as agent of a purchaser of standing timber, was in possession of the timber, though not in possession of the land, that being in possession of the vendor, is properly excluded as a mere conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

9. VENDOR AND PURCHASER (§ 243*)—BONA FIDE PURCHASER—NOTICE—EVIDENCE.

Where, in ejectment by a purchaser of standing timber against a subsequent purchaser of the land from the vendor in possession, the issue was whether defendant had notice of the sale of the timber, evidence of plaintiff's entries on the land and cutting timber thereon during three months before the sale to defendant was inadmissible, in the absence of evidence of defendant's knowledge thereof.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 606-608; Dec. Dig. § 243.*]

10. VENDOR AND PURCHASER (§ 243*)—BONA FIDE PURCHASER—NOTICE—EVIDENCE.

The purchaser of land was entitled to show as against a prior purchaser of the standing timber, that the land including the timber was not worth more than the price paid, to show his good faith in the purchase of the land with the timber.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 606-608; Dec. Dig. § 243.*]

Mayfield, J., dissenting in part.

Appeal from Circuit Court, Etowah County; John W. Inzer, Judge.

Ejectment by the Curtis-Attalla Lumber Company against Obal Christopher, revived after his death against G. E. Christopher and others, as his heirs. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

The facts sufficiently appear from the opinion. The oral charge is set out in the opinion also.

The following charges were requested by the defendant: (4) "The court charges the jury that a possession of land which does not exclude the owner is not such a possession as will constitute notice." (5) "The court charges the jury that, if the Curtis-Attalla Lumber Company and McDaniel were in possession of the land and timber jointly when Capt. Elliott bought, such possession would constitute no notice of the Curtis-Attalla Lumber Company's right in the premises, and the verdict of the jury must be for the defendant, if the case is otherwise made out by the defendant." (7) "The possession of growing timber on land, without any other interest in the land except the timber, whilst the owner of the land is in possession of the land on which the timber is growing, will never constitute notice of the rights of the person in possession of such growing timber." (9) "The court charges the jury that a possession of land which does not exclude the owner from possession is not such a possession as will constitute notice." (11) "The court charges the jury that the possession of the Curtis-Attalla Lumber Company, under the evidence in this case, does not constitute notice of its right." (12) "The court charges the jury that if McDaniel and the Curtis-Attalla Lumber Company were in possession of the timber jointly, and Capt. Elliott bought, such possession

would constitute no notice of the Curtis-Attalla Lumber Company's rights in the premises, and the verdict of the jury must be for the defendant, if the case is otherwise made out by the defendant." (13) "If the jury are reasonably satisfied from the evidence that McDaniel was in possession of the lands in question, on which the timber sued for was growing, the law says he was in possession of said timber, and the fact, if it be a fact, that the Curtis-Attalla Lumber Company was also in possession of said timber, without more, would constitute no notice of the Attalla Lumber Company's right." (14) Same as 12. (15) Same as 12. (16) "If McDaniel was in possession of the land conveyed to the defendant at the time of said sale, then the defendant is chargeable with no notice of plaintiff's claim by the cutting of the timber by plaintiff, unless defendant knew of said cutting." (17) "The court charges the jury that the possession, in order to give notice, must be exclusive—that is, the vendor must be out of possession, and his vendee in the exclusive possession; and if they are reasonably satisfied from the evidence that defendant bought the land without actual notice of plaintiff's claim, then their verdict must be for the defendant in this case, provided they are also reasonably satisfied from the evidence that McDaniel was in possession of the land at the time of said sale." (18) "The court charges the jury that, if McDaniel and plaintiff were in the joint possession of the timber on the land in this case, such possession by plaintiff would not give notice of plaintiff's claim, and, unless defendant had actual notice of plaintiff's claim, then their verdict must be for the defendant."

At the request of the plaintiff the court gave the following charges: (1) "The court charges the jury that if, at the time of the purchase by Christopher, the plaintiff was in actual, open, and notorious possession of the timber described in the deed from McDaniel to Lewin, and this possession was exclusive and under claim of title, then, if the facts and circumstances were such that Elliott or Christopher either knew, or by the exercise of reasonable diligence could have known, of such possession, the verdict of the jury should be for the defendant." (2) "The court charges the jury that the possession of the vendee under an unrecorded deed, who is in the open, notorious, and exclusive possession and occupancy of real estate, claiming it as his own, is constructive notice of the vendee's title, and is as effective for the purpose of notice as though the deed had been duly recorded." (3) "The court charges the jury that the law charges the purchaser of land with notice of the possession of any part of such realty as may be in the actual, open, notorious, and exclusive possession of another claiming it as his own."

Dortch, Martin & Allen, for appellants.
Goodhue & Blackwood, for appellee.

SOMERVILLE, J. The appellee sued the appellant in ejectment to recover possession of all the timber of a certain size growing on certain lands. These lands were originally owned by one J. A. McDaniel, who sold the timber in question to one A. M. Lewin on February 28, 1903. Lewin's deed was not recorded until April 10, 1909. Lewin in turn sold and conveyed the timber to the Curtis-Attalla Lumber Company (plaintiff and appellee) on September 28, 1903, by deed recorded on October 17, 1903. On October 15, 1904, McDaniel sold and conveyed the lands of which this timber formed a part, by general description and without exception or reservation, to Obal Christopher, the defendant in ejectment, by deed recorded on November 1, 1904. McDaniel was continuously in possession of the land until October 15, 1904, when he delivered the possession to the purchaser, Christopher. The material and controlling issue in the case was whether the purchaser, Christopher, had, at the time of his purchase, actual or constructive notice of the rights of the plaintiff Lumber Company under their unrecorded deed. Upon this issue the evidence, though strongly preponderant in favor of the defendant, was in sharp conflict, and the jury found the issue in favor of the plaintiff. The assignments of error relate to rulings on the admission of testimony, and to instructions given and refused by the trial court.

[1] The case of *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418, often approved and followed by the later cases, settles the following principles: (1) The possession of real estate by a vendee under an unrecorded deed operates as constructive notice of his rights only when his possession is open, notorious, and exclusive. (2) Such vendee's possession jointly with his vendor is not such notice.

[2] An important qualification of the rule is that a prior possession, which has terminated before the second purchaser's rights are acquired, cannot operate as constructive notice to him. 2 Pom. Eq. Jur. § 662, cited and approved in *O'Neal v. Prestwood*, 153 Ala. 443, 449, 45 South. 251. Of course, however, such a possession, actually known to the second purchaser, may, especially in connection with other evidence, tend to show actual knowledge of the antecedent claim—a question quite distinct from that of the constructive notice resulting from contemporaneous possession, the effect of which does not depend upon actual knowledge of it.

[3] A sale of growing timber may pass the legal title to the purchaser; but, without more, it passes no interest in the soil generally, and confers no right of possession that can be exclusive of the general owner's possession. The right to take possession of such timber can be executed only by entering upon the land and severing it from the soil; and until this is done the actual possession of

the timber, undelivered as yet, remains in the general owner in possession of the land, as the quasi bailee of the owner of the timber. This, it seems to us, belongs to the category of self-evident truths, which need no demonstration. See *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776.

[4] It results from this that the principle of constructive notice to the defendant, through the plaintiff's alleged possession of the timber while still standing on McDaniel's land, cannot be applied to the facts of the present case; the only legitimate issue being as to actual notice on the part of Christopher, or his purchasing agent, of the rights of the claimant of the timber.

The case of *Bolland v. O'Neal*, 81 Minn. 15, 83 N. W. 471, 83 Am. St. Rep. 362, is quite different from the instant case. There the timber purchaser—to quote from the opinion—"took actual and open possession of about 20 acres of the central portion of the land, along the roads, and scattered buildings all over it. No one could go along that way without being challenged at once by open, notorious, adverse acts of possession. They had commenced to cut the trees down, and were in the act of cutting timber upon the land, when plaintiff purchased." This actual possession, adverse to the general owner, was visibly evidenced by the establishment on the land of a large lumber camp to accommodate a hundred men and many horses, including barns, sleeping quarters, cookhouse, storehouse, office, and blacksmith shop. It appears, therefore, that there was an extensive and exclusive possession of the land for the patent purpose of removing the timber, as distinguished from a mere occasional entry and cutting as in the present case; and, on such facts, it would seem that the Minnesota court correctly ruled that there was such a possession of the timber as imported constructive notice of ownership.

The evidence here shows that McDaniel remained continuously in possession of the land, and that the timber claimant never had possession of any part of the land; his action being confined to merely entering and cutting and hauling away the logs at intervals.

[5] The trial court *ex mero motu* charged the jury as follows: "The fact, if it be a fact, that Christopher or Elliott, or both of them, knew or had notice that the timber had been cut or was being cut and removed from the land at or prior to the time of the alleged purchase on the 15th day of October, 1904, would not in this case be notice to Christopher or Elliott that the timber so cut was cut and removed by the plaintiff under a contract of purchase or ownership of the timber. The evidence in this respect must be sufficiently strong to reasonably satisfy you that Christopher or Elliott had such notice of the cutting and removing of the timber as would reasonably impress the mind of a reasonable man that the timber was cut and re-

moved by plaintiff as owner of the timber, and not merely by the permission of or by consent of McDaniel. If defendant knew, or had means of knowing, of the cutting of the timber at or before the time of defendant's purchase, then he would be chargeable with notice of plaintiff's claim. The jury in ascertaining this matter will weigh and consider all the evidence in the case bearing upon the subject so as to ascertain reasonably therefrom what notice, if any, Christopher or Elliott had at the time of the alleged purchase of McDaniel of the timber and ownership thereof by plaintiff. Did Christopher or Elliott know, at the time of their alleged purchase of the land of McDaniel, that the plaintiff owned the timber the subject-matter of the suit, and if you find from all the evidence that defendant or Elliott, at the time of their purchase and payment for the land, knew reasonably of the ownership of the timber being in the plaintiff, then you should find in favor of the plaintiff."

[6] This charge is, we think, a correct statement of the law as applicable to the evidence before the court, with the exception of a single paragraph, as follows: "If defendant knew, or had means of knowing, of the cutting of the timber at or before the time of defendant's purchase, then he would be chargeable with notice of plaintiff's claim." This was a flagrant contradiction of the first paragraph of the charge, and was an erroneous statement of the law. We cannot know which of these instructions the jury followed, and hence cannot hold that the erroneous contradiction of the first paragraph was not injurious error. *G. & A. Ry. Co. v. Ballard*, 157 Ala. 618, 47 South. 578.

[7] Charges 4, 5, 7, 9, 11, 12, 13, 14, 15, 16, 17, and 18, requested for the defendant, correctly state the law of constructive notice as above declared; and, in view of some of the evidence, should have been given by the court, except that some of them are deficient in not qualifying the "notice" referred to as "constructive" notice.

Charges 1, 2, and 3, given for the plaintiff, are at least abstractly correct.

[8] Since possession of growing timber, independently of any possession of the land itself, is a legal impossibility, the statement of the witness Smith that plaintiff's agent was in possession of the timber, though not in possession of the land itself, was a mere conclusion, which should have been excluded.

[9] It was error also to allow the plaintiff to prove the fact of its several entries upon the land and its cutting of timber during the months of July, August, and September, 1904, without some evidence of defendant's knowledge thereof. In the latter case, such proof would be competent as tending to show defendant's actual knowledge of plaintiff's claim, in connection with McDaniel's testimony that he had expressly informed defendant of it. For the same reasons it was

error to allow plaintiff to prove the quantity of timber cut on those occasions.

[10] The issue involved, in part, the bona fides of the defendant's purchase of the land for a valuable consideration. As bearing upon his good faith, he should have been permitted to show that the property purchased by him was not worth in excess of the price paid, \$8,000. Hence the propriety of the question to defendant's witness Elliott, "Whether or not the \$8,000 was not the market value of the property set forth in the McDaniel deed to Christopher, including the timber on the land," in the rejection of which there was error.

For the errors noted above, the judgment will be reversed, and the cause remanded.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting. MAYFIELD, J., concurs in the reversal, but not in all of the opinion.

MAYFIELD, J. I concur in the reversal and mainly in the opinion in this case; but I think there is a more important question which lies across the doorsill of this inquiry, that is not noticed in the opinion, and seems not to have been noticed by counsel nor by the trial court. This question, however, goes to the jurisdiction, and to the validity of the judgment, and therefore could and should be noticed at any stage of the proceedings, and the question should be considered by the court *sua sponte*. The question is: Will statutory ejectment lie, in this state, for the character of property sued for and recovered in this action?

The action is the statutory one, in the nature of ejectment. The property sued for and recovered is described in the complaint as follows: "All the saw timber 10 inches and larger at the butt, lying north of dry creek on the tract known as the E. P. Little place, and also all the timber 10 inches and larger at the butt on the northeast quarter of section 3, township 13, range 5 east, all situated in Etowah county, Alabama."

I am of the opinion that such action will not lie in this state, nor in any other state unless expressly authorized by statute; and I do not know of, and never heard of, any such statute; and by what investigation I have been able to give to the subject, I have been unable to find any authority, statutory or common law, which will authorize such an action. But for the fact that the learned trial judge, the able counsel in this case, and my learned Brothers, seem to think such an action will lie, I should have no doubt upon the subject. I am, however, of the opinion that they have merely passed the question *sub silentio*.

The text-writers and the adjudged cases, both English and American, state the law to be that ejectment will not lie for anything upon which an entry cannot be made, or the possession of which, if recovered, the sheriff

cannot deliver. The action will therefore lie only for corporeal hereditaments, and not for those which are incorporeal.

It is also said, in the older cases, and copied into some of the texts, that: "A party may have ejectment for right of herbage, *pro prima tonsura*; that is to say, if a man has a grant of the first grass that grows on the land every year, he may maintain ejectment against him who withholds it from him. *Ward v. Petifer*, Cro. Car. 362. So, also, ejectment may be had on a demise of the hay-grass and aftermath (*Wheeler v. Toulson*, Hard. 330), on the principle, in these cases, that the parties, being entitled to all the profits of the land, are entitled also to the land for the same time, and no one can enter thereon while they are thus entitled without being a trespasser." *Tyler on Ejectment & Adverse Enjoyment*, p. 39.

It must be remembered that in ejectment, in its original form, damages only were recoverable; but later the writ of *habere facias possessionem* was allowed, in conjunction with the damages, and in some jurisdictions the plaintiff might succeed as to damages, but fail as to possession, and in some jurisdictions counts for damages and counts for possession were allowed to be joined in the same action. But where the action is confined to that of possession of land and the mesne profits for withholding the possession of land, then the subject-matter or the interest in the land must be such as the sheriff can deliver possession of, to the plaintiff, under a writ of restitution. *Sedg. & Wait, Trial of Title to Land*, §§ 96, 97.

The test as to when the action will lie is well stated in the above text, as follows:

"Sec. 100. Right of possession essential.—Whatever takes away the right of possession in present is fatal, and constitutes a complete defense to the action. The plaintiff must have a right of entry in virtue of or incident to some corporeal estate or interest in the premises, for the right to take actual possession of the land is the question to be tried, and constitutes the foundation of the action, whatever may be the character or source of the claimant's title. Chitty says: 'A party having a right of entry, whether his title be in fee simple, fee tail, in copyhold, for life, or years, may support an action of ejectment.'

"Sec. 101. True test as to when ejectment lies.—'The true test of this action,' says the New York Supreme Court, 'seems to be that the thing claimed should be a corporeal hereditament, that a right of entry should exist at the time of the commencement of the action, and that the interest be visible and tangible, so that the sheriff may deliver the possession to the plaintiff in execution of the judgment of the court.' Hence rights or interests in land which lie in grant, being invisible and incorporeal, are not, at common law, the subject of this action."

If a plaintiff owned all the timber on land, and had the exclusive right of possession for the purpose of cultivating and marketing the timber, then ejectment by him might lie, though as to this there is grave doubt; but where a party merely purchases certain parts of the timber on land, has only a mere license or privilege to go upon the land for the purpose of removing the timber which he has purchased, of course ejectment will not lie. If the sheriff should put him in possession of his timber thus growing upon the land, he would necessarily have to put him in possession of the land, which did not belong to him, and of a possessory right which he did not claim.

That the action in this case will not lie, to my mind, is conclusively shown by the fact that the books show the report of no case wherein such an action has been sustained. If such actions will lie, surely they would have been brought before this one, and some of them would have found their way into the books.

As the books contain no reported cases like this, of course they contain no reason why the action in the specific case will not lie. The cases which have been brought, for minerals, mineral rights, mines, mining rights, for annexations to the soil such as houses, rooms, cellars, fixtures, horizontal divisions of land, vaults, for oil and gas wells, for made lands, land under water, etc., are not analogous to the extent of authorizing this action, though in some respects they are different from the ordinary actions of ejectment, and, in some respects, from this action. The chief difference is that in those actions there is an exclusive right to the possession of the thing recovered, and of the land upon which it is situated, for the use or purpose for which the thing recovered is sued and to be used.

In the case at bar the plaintiff never purchased any interest in the possessory right of the land; he merely purchased certain timber growing upon the land, and while, of course, the purchase and sale is considered or treated as a contract with regard to land, to the extent that it must be in writing and must conform to the statute of frauds, yet the effect of the sale, when consummated, is to sever the timber from the land and to convert it into personalty, and the only interest the purchaser acquires in the land is a muniment or license to go upon the land for the purpose of removing or marketing his timber, which is thereafter a chattel and not realty.

If a man should purchase all the timber and growth upon land, and the exclusive right to grow or cultivate timber thereon for a number of years, then he might have such an interest as would support ejectment; but when, as in this case, he merely purchases a part of the timber of certain dimensions and descriptions, the effect of his contract is to

sever the timber so purchased from the land and the other growing timber, and to convert it into a chattel, with a mere license or privilege to go upon the land for the purpose of removing the timber purchased. Of course, ejectment will not lie for a chattel, nor will a mere license or permit to go upon the land for the purpose of removing it support ejectment. This is the only right or title which the plaintiff claims in this action, and it will not, of course, support ejectment.

When the owner of land sells the mineral rights therein, and the right to mine the minerals, this, of course, under the same rule or fiction of law, works a severance of the two estates, but in that case each estate or interest remains and continues to be real estate; while in the case of the sale of certain described timber, the sale, though required to be in writing, converts the timber or trees sold into a mere chattel, with the privilege or license to go upon the land for the purpose of removing it.

It has been suggested that as ejectment at common law would lie for pasturage, herbage, and pannage, this is authority to support the action in this case; but this is not true, for the reasons above mentioned, and the subject is possibly best treated in Sedgwick & Wait on Trial of Title to Land, § 143. The reasoning is to me so conclusive that I here set it out: "Sec. 143. Pasturage and herbage.—The early cases, decided in England, with regard to the right to bring ejectment for pasturage and herbage, are of little value at the present day. They seem to have turned chiefly on questions of evidence and pleading. These rights somewhat resemble fishery rights. With regard to both, it is clear that they may exist separate from the interest in the soil. Lord Coke says that the grantee of *herbagium terræ* has a 'particular right in the land, and shall have an action *quare clausum fregit*; but by grant thereof and liverie made, the *soile* shall not passe.' Where the right to the soil and the herbage are in the same person, the recovery of the one in ejectment would carry the other with it; but that the owner of the separate herbage or pasturage rights would now be permitted to maintain ejectment may well be doubted. In an early case in the King's Bench, often cited, it was held that *ejectione firmæ* would lie for the pasturage of 100 sheep; but it does not appear from the report what the interest of the plaintiff in the soil was, and the question may have been only that of the proper description of the subject of the action; and in a later case in the Exchequer, where *ejectione firmæ* was brought upon a demise de *herbagio et pannagio* of so many acres, the court stated as a reason for inclining against the plaintiff, that 'herbage does not include all the profit of the soil, but only a part of it,' referring to the passage from Coke above

cited. In *Ward v. Petifer*, and in *Parker v. Staniland*, in the King's Bench, it was said that ejectment would lie for the first crop growing upon the land; but in the second case the remark was entirely obiter, while in the first it was not needed for the actual decision of the question presented to the court, for the jury were told that if they believed that the plaintiffs had *only* the first crop (and not the entire profits through the year), they should return a special verdict to that effect, 'and leave it to the law whether an ejectment lies in this manner.' The case is chiefly remarkable for containing a suggestion, similar to that above noted as having been advanced with regard to fisheries, that the owner of the first crop will be presumed, in the absence of evidence to the contrary, to be the owner of the freehold. These decisions certainly cannot be regarded as sufficient to uphold ejectment for herbage or pasturage, when separated from the general ownership of the soil, and existing as a mere right to the profits of the land. Pannage, or the right to gather mast, which, in the nature of the interest, cannot be distinguished from pasturage or herbage, has been held insufficient to support ejectment. The Supreme Court of Massachusetts has decided that the grantee of the 'herbage or feeding' of land cannot maintain a writ of entry, and this decision, it seems to us, should be regarded as an authority in any state in which the action of ejectment prevails."

I know there is a great variety and contradiction of opinions as to the interest, if any, which a purchaser or vendee of standing timber acquires in the land or soil upon which the timber is standing. The oldest cases, or a majority thereof, held that he acquired no title or ownership therein; that it was a mere chattel sale, with a license or permit to remove it; and that the vendor could revoke the license or muniment at pleasure, until the timber was severed, and in some cases until it was removed from the land. This doctrine, however, in the main, has been abandoned, and the rule is declared to be that such a sale and alienation passes an interest in the land itself, and hence that the contract must be in writing and comply with the statute of frauds, and the conveyance comply with the statutes as to deeds or conveyances of land. But it has never been decided that it passes such title or interest as would support ejectment against the owner of the freehold.

If the contract of sale fixes no time within which the timber must be removed, then the law says it must be removed within a reasonable time. When the contract limits or fixes the time in which the removal shall be made, the great majority, if not the great weight, of authorities, hold that, on the expiration of this time limit, all right, title, interest, claim, and demand of the vendee

in or to the timber or land ceases or is determined.

But some of the courts hold that the title to the timber does not so determine nor revert unless the contract expressly so provides, but only the right to enter upon the land is terminated; that the vendee after the expiration of the time limit still owns the timber, although he has no right to remove it—a paradox of contradictions. It is certainly illogical to hold that the contract and sale passed an interest in land, and that by virtue of the same contract, after the expiration of the time limit fixed by the contract, the vendee still owns the timber, but has lost his interest in the land. If the growing timber, which alone is sold and conveyed, is an interest in the land, when the interest in the land is ended by the very terms of the contract and deed, surely the title to the timber is also terminated, which is the interest in the land and the only interest sold or conveyed.

This court, however, is among the few courts which hold that the vendee still owns the timber, although he has no right to use or remove it. *Magnetic Ore Co. v. Marbury Lumber Co.*, 104 Ala. 465, 16 South. 632, 27 L. R. A. 434, 53 Am. St. Rep. 73; *C. W. Zimmerman Mfg. Co. v. Daffin*, 149 Ala. 386, 42 South. 858, 9 L. R. A. (N. S.) 663, 123 Am. St. Rep. 58; *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776.

In the case of *Zimmerman v. Daffin*, 149 Ala. 380, 389, 42 South. 858, 9 L. R. A. (N. S.) 663, 123 Am. St. Rep. 58, this court used the following language: "If the limitation as to the time of cutting and removal should be construed as a covenant on the part of the purchaser that it would cut and remove the timber in the time specified, the title to the timber would remain in the purchaser after the time limit had expired, and he could still enter upon the premises and remove the same at his pleasure, being liable to the vendor for such damages as he should cause in so doing. The vendor would also have a right of action against the vendee for a breach of the covenant in not performing the covenant as agreed; or it may be that the vendor would be entitled to remove the timber after the time limit himself, but not to appropriate it to his own use." Here is where the court went astray in following the Illinois rule, instead of the Michigan rule. The great number and weight of authorities are in line with the Michigan rule, and against the Illinois rule which our court followed.

If the sale of the timber originally was a sale of a chattel merely, as the oldest cases held, with a muniment or license to remove, then the Illinois rule would be correct and consistent; but if, instead, as all the authorities now hold, it is a sale and conveyance of an interest in the land itself, when the interest in the land is terminated and de-

terminated by the contract itself, then the title to the timber ceases and is terminated for the same reason and by the same contract. It is self-contradictory to say that the sale of growing trees is a sale of an interest in land, and that the interest in the land ceases and is terminated by the contract itself, and yet that the title to the timber or trees continues though the interest in the land is terminated by the same. Both propositions cannot be true; one must be false. If the sale of the trees was the sale of a chattel, then the title to them could remain, though the right to remove had ceased; but if the sale of the trees be not the sale of a chattel, but the sale of an interest in the land and soil, and this interest in the land or soil is terminated by the contract and conveyance, the vendee's interest in or title to the trees must of necessity lapse with the expiration of the contract.

This is well pointed out by the annotators, in the reports of the cases of *McRae v. Stillwell*, 111 Ga. 85, 36 S. E. 604, 55 L. R. A. 513; and *Midyette v. Grubbs*, 145 N. C. 85, 58 S. E. 795, 13 L. R. A. (N. S.) 278; and *Adkins v. Huff*, 58 W. Va. 645, 52 S. E. 773, 3 L. R. A. (N. S.) 649, 6 Ann. Cas. 246. The notes to these cases collect and review the authorities upon the subject, the conclusion of which is thus well stated by the annotators in 55 L. R. A. at pp. 535, 536: "The title to standing timber passes at the time of the conveyance, and the purchaser acquires the right to enter on the land for the purpose of cutting and removing the timber, and also an interest in so much of the soil where it grows as is necessary to sustain and nourish the trees until they are cut down. He cannot refuse to pay for the trees on the ground that the vendor had no title to the land, if his possession has not been disturbed. A provision as to the size or suitability of the trees conveyed will generally be held to refer to the time of the conveyance, rather than some time in the future, in the absence of anything to show a contrary intent. Where the conveyance specifies a particular time for the removal of the timber, the purchaser has generally been held to have forfeited all rights in timber not removed within the time specified, although a few cases hold that he still retains the title to the timber, but cannot remove the same, as his right of entry has gone. It would seem that the mere cutting of the trees within the time specified without their removal from the land is insufficient to preserve the purchaser's rights in the timber; but the manufacture of them into timber has been held a sufficient removal of them, although such timber still remains on the land."

I have examined all the authorities I can find upon the subject, and I think the conclusion of the annotator is not only supported by the great number and weight of

authorities, but, as before stated, by reason and the very nature of things.

But as before stated, none of the reported cases hold that the vendee acquires any such interest or title as will authorize him to maintain ejectment against the vendor, or the owner of the freehold estate, while he might defend against an action of ejectment brought by the vendor, which was intended to prevent his entering and removing the timber which he had purchased, during the time mentioned in the contract or within a reasonable time if no time limit was fixed by the contract. Such defense seems to be recognized in the case of *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776. But this is quite a different thing from allowing such a defendant to bring ejectment for the timber. Such a defense as was interposed and recognized in that case might be good upon the theory that there was no ouster, and no unlawful entry or withholding, but that all things done were lawful, and therefore would not warrant the defendant's ejectment when he was there for a lawful purpose. In other words, that where there has been no ouster ejectment will not lie.

I am not able to find any case in which the owner of the timber has been allowed to recover in ejectment against the owner of the freehold. I concede that he might recover against a bare trespasser.

It is well-settled law in this state that, in order for a plaintiff in common law or statutory ejectment to recover, he must recover upon both "a title and a right of entry existing at the commencement of the suit and continuing to the day of trial." *Anderson v. Anderson*, 64 Ala. 403.

Applying these principles of law to the case in hand, it seems to me to be settled beyond doubt that plaintiff could not succeed in ejectment. If we conclude that the plaintiff was the absolute owner of the timber sued for, at the commencement of the action, and at the time of the trial, he certainly had no right of entry upon the premises at the time of the trial, and therefore no right of recovery in ejectment. The contract or deed under which he claimed title expressly limited the time of entry for removal to three years from the date of the deed, which was executed February 28, 1903. The trial was not had until April 13, 1909, more than three years after the time of entry had expired by the very terms of the deed, the only source of title by which he claimed. See deed, Tr., p. 3.

This court and all others have held that if the vendor fails to remove the timber within the time limit of the contract, and removes it thereafter, he is a trespasser and is liable to the owner of the freehold as such. It would certainly be an anomaly in law for a court, by its judgments, to order a sheriff or a party to a suit to put a trespasser upon the land of another.

If the plaintiff rightly recovered in this suit, and the judgment in his favor is executed, such will be the effect of the judgment and orders of the court in this case.

There is another insurmountable practical difficulty in the way of the plaintiff's recovery in this action. He claims only "the saw timber measuring 10 inches at the butt." All the authorities agree that such a deed only passes title to or includes such trees as were comprehended in the description at the date of the deed, to wit, February 28, 1903. Who could go into a forest 11 years after a given date, and point out with certainty the trees, and those only, that corresponded to the stated measurements at the time in question? The feat would be an impossibility. Again, how far from the ground should the measurement be made? And how is the sheriff to put the plaintiff in possession of the trees purchased without disturbing or interfering with the defendant's undisputed and conceded rights?

An attempt to answer these questions will show that the action will not lie.

CHAMBOREDON v. FAYET et al.

(Supreme Court of Alabama. Jan. 19, 1912.
Rehearing Denied Feb. 17, 1912.)

1. HOMESTEAD (§ 142*)—PERSONS ENTITLED—CHILDREN.

Under Code 1907, § 4197, providing that, if decedent had no homestead and no real estate out of which a homestead can be formed, the widow and minor children, or either of them, may have real estate sold and \$2,000 of the purchase money applied by the court in the purchase of a homestead, a minor daughter of decedent, who had never been a member of his family, her mother having been divorced from the father shortly after her birth, is entitled to a homestead out of his realty.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 142.*]

2. HOMESTEAD (§ 142*)—CHILDREN—DIVORCE OF PARENTS.

Though under Code 1907, § 3816, a divorce bars the wife's right to dower in the realty of her husband, and any distributive right in his personalty it does not conclude the homestead right of the children of the marriage.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 142.*]

3. HOMESTEAD (§ 141*)—PERSONS ENTITLED—WIFE.

A wife, though living apart from her husband for years prior to his death, is, under Code 1907, § 4197, entitled to a homestead out of his property.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 261-270; Dec. Dig. § 141.*]

4. HOMESTEAD (§ 136*)—PERSONS ENTITLED—BARRING HOMESTEAD.

A testator cannot, by his will, cut off the right of his widow and minor children to claim a homestead, under Code 1907, § 4197.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 249, 250; Dec. Dig. § 136.*]

5. HOMESTEAD (§ 205*)—ABANDONMENT—FAILURE TO CLAIM.

The right of homestead is a mere personal privilege, which is waived, unless claimed before the property is sold for debts or distribution.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 339; Dec. Dig. § 205.*]

6. HOMESTEAD (§ 145*)—ACQUISITION—WAIVER OF RIGHTS.

Under Code 1907, § 4197, providing that a homestead may be set off to the widow or minor children of any decedent, provided a petition or bill in equity is filed before final distribution, no laches of the widow or guardian of a minor child will bar the right to claim homestead, until there has been a final disposition.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 145.*]

7. HOMESTEAD (§ 150*)—ESTABLISHMENT—DUTY OF PROBATE COURT.

Upon the failure of the widow or minor children to make selection of a homestead, it is the duty of the probate court to have a homestead selected for them; but there is no such duty upon the executors or administrators of decedent.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 150.*]

8. HOMESTEAD (§ 145*)—ESTABLISHMENT—BARRING OF HOMESTEAD.

The right of a minor child to a homestead, in accordance with Code 1907, § 4197, providing for the apportionment of a homestead if a petition or bill in equity is filed before final distribution, is not barred by a voluntary distribution of the decedent's estate between his other children, who were his legatees; for the testator could not bar the right by will, and a voluntary distribution is not a final distribution or order of the probate court.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 145.*]

9. EXECUTORS AND ADMINISTRATORS (§ 181*)—EXEMPTIONS TO WIDOW AND CHILDREN—PROPERTY SUBJECT.

Under Code 1907, § 4200, providing that there shall be exempt to widows and minor children, from administration and payment of debts, personal property to the amount of \$1,000, and that, if the estate is solvent, the value of such property shall be credited on the distributive shares of the widow and children, the exemption can only be taken out of personalty, and cannot be derived from the sale of realty.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 681-685; Dec. Dig. § 181.*]

10. EXECUTORS AND ADMINISTRATORS (§ 189*)—ADMINISTRATION—RIGHT TO EXEMPTION.

Where the guardian of a minor child, in consideration of a cash payment by the other legatees, abandoned the contest of the will of her ward's father, the rights of the minor to the exemption of \$1,000 provided for by Code 1907, § 4200, are not lost, as the consideration so paid is not a part of the property disposed of by the will.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 189.*]

11. EXECUTORS AND ADMINISTRATORS (§ 55*)—ASSETS OF DECEASED HUSBAND'S ESTATE—PROPERTY OF WIFE.

Jewelry, which a wife permits her husband to wear during his life, does not become part of his estate.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 55.*]

12. EXECUTORS AND ADMINISTRATORS (§ 177*)
— ALLOWANCE TO CHILDREN — PROPERTY
SUBJECT.

An iron safe and an electric battery are neither articles of personal apparel, nor household or kitchen furniture, necessary for the use and comfort of a family, and so a minor child cannot claim such articles as exempt from administration, under Code 1907, § 4199.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 177.*]

13. EXECUTORS AND ADMINISTRATORS (§ 177*)
— ALLOWANCE TO CHILDREN — PROPERTY
SUBJECT—"WEARING APPAREL."

Under Code 1907, § 4199, exempting to a minor child the "wearing apparel" of its deceased father, a minor child is entitled to a watch and chain belonging to the decedent.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 177.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7423-7426, 7834.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by Adele Chamboredon, as guardian of Clio May Fayet, against Toney Fayet and others. From a decree dismissing the bill, complainant appeals. Reversed and remanded.

J. B. Aird and Arthur L. Brown, for appellant. Henry Upson Sims, for appellees.

SAYRE, J. This bill is filed by Adele Chamboredon, as duly appointed guardian of her infant daughter, Clio May Fayet, both residents of this state, against the three executors of the will of August Fayet, deceased, and his eight adult children, two of whom are also executors and made parties defendant as such. The third executor, also a party, is a son-in-law of the decedent. The bill avers that the executors are proceeding to administer the estate in the probate court in utter disregard of the claims and rights of complainant's ward, and are dividing the property among themselves and the other defendants, but that no steps have been taken for a final settlement in the probate court. The purpose of the bill is to have a homestead, \$1,000 in money, and certain articles, to wit, a diamond ring, diamond stud, gold watch and chain, set ring, cuff buttons, iron safe, and electric battery, alleged to have constituted a part of decedent's wearing apparel and household furniture, declared exempt to complainant's ward and set apart to her use and benefit, and, in order that the relief sought may be made more effective, to have the administration removed into the court of chancery. By pleading and uncontradicted evidence it appears that decedent was thrice married. His eight adult children were the offspring of his first marriage. His second wife died childless. Complainant had been decedent's third wife, and her ward was the child of that marriage. Decedent had procured a decree of divorce from complainant on the ground of abandonment, and by that decree

the custody, care, and control of the child was awarded to and imposed upon complainant in this cause, who thereafter resumed her maiden name, and is now known as Mrs. Adele Chamboredon. The wife was awarded alimony. At the same time, and, it may be inferred, in pursuance of some provision in the decree of the court granting alimony, though that decree is not before us, decedent conveyed to complainant, as trustee for her infant daughter, real property valued at \$1,667. Clio May never lived with her father, having been born after the separation of her parents, but before the divorce. Decedent left a large estate, consisting of real and personal property. By his will he divided his entire estate among the children of his first wife, referred to his former provision for his divorced wife, and left to his infant daughter \$1.

In his decree dismissing the bill the chancellor assigns no reason for his conclusion that the complainant was not entitled to relief. Appellees seek to justify the result on various grounds, which will be stated and considered.

[1] It seems to be contended, on the authority of *Ex parte Pearson*, 76 Ala. 521, that complainant's ward is not entitled to exemptions of any sort, because she was never a member of decedent's family. In that case it was held that the exemptions of personal property to the widow and minor children of a decedent, under the Code of 1876, like the exemption of a homestead, contemplated the existence of a family relation in this state, so that where a decedent died in this state, after a residence of several years, while his wife and children continued to reside at his former residence in another state, and never came to this state until after his death, they were not entitled to statutory exemptions of personalty. This was put upon the language of section 2824 of the Code of 1876, providing that "any person dying, leaving a widow, or child, or children, under the age of twenty-one years, members of his family, in addition to the exemption heretofore made under this chapter [homestead exemption], there shall be exempt all the wearing apparel of the deceased," etc. But the law was significantly changed in the codification of 1886, when the section was made to read: "In favor of the widow and minor child or children, or either, of such decedent, there shall be exempt from administration and the payment of debts * * * all the wearing apparel of the decedent," etc. Code 1886, § 2545. Such has been the language of the provision since that time. Code 1907, § 4199. And in 1903 (Acts 1903, p. 150) section 2070 of the Code of 1896, which provided for exemptions in lieu of homestead, was amended so as to read as section 4197 of the Code of 1907 now reads; the effect being that, if de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cedent, at the time of his death, has no homestead exempt to him, or has no other real estate out of which a homestead can be carved, "the widow and minor children, or either of them, may by petition in the probate court, or by bill in equity, have the homestead or any other real estate owned by the decedent at the time of his death sold, and two thousand dollars of the purchase money therefor applied by the court in the purchase of a homestead for the benefit of such widow and minor children, or either of them: Provided such petition or bill in equity is filed before a final distribution of the assets of decedent's estate has been made. * * * And in no case, and under no circumstances, shall the widow and minor children, or either of them, be deprived of homestead or two thousand dollars in lieu thereof, if they or either of them apply therefor in manner as herein provided, before final distribution of the decedent's estate." [2] The decree of divorce barred the wife of her dower, and of any distributive share in the personal estate of her husband (Code, § 3816); but no rights of the child were concluded by that decree, nor do the statutes of the state express a policy which would cut off her homestead right. [3] But for the decree of divorce the wife would have been entitled to homestead, notwithstanding she had lived apart from her husband for years prior to his death. *Coker v. Coker*, 160 Ala. 269, 49 South. 684, 135 Am. St. Rep. 99; *Nolen v. Doss*, 133 Ala. 259, 31 South. 969. The language of the statute providing for homestead and other exemptions for minor children covers the case of this child, and it is not within the province of the court to ingraft upon it any exceptions. *Walker v. Walker*, 181 Ill. 260, 54 N. E. 956; *Hall v. Fields*, 81 Tex. 553, 17 S. W. 82.

[4] August Fayet had resided in Jefferson county for many years before his death, and at that time had a homestead there. His death occurred in April, 1908, and his will was offered for probate in the same month, but, for reasons to be stated further on, was not admitted to probate until June, 1909. The will contained a direction that the executors, for the purpose of making an equal distribution of testator's real estate among his eight adult children, should, as soon after his death as convenient, provide for a division of the realty among them. In the latter part of June, 1910, the executors proceeded to carry out this provision of the will; the said children adopting their acts in the premises by exchanging deeds among themselves. On this division the homestead was allotted to one of the sons. Complainant had never lived in this home place, and prior to the filing of this bill, which was in October, 1910, no demand or claim of homestead right had been made on behalf of her infant daughter. The evidence shows that the place, after being reduced to its

lowest practicable area, is worth considerably more than \$2,000. Where the homestead does not exceed \$2,000 in value, or 160 acres in area, it vests in the exemptioner immediately upon the death of the parent of husband with or without administration. This because selection is unnecessary. But if the homestead is worth more than \$2,000, there must be an administration and selection to vest title. The testator cannot by his will cut off the right of his widow and minor children, or either of them, to claim homestead or other exemptions under the statute. *Bell v. Bell*, 84 Ala. 64, 4 South. 189; *Hubbard v. Russell*, 73 Ala. 578. [5] But homestead and other exemptions are merely personal privileges, which are waived, unless claimed at the time and in the manner prescribed by law. And where selection is necessary, it must be made before the property has been subjected to the payment of debts or sold for distribution. *Jackson v. Wilson*, 117 Ala. 432, 23 South. 521; *Quinn v. Campbell*, 126 Ala. 280, 28 South. 676; *Newell v. Johns*, 128 Ala. 584, 29 South. 609; *Faircloth v. Carroll*, 137 Ala. 243, 34 South. 182; *Dake v. Sewell*, 145 Ala. 581, 39 South. 819; *Headen v. Headen*, 54 South. 646; *Jarrell v. Payne*, 75 Ala. 577; *Sherry v. Brown*, 66 Ala. 51. [6] Short of the period fixed by statute—that is, the final distribution of the estate of the decedent, as the statute now has it—no laches of the widow, or of the guardian for the minor children, can operate a waiver or loss of the right. [7] In the event of the failure of both to make the selection, it is the duty of the judge of probate to appoint appraisers to make selection and set apart the property selected for appraisement. *Mitcham v. Moore*, 73 Ala. 542. But no liability in this regard is placed by law upon an administrator (*Henderson v. Tucker*, 70 Ala. 381), and, of course, neither the law nor the will in this case imposed any upon the executors; but they might have saved a resort to chancery by a suggestion to the probate judge that the case called for the appointment of appraisers. And the statute, in order that the settlement of estates may not be unduly delayed, fixes a limit beyond which there can be no delay without forfeiture of the privilege, and, of necessity, minor children, in the absence of fraud, must be bound by the acts of those appointed by law to act for them. [8] Now appellees, concurring in what has been said, indeed using the result of the cases cited as the basis of their argument, insist that, by the failure of those whose duty it was to act for the minor child to assert her right until the executors had distributed the realty among testator's adult children in strict pursuance of the directions of the will, complainant's ward lost her right to an exemption in lieu of homestead. The pertinent language to be found at the conclusion of section 4197 of the Code has been quoted. We do not construe it to

mean that an exemption in lieu of homestead may in any case be carved out of personality or the proceeds of personality. That has never been the law or policy of this state, and the language of the statutes, including section 4197 itself, at various places excludes the idea. And we may concede that it was not intended to uproot the statutory rule, long construed and established in the decisions of this court, that an application for exemption in lieu of homestead comes too late if deferred until the real property of the estate has been sold under the order of the court for the payment of debts or for distribution. There may be also substantial ground for appellees' notion that the final distribution of which the statute speaks is a distribution of all the realty, out of which only can an exemption in lieu of homestead be carved, although it be decreed in advance of a final settlement of the estate. And, in short, the last clause of the section may be nothing more than a legislative declaration of the law as it was before the amendment of 1903. The objection to the exemption in this case must be determined upon another consideration. The real property of decedent's estate has not been distributed by any order, decree, or judgment of a court, within the contemplation of the last clause of section 4197 of the Code. The testator could not deprive complainant's ward of her exemption by his will, as we have seen. *Hubbard v. Russell* and *Bell v. Bell*, supra. No more could the executors, carrying out the provisions of the will, or the devisees, acting among themselves to the same end. The property is still in the hands of the devisees. No question about the possible rights of innocent purchasers being involved, the pleadings and proof fail to disclose any sufficient reason for denying to complainant's ward a right of which the statute says widows and minor children cannot be deprived in any case or under any circumstances, save only where there has been a final distribution of the decedent's estate. However broader the language of the amended section may be than the true legislative purpose, to be learned from other parts of the statutory system of exemptions and the decisions of this court, the section in its present as well as its former shape is sufficient to show that appellant's ward was entitled to the exemption in lieu of homestead claimed by her bill in the court below.

[8, 10] It has already been stated that the probate of August Fayet's will was delayed for about 14 months. This was because complainant, Adele Chamboredon, as guardian for her child, Clio May, set on foot a contest which was twice submitted to a jury without a decision of the issue. Then, by agreement, Mrs. Chamboredon, in consideration of \$8,000 paid to her by the executors for the use of her daughter and ward, withheld active opposition to the probate of the will, and so it was admitted to probate in June,

1909. This was the form assumed by the transaction. The payment was in effect made by the adult devisees; each of them being charged by the executors with \$1,000, and their receipts taken for that sum. And it is doubtful that the guardian had authority to make this compromise of the rights of her ward without the advice and consent of the probate or chancery court; but of this the parties are not now in a position to complain. It does not appear that in making or carrying into execution this agreement by which the executors were suffered to probate the will there was any effort to provide against the contingency of the ward's future claim of exemptions. Toney Fayet, one of the executors, and the only one who testifies on the subject, deposes that "nothing was said in any of the agreements about withdrawing the contest with reference to exemptions to Clio May Fayet under the statute or otherwise." The evidence shows that the executors have undistributed in their hands a sum of money considerably in excess of \$1,000. By section 4200 of the Code provision is made, in favor of widows and minor children, that there shall be exempt to them from administration and the payment of debts personal property to the amount of \$1,000; but if the estate is solvent—as the estate of Fayet is—the value of such property shall, on final settlement and distribution of the estate, be credited on the distributive shares of the widow and children receiving the benefit thereof. This exemption is taken out of personality; it cannot be derived from the sale of realty. *Hunter v. Law*, 68 Ala. 365. Appellees insist that the \$8,000 received by the minor in consideration of abandoning the contest must take the place of any interest she would have had in the personal estate, if there had been no will, or if the contest had been successful. But the executors and the guardian had no right to carry the agreement so far. Nor can the court, on consideration of supposed equities, assume any such agreement for them, because, if we assume, on the one hand, that the minor was entitled to an interest in the estate as if there were no will, her interest would far exceed the sum she received; and, on the other hand, if we deal with the estate as disposed of by a testament valid for every purpose but that of cutting off exemptions from administration, as it seems we must, the amount received in compromise must be considered to have been derived from some source other than the estate of the decedent. The court is not concerned about it. The will, having been duly probated, must stand as the law of the estate, except as modified by statute. The exemption of \$1,000, having been asserted for the minor before final distribution, should have been allowed and made effective by a decree of the chancery court.

[11] As for the articles of wearing apparel and household furniture claimed for the

minor under section 4190 of the Code, the ring and the stud were proved to have belonged to testator's second wife, who gave them to him for his life only. They are not a part of his estate.

[12] The iron safe and electric battery are not articles of personal apparel. They are hardly to be classed as articles of household or kitchen furniture necessary for the use and comfort of a family. They are not exempt from administration.

[13] As for the other specific articles claimed as exempt, it seems that the claim should have been allowed. *Phillips v. Phillips*, 151 Ala. 527, 44 South. 391, 125 Am. St. Rep. 40, 15 Ann. Cas. 157.

For the errors pointed out, the decree will be reversed, and the cause remanded.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

CASTLEBERRY v. STRINGER.

(Supreme Court of Alabama. Feb. 1, 1912.)

1. WILLS (§ 439*) — CONSTRUCTION — TESTATOR'S INTENT.

The cardinal rule in construing wills is that testator's intention must prevail if not inconsistent with law or public policy.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.*]

2. WILLS (§ 441*) — EVIDENCE TO AID CONSTRUCTION.

In ascertaining testator's intent, the court will place itself so far as possible in his position when the will was executed by considering the surrounding circumstances, the condition of his estate, and family, his social relations, affection for the beneficiaries, etc.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 958; Dec. Dig. § 441.*]

3. WILLS (§ 446*) — CONSTRUCTION — CONSTRUCTION FAVORING VALIDITY.

The court must adopt the construction which will effectuate the will, if it can be so fairly construed, as against one which would avoid it.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 962; Dec. Dig. § 446.*]

4. WILLS (§ 455*) — CONSTRUCTION — SURROUNDING CIRCUMSTANCES — SKILL OF DRAFTSMAN.

The fact that a will was drawn by an unskilled person may be considered in construing it.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 972, 973, 976; Dec. Dig. § 455.*]

5. WILLS (§ 506*) — CONSTRUCTION — "HEIRS."

The word "heirs" has a fixed legal meaning, which must be given it when used in a will, unless controlled by the context, but it may also be used in a nontechnical sense, and, when the context requires that it be so construed to effectuate testator's intent, it may be given the meaning of "children."

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1090-1099; Dec. Dig. § 506.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3241-3285; vol. 8, pp. 7677, 7678.]

6. WILLS (§ 506*) — CONSTRUCTION — "HEIRS."

A will directed that testatrix's mother should have the entire use and control of the

property during her life, and that the H. building should go to testatrix's brother, and the residue of her property, both real and personal, should "go to the heirs of my sister F." The will was drawn by an unskilled person unfamiliar with technical legal terms, and, when it was executed, sister F. was about 32 years of age, and testatrix's mother, the life tenant, was much older. Held that, in view of the improbability of sister F. dying before the life tenant so as to have "heirs" at the life tenant's death, that word would be construed as meaning "children," so that the sister's children would take a vested remainder in the residue of the property other than the H. building.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1090-1099; Dec. Dig. § 506.*]

7. WILLS (§ 629*) — ESTATE PASSING — CONTINGENT REMAINDERS.

The law rather disfavors contingent remainders and lapses, and favors vested remainders.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.*]

Appeal from City Court of Talladega; Cecil Browne, Judge.

Suit by Fannie C. Stringer against E. C. Stringer and others to quiet title. From a judgment for complainant, W. B. Castleberry, as guardian for one of defendants, appeals. Affirmed.

The bill contains the usual statutory averments, making a copy of the will an exhibit, and setting out what complainant supposes to be the effects of the will. Olmsby Tilton is made a respondent, with the allegation that she is insane, and is the daughter of a sister of the testatrix. A guardian was appointed, who filed an answer, setting up that she was an heir of the testatrix and entitled to a one-third interest in the property. The will is as follows: (1) Payment of debts. "(2) I direct that my mother, Mrs. N. C. Carroll, is to have the entire use and control of all of my property during her life. (3) At the death of my mother, I want the Hubbard building on East street, now used by the B. & A. R. R. Co. as an office, to my brother James E. Carroll. The residue of my property, both real and personal, to go to the heirs of my sister Mrs. Fannie C. Stringer." Then follows appointment of her mother as executrix without bond.

It appears from the evidence that the testatrix died in 1898; that her mother, Mrs. Carroll, survived her, and died in 1905; that, before Mrs. Carroll's death, one of Mrs. F. C. Stringer's children died; that, after Mrs. Carroll's death, A. P. Stringer and E. Gipson Stringer, the remaining children of Mrs. F. C. Stringer, made Mrs. Stringer a deed to all their interest in the property. It further appeared that, since the death of her mother, Mrs. Stringer and her children have been in the possession of the property, and have claimed the property, subject to the rights of Mrs. Carroll. Olmsby Tilton ap-

pears to have been the child of a deceased sister of the testatrix, Mrs. Savery.

W. B. Castleberry, for appellant. Knox, Acker, Dixon & Sterne, for appellee.

ANDERSON, J. [1] "The fundamental and cardinal rule in the interpretation of wills is that the intention of the testator, if not inconsistent with some established rule of law or with public policy, must control, and it is the duty of the courts to ascertain such intention and to give force and effect to the scheme that he had in mind for the disposition of his estate." 30 Am. & Eng. Ency. Law (2d Ed.) p. 661. "A cardinal principle in the construction of wills is to ascertain the intent of the testator, and give it effect if it is not prohibited by law." *Smith v. Smith*, 157 Ala. 79, 47 South. 220, 25 L. R. A. (N. S.) 1045.

[2] "In endeavoring to construe a will so as to ascertain the intention of the testator, the courts will put themselves as far as possible in the position of the testator by taking in consideration his modes of thought and the circumstances surrounding him at the time of the execution of the will. Thus courts will consider the condition of his family and estate, the comparative amounts of realty and personalty, his affection for the legatees, his social relations," etc. 30 Am. & Eng. Ency. Law (2d Ed.) p. 666.

[3] "When a will fairly construed is susceptible of two constructions, one of which would render it inoperative and the other give effect to it, the duty of the court is to adopt the latter construction." 30 Am. & Eng. Ency. Law (2d Ed.) p. 667. "If the language of the instrument is uncertain, or there is a latent ambiguity, evidence is admissible of the testator's feeling towards, and his relation to, the persons affected by the will, in order to interpret his intentions and to explain the doubtful words." 30 Am. & Eng. Ency. Law (2d Ed.) p. 679.

[4] "The facts showing the person drawing the paper was unskilled will be considered in construing the will." *Findley et al. v. Hill*, 133 Ala. 229-233, 32 South. 497; *May v. Richie*, 65 Ala. 602. "Where the word 'heirs' is used in an instrument, and from the evidence showing the circumstances which attended the making of the will, and the fact that the will shows it was drawn by an unskilled person, and the necessary construction requires it, the word 'heirs' will be held to mean children." *Findley v. Hill*, 133 Ala. 229-233, 32 South. 497; *Campbell v. Noble*, 110 Ala. 382-394, 19 South. 28; *May v. Richie*, 65 Ala. 602; *Twelves v. Nevill*, 39 Ala. 175-180; *Flanagan v. State Bank*, 32 Ala. 508-511; *Powell v. Glenn*, 21 Ala. 458-466; *Fellows v. Tann*, 9 Ala. 999-1004; *Kalbach v. Clarke*, 133 Iowa, 215, 110 N. W. 599, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647.

[5] "'Heir' is a legal term, and is used in

a legal sense, with a fixed legal meaning. The word has a technical signification, and, when unexplained and uncontrolled by the context, must be interpreted according to its technical sense, or its strict legal import. But the word, notwithstanding its primary and well-understood meaning, is susceptible of more than one interpretation, and has in law several significations, under different circumstances, and the word 'heirs,' as frequently happens, is not used in any exact or technical way. The signification of the word is in all cases a question of intention. 'Heirs' is very generally construed as meaning children, where the context so requires, where it is necessary that the term be so construed in order to carry out the clear intent of the instrument, or where it is plain that it is used in a popular sense, as a word of description referring to a certain class of persons." 21 Cyc. p. 418.

[6] The will in question was drawn by a person admitted to be unskilled in such work and unfamiliar with technical law terms, and it is manifest that the testatrix intended to devise all of her property to her mother, Mrs. Carroll, for life, with a vested remainder in the Hubbard property to her brother, James E. Carroll, and a vested remainder as to the residue of her estate in the children of her sister, Mrs. Fannie C. Stringer.

[7] The law of Alabama is rather opposed to contingent remainders and lapses, and favors vested remainders, and this rule of construction is especially applicable, when it is reasonably possible to harmonize the words of a will with an intention of the testator to preserve the remainder and prevent a lapse. The life tenant was the mother of Mrs. Stringer, and it was unnatural to suppose that the mother would survive her daughter, the said Mrs. Stringer, but which was essential in order for her (Mrs. Stringer) to have heirs who could take upon the death of her mother, the life tenant. Therefore, to construe the word "heirs" in a technical sense would defeat the remainder and the intention of the testatrix, unless the mother survived her daughter, the said Mrs. Stringer. As well expressed in the opinion of the learned trial court: "At the time of the making of the will the complainant Fannie C. Stringer was about 32 years of age. The life tenant was her mother, and necessarily considerably older. In all human probability, Mrs. Stringer, the daughter, would long outlive the life tenant, her mother, and therefore could have no 'heirs' at the death of such life tenant. It seems to me it would be a strained construction to hold that the word 'heirs' in this clause of the will was used in its strict legal signification. On the other hand, taking into consideration the in-expert manner in which this will is drawn and worded and the state of facts as shown by the proof, under which the will was made, for the purpose of elucidating the scheme of

disposition which occupied the mind of the testator,' and placing myself as near as possible in the situation of the person whose language I am construing, I think the court is justified in departing from the strict legal interpretation of the word 'heirs,' and in holding that this word was used as synonymous with and in lieu of the word 'children.'" We therefore hold that the will gave a life estate to the mother of testatrix and a vested remainder in and to the property, other than the Hubbard building, to the children of Mrs. Stringer, and do not think that the property descended under the terms of section 6154 of the Code of 1907, upon the theory that there was no one capable of taking upon the termination of the life estate. The case of *De Bartelaben v. Dickson*, 166 Ala. 59, 51 South. 986, is not opposed to the present ruling. In the first place, it did not appear that the scrivener was ignorant of the meaning of the term "heirs." Moreover, it was not reasonable to anticipate a lapse, as the remainder went to the heirs of the life tenant, and there would naturally be heirs to take upon her death. Here the remainder did not go to the heirs of the life tenant, but to those of a third person, who was younger than the life tenant and whom the testatrix had every reason to think would survive the said life tenant, thus preventing a qualified taker upon the expiration of the life estate if the word "heirs" is given a strict, technical meaning.

The decree of the city court is affirmed. Affirmed. All the Justices concur.

HARTON v. LITTLE et al.

(Supreme Court of Alabama. Dec. 21, 1911.
Rehearing Denied Feb. 15, 1912.)

1. EVIDENCE (§ 69*)—PRESUMPTIONS—REGULARITY OF FORECLOSURE.

In the absence of contrary evidence, it is presumed that the foreclosure of a mortgage was regular and valid.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 90; Dec. Dig. § 69.*]

2. MORTGAGES (§ 340*)—FORECLOSURE—PLAINTIFFS.

Power of foreclosure and sale contained in a mortgage may be exercised by any person entitled to the mortgage debt without an assignment of the mortgage to him; a transfer of the debt in writing or by parol being an equitable assignment of the mortgage, and Code 1907, § 4896, providing that such a power of sale may be exercised by any person entitled to the money secured.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1036-1038; Dec. Dig. § 340.*]

3. TRUSTS (§ 366*)—ENFORCEMENT—PARTIES.

One having no interest in the land in which a trust is sought to be declared, and against whom no relief is prayed, is not a proper party respondent to the proceeding.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 574-583; Dec. Dig. § 366.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Suit by H. M. Harton against W. M. Little and others. From a decree for defendants, complainant appeals. Affirmed.

S. C. M. Amason, for appellant. Frank S. White & Sons and Campbell & Johnston, for appellees.

SOMERVILLE, J. The appellant, H. M. Harton, filed his bill to declare and enforce an alleged trust in certain land to which the Gibson Realty Company, one of the respondents, is shown to have a clear record title. Subsequent to the creation of the alleged trust and the alleged accrual to complainant of an undivided half interest in the land, the alleged trustee—with complainant's knowledge, and without protest from him apparently—conveyed said half interest to complainant's wife, reciting a purchase price of \$5,000. Contemporaneously with this transaction, complainant and his wife executed a mortgage deed granting and selling said land to the said trustee-grantor to secure the payment of a recited purchase-money note for \$3,000, as recited in the mortgage. This mortgage was afterwards foreclosed by sale under the power therein granted; the recitals of the foreclosure deed being that Mrs. Johnston, the mortgagee and payee, "for valuable consideration and before maturity indorsed, transferred and assigned to the First National Bank of Birmingham the note and mortgage aforesaid," and that "W. J. Gilmore purchased for valuable consideration the note due said bank as aforesaid, and received an indorsement and transfer of the security above mentioned."

[1] The recitals of this deed are full, and amply show, *prima facie*, a valid foreclosure of the mortgage by the transferee and owner of the debt which it secured. *Naugher v. Sparks*, 110 Ala. 572, 18 South. 45. Moreover, regularity and validity are presumed in the absence of evidence to the contrary. *Ward v. Ward*, 108 Ala. 278, 19 South. 354.

The title thus acquired by Gilmore as purchaser at the foreclosure sale for the price of \$3,951.20 passed by mesne conveyances to the Gibson Realty Company, which paid therefor to its grantor the sum of \$11,666.66 in money, and received a statutory warranty deed of conveyance.

[2] The only impeachment of this title attempted by the bill of complaint is by the allegation that Mrs. Johnston did not assign and transfer the mortgage to the bank, and that the bank did not assign and transfer the mortgage to Gilmore, but merely delivered it to him. It is not at all necessary that a mortgage deed be assigned in order to enable the owner of the debt to foreclose under a power of sale. The power of sale is a part of the security, and may be exercised

by an assignee, or any person who is entitled to the mortgage debt. Code 1907, § 4896; *McGuire v. Van Pelt*, 55 Ala. 344; *Buell v. Underwood*, 65 Ala. 285; *Wildsmith v. Tracy*, 80 Ala. 258; *Ward v. Ward*, 108 Ala. 278, 19 South. 354. And a transfer of the debt, by writing or by parol, is in equity an assignment of the mortgage. *McMillan v. Craft*, 135 Ala. 148, 33 South. 26; *Buckheit v. Decatur Co.*, 140 Ala. 216, 37 South. 75.

The bill does not deny the assignment of the debt, nor the ownership thereof by either the bank or Gilmore, and hence its averments are wholly insufficient to overcome the recitals of the deed, or to show an unauthorized exercise of the power of sale.

We hold, therefore, that the bill shows on its face that whatever interest complainant may have once had in the land has passed by his voluntary deed to the Gibson Realty Company, and the bill is therefore without equity, and the complainant is not entitled to relief. The grounds of demurrer pointing out this fatal defect were properly sustained.

[3] It is evident, on the face of the bill, that the respondent R. D. Johnston has no interest whatever in this land, nor in this litigation; nor is any relief prayed against him. His demurrer for his misjoinder as a party respondent was properly sustained.

We deem it unnecessary to consider whether, under the peculiar circumstances recited in the bill, complainant ever acquired an interest in the land; or whether his conduct with respect thereto would bar his entrance into a court of equity. For the reasons assigned, the decree of the chancery court must be affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

CONTINENTAL CASUALTY CO. v. OGBURN.

(Supreme Court of Alabama. Nov. 23, 1911.
Rehearing Denied Feb. 15, 1912.)

1. INSURANCE (§ 146*)—POLICY—CONSTRUCTION—FORFEITURE CLAUSES.

The rule that insurance contracts must be strictly construed against the insurer should be especially followed as to forfeiture clauses.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.*]

2. INSURANCE (§ 467*)—CONTRACT—ACCIDENT POLICY—CONSTRUCTION.

The insuring clause of an accident policy provided that if the insured received personal bodily injury, directly and independently of all other causes through external, violent, and purely accidental means, and which causes at once and continuously after the accident total inability to engage in any and every labor or occupation, the company would pay indemnity for loss of life, limb, sight, or time resulting therefrom. Part 2, in fixing the compensation for loss of life, limb, etc., declared that if, within 90 days from the date of the accident, any one of specified losses should result necessarily and solely from such injury, as described

in part one, the company would pay, subject to the provisions of a subsequent clause, and then proceeded to fix the amount of insurance for loss of life, limb, etc. *Held*, that a death loss under such policy was expressly limited to an injury described in part 1, and which must have resulted necessarily and solely therefrom within 90 days after its infliction, so that an objection that the provisions of part 1 were inapplicable in case of loss by death is unsustainable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1187; Dec. Dig. § 467.*]

3. INSURANCE (§ 467*)—ACCIDENT POLICY—"AT ONCE"—"IMMEDIATELY."

Where an accident policy only insured against bodily injuries caused through external, violent, and purely accidental means, causing "at once," and continuously after the accident, total inability to engage in any and every labor or occupation, etc., the term "at once" or "immediately" should be construed as adverbs of time and not causation, and were not intended to mean "reasonable time," but rather "presently," or without any substantial interval between the accident and disability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1187; Dec. Dig. § 467.*]

For other definitions, see Words and Phrases, vol. 1, pp. 610, 611; vol. 4, pp. 3403-3410.]

4. INSURANCE (§ 560*)—PROOFS OF LOSS—DEFECTS—WAIVER.

Where preliminary proofs of loss are presented to the insurer in due time, defects therein may be waived by the insurer's failure to object to them on that ground, or by refusing to pay for any reason other than defects in proofs.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1393-1404; Dec. Dig. § 560.*]

5. APPEAL AND ERROR (§ 736*)—JOINT ASSIGNMENT—REVIEW.

A joint assignment of error will be overruled, unless sustainable on both grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3028, 3029; Dec. Dig. § 736.*]

6. INSURANCE (§ 668*)—ACCIDENT POLICY—DEFECTIVE PROOFS—WAIVER—QUESTION FOR JURY.

In an action on an accident policy, evidence *held* to require submission to the jury of defendant's waiver of defects in the proof of loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1732-1770; Dec. Dig. § 668.*]

Appeal from Circuit Court, Jefferson County; E. C. Crowe, Judge.

Action by Lula Ogburn against the Continental Casualty Company on an accident and death policy. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Plea 6, after quoting part 1 of the contract as set out in the opinion, avers that the insured did not receive personal bodily injuries which caused at once and continuously after the accident a total inability to engage in any and every labor or occupation. The demurrers to this plea were that it is not shown that the provisions referred to would be operative in case of loss by death. It is affirmatively shown in said plea that the provision therein set out is not applicable in the case of death. Plea 4 sets out the policy

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

requirement as to proof of injury, fatal or nonfatal, and avers a failure to comply therewith, with the further averment of the clause of strict compliance in said policy. The third replication to this plea sets up a waiver of the benefit of this provision, in that there was an absolute denial of liability, on the ground that the insured died of a disease, and not as the result of an accident. The seventh replication sets up that proof of death was made, and no objection was ever made to the sufficiency of such proof, but that the proof was retained without objection made within a reasonable time.

Charles A. Calhoun, Manton Maverick, and M. P. Cornelius, for appellant. Black & Davis and Riddle, Ellis, Riddle & Pruett, for appellees.

ANDERSON, J. [1] "Insurance policies are framed by insurance companies with great care and caution, with a view of limiting their liability as much as possible; and in most cases impose conditions and duties on the assured, to be performed with marked particularity. They should be and are liberally construed in favor of the assured, which conditions and provisions are strictly construed against the insurer." *Piedmont Co. v. Young*, 58 Ala. 486, 29 Am. Rep. 770. And this rule is especially followed in dealing with forfeiture clauses of insurance contracts. *Equitable Co. v. Golson*, 159 Ala. 508, 48 South. 1034. On the other hand, courts are not at liberty to make new contracts for parties, and where the language is unambiguous, and but one reasonable construction of the contract is possible, the court must expound it as made, however hard it may operate on the parties; for in contracts of insurance, as in other contracts, the rights of the parties are determined by the terms of the instrument as far as they are lawful. 1 Encyc. L. & P. 323.

[2] Part 1 of the contract in question, being the insuring clause for accident, says: "If the insured while this policy is in force shall receive personal bodily injury (suicide sane or insane not included) which is effected directly and independently of all other causes through external, violent and purely accidental means, and which causes at once and continuously after the accident total inability to engage in any and every labor or occupation, the company will pay indemnity for loss of life, limb, limbs, sight or time resulting therefrom." Part 2, in fixing the compensation for loss of life, limb, etc., says: "If, within ninety days from the date of the accident, any one of the following losses shall result *necessarily and solely* from *such injury* as is described in part 1, the company will pay subject to the provisions of part 6." It then proceeds to fix the sum for loss of life, limbs, etc. It must be observed that the death loss is expressly referable to such injury as is described in part 1, and which

must have resulted *necessarily and solely* therefrom, and within 90 days after the infliction of same; that is, the assured must have sustained an injury, through external, violent, and purely accidental means, and which *caused at once and continuously* after the accident total inability, etc., and his death must have resulted within 90 days from such an accident so sustained in order to entitle the beneficiary to the death claim as provided by part 2. Plea 6 is couched in the language of the policy contract, and the demurrers, which make the point that the accident as described in part 1 has no application to the death feature of the contract, should have been overruled, and the trial court committed reversible error in sustaining same. In the case of *Rorick v. Railway Officials*, 119 Fed. 63, 55 C. C. A. 369, the court held that the death clause of the policy was not controlled by the clause defining the nature and character of the accident, though there is a strong dissenting opinion by Gilbert, C. J. Whether this case is sound or not, it can be differentiated from the case at bar as the death clause there provided for "loss of life, occurring within ninety days from the date of the accident causing the fatal injury," and did not refer to the part of the policy defining the accident or requiring that death should result necessarily and solely from such injury as so described, as does the policy contract in question. As to the meaning of the injury as described, this would arise upon a construction of the plea, as it is couched in the language of the contract and was not subject to the plaintiff's demurrer.

[3] It is sufficient to say that the terms "at once" and "immediately," as used in the accident policies, in dealing with the nature and character of the disability, have been construed by a majority of the courts as adverbs of time and not causation, and that they do not mean a reasonable time, but mean presently or without any substantial interval between the accident and the disability. 1 Encyc. L. & P. 332; *Cooley's Briefs on Insurance*, vol. 4, pp. 3168, 3169; *Williams v. Preferred Ass'n*, 91 Ga. 698, 17 S. E. 982; *Vess v. United Society*, 120 Ga. 411, 47 S. E. 942; *Pepper v. Order of America*, 113 Ky. 918, 69 S. W. 956; *Merrill v. Travelers' Co.*, 91 Wis. 329, 64 N. W. 1039; *Preferred Ass'n v. Jones*, 60 Ill. App. 106; *Ritter v. Accident Ass'n*, 185 Pa. 90, 39 Atl. 1117; *Pac. Mutual Co. v. Branham*, 34 Ind. App. 243, 70 N. E. 174.

[4-6] "It has been held by this and other courts that where the preliminary proofs of loss are presented to the insurer in due time, and they are defective in any particular, these defects may be waived in either of two modes: First, by a failure of the insurer to object to them on any ground, within a reasonable time after receipt; in other words, by undue length of silence after presentation.

And, second, by putting their refusal to pay on any other special ground than such defect of proof. The reason is that fair dealing entitles the assured to be apprised of such defect, so that he may have an opportunity to remedy it before it is too late." Central Ins. Co. v. Oates, 86 Ala. 568, 6 South. 84, 11 Am. St. Rep. 67, and cases there cited. Replications 3 and 7 to plea 4 seem to conform to the above-quoted authority and were not subject to the defendant's demurrers which were properly overruled by the trial court. Moreover, the assignment of error as to said replications was joint, and the trial court could not be reversed unless both of them were subject to the demurrers. A. G. S. R. Co. v. Clarke, 145 Ala. 460, 39 South. 816. Nor can we say that the trial court erred in refusing the general charge for the defendant, upon the theory that the plea was proven and the plaintiff failed to prove said replications. The plaintiff addressed a letter to the defendant dated September 9th, which was received within 30 days after the death of the insured, informing it of the claim, death of the insured, and the cause of same, which was treated with silence. Then, too, the defendant, on September 21st (after receipt of her letter and within 30 days after the death of her husband), wrote her, making no allusion to said defective proof sent them or to her demand, settling with her on the disease rather than accident basis, and demanding a surrender of the policy. The jury could well infer a refusal to pay the death claim, not for failure to furnish the requisite proof, but upon the ground that the death of the assured resulted from disease and not from accident.

Since this case must be reversed, it is needless for us to determine whether or not the trial court erred in refusing a new trial because the verdict was palpably contrary to the great weight of the evidence.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur, except McCLELLAN, J., not sitting.

SOUTHERN COTTON OIL CO. et al. v. HARRIS.

(Supreme Court of Alabama. Jan. 18, 1912.
Rehearing Denied Feb. 15, 1912.)

1. TRESPASS (§ 41*)—PLEA—UNCERTAINTY.

In an action of trespass for wrongfully taking a stock of goods, an answer which sets up that before the bringing of the suit the defendant sued out an attachment, which was levied upon the property sued for as that of one R., "and plaintiff alleges that said property was at the time of the levy of said writ of attachment the property of said R., and that the said plaintiff had no title thereto as against the plaintiff in said attachment," is insufficient for its confusing effect in alleging that the "plaintiff" alleges the property to be the property, etc., and

for its failure to describe the suit with sufficient certainty, by failing to state the defendant therein.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 89-97; Dec. Dig. § 41.*]

2. TRESPASS (§ 41*)—JUSTIFICATION—ATTACHMENT—REQUISITES OF PLEA.

And such plea was insufficient for failing to show that the writ of attachment was ever returned into court.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 89-97; Dec. Dig. § 41.*]

3. APPEAL AND ERROR (§ 1040*) — HARMLESS ERROR.

The sustaining of a demurrer to a plea will not be ground of reversal where the defendant had the benefit of the facts alleged therein under other pleas.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

4. TRESPASS (§ 41*)—JUSTIFICATION—ATTACHMENT—REQUISITES OF PLEA.

An answer in trespass for wrongfully taking a stock of goods, which attempted to show that the goods were taken under an attachment and sold to satisfy a judgment entered in favor of the present defendant, is insufficient where it neither shows under what process the property was sold, nor whether there was any order or process authorizing the sheriff to sell the same, nor that any process was returned into court.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 89-97; Dec. Dig. § 41.*]

5. FRAUD (§ 43*)—PLEADING—NECESSITY OF PLEADING.

While, where the issue at law is as to the title to real or personal property, under a claim that the title of one of the parties was obtained by fraud, the facts constituting the fraud need not be alleged with the same particularity requisite in a bill in chancery to cancel a conveyance, this being a matter of proof on the issue of title vel non, yet where the pleader undertakes to state the facts they must show fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 37; Dec. Dig. § 43.*]

6. FRAUDULENT CONVEYANCES (§ 24*) — DEFENSES—FRAUDULENT OBTENTION OF PROPERTY—SUFFICIENCY OF PLEA.

Under Code 1907, § 4293, which provides that conveyances or assignments, made to hinder or defraud creditors, are void, a mere attempt to sell and convey a stock of goods and their consequent removal to the storehouse of the purchaser and intermingling with other goods is not fraudulent and will not avoid the sale.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 32-46; Dec. Dig. § 24.*]

7. TRIAL (§ 45*)—OFFER OF PROOF — SUFFICIENCY.

In an action of trespass for taking a stock of goods, a statement by counsel for defendants that he "proposed to show that" the plaintiff "married stock of goods and continued in business" was properly excluded by the court as unintelligible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 110-114; Dec. Dig. § 45.*]

8. TRESPASS (§ 45*)—EVIDENCE.

Where defendant in trespass for the taking of a stock of goods justified on the ground of a fraudulent sale to plaintiff and an attachment, the plaintiff was shown to be in business for himself, whether he received any part of his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

stock from his wife was a matter interesting only to himself and wife, and questions as to such matters were properly excluded as not tending to show that he was without means to purchase the stock alleged to have been wrongfully taken.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 116-122; Dec. Dig. § 45.*]

9. FRAUDULENT CONVEYANCES (§ 159*)—DEFENSE—INSOLVENCY OF TRANSFEROR.

A debtor may prefer a creditor and sell his property to him for a fair consideration in payment of an existing debt though he is insolvent, and that fact be known to the purchaser, so that, in trespass for the taking of a stock of goods justified on the ground of a fraudulent sale and an attachment, questions as to the insolvency of the seller and as to his informing the plaintiff as to his condition were properly excluded.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 506-517; Dec. Dig. § 159.*]

10. APPEAL AND ERROR (§ 837*)—PLEA—TIME OF FILING—EFFECT ON RELEVANCY OF EVIDENCE UNDER ISSUES.

Where a plea was not filed until after testimony was offered and rejected, it cannot be looked to in determining the correctness of the court's action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3278; Dec. Dig. § 837.*]

11. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR — ADMISSION OF IMMATERIAL EVIDENCE.

Where in trespass for the taking of a stock of goods the defense was that the goods were taken by a sheriff under an attachment, there was no reversible error in permitting the sheriff to testify whether he had given the plaintiff notice of another levy as the matter was immaterial to the issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4163; Dec. Dig. § 1050.*]

12. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—RECEPTION OF EVIDENCE.

Permitting an answer to a question cannot be complained of as error where the witness answered that he did not know.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

13. TRESPASS (§ 24*)—DEFENSE — JUSTIFICATION UNDER PROCESS.

An attachment will not sustain a plea of justification under process in trespass for a wrongful taking of a stock of goods, where the record of the proceedings under which the justification is claimed shows that the levy was quashed under claim of exemptions.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 52; Dec. Dig. § 24.*]

14. TRESPASS (§ 68*)—INSTRUCTIONS—IDENTIFICATION OF SUBJECT-MATTER.

An instruction in trespass for a wrongful taking of a stock of goods, which submits that if the jury believe that at the time the plaintiff purchased "the goods, the subject of this suit," one R. owed him a bona fide debt in satisfaction of which "plaintiff purchased said stock of goods," etc., they should find for the plaintiff, sufficiently shows that the goods were those purchased by the plaintiff from R. where the whole subject of the litigation is as to the validity of that purchase, even though the defendants claim that all of the plaintiff's goods were liable to the levy of the attachment under which

they justify by reason of a wrongful intermingling.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 151, 152; Dec. Dig. § 68.*]

15. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF FACT.

And such instruction is not improper in assuming that the goods had been purchased, as it requires a finding of that fact, and the evidence does not conflict to the effect that the goods were purchased; the only question being as to whether the purchase was valid.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

Appeal from Circuit Court, Blount County; J. E. Blackwood, Judge.

Action by W. A. Harris against the Southern Cotton Oil Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

The action was for wrongfully taking a stock of goods, wares, and merchandise of the plaintiff, located at the storehouse of the plaintiff at Gum Springs, in Blount county, Ala. The following are the pleas discussed in the opinion: (3) "For further answer to said complaint the defendants say that on the 3d day of January, 1908, the defendant the Southern Cotton Oil Company instituted suit in the circuit court of Blount county, Ala., for the sum of \$800, evidenced by a note executed by said J. W. Ratliffe, and payable to the said Southern Cotton Oil Company, and in aid of said suit said Southern Cotton Oil Company sued out an attachment out of said circuit court and placed same in the hands of the defendant W. E. Graves, as sheriff of Blount county, Ala., and was by him levied upon the property mentioned in said complaint as the property of said J. W. Ratliffe; and plaintiff alleges that said property was, at the time of the levy of said writ of attachment, the property of said J. W. Ratliffe, and that the said plaintiff had no title thereto as against the plaintiff in said attachment." (4) "For further answer to said complaint defendants say that on the 3d day of January, 1908, the defendant the Southern Cotton Oil Company instituted suit in the circuit court of Blount county, Ala., against one J. W. Ratliffe, upon a note executed by said Ratliffe to said Southern Cotton Oil Company for the sum of \$800, and in aid of said suit procured an attachment to be issued by the clerk of said circuit court, which said writ of attachment was levied by the sheriff of Blount county upon the property mentioned in the complaint as the property of said Ratliffe, for the satisfaction of the debt, the foundation of the said suit, and said property was sold by the said W. E. Graves, as the sheriff of Blount county, and the proceeds thereof applied to the satisfaction of the judgment rendered in said court in said suit in favor of the said Southern Cotton Oil

Company, and against the said J. W. Ratliffe; and defendants allege that for some time prior to the levy of said attachment, and up to within a few days before said levy, the said J. W. Ratliffe was engaged in the mercantile business in said county, and within a few days before said levy attempted to sell and convey the stock of goods belonging to said Ratliffe to the plaintiff in this case, and the said stock of goods was removed from the storehouse of said Ratliffe to the storehouse of the plaintiff, and there intermingled with other goods in the storehouse of plaintiff for the purpose of destroying their identity, and for the purpose of hindering, delaying, or defrauding the creditors of said Ratliffe; and defendants allege that said attempted sale was void, and passed no title to said property to the said W. A. Harris as against the creditors of the said Ratliffe."

The demurrers were that the plea fails to describe the suit upon which said writ of attachment was issued, fails to show that the writ of attachment was ever returned into court, fails to show that said property was in any way subject to said writ of attachment, fails to describe the process under which said goods were sold with sufficient certainty, purports to be a plea setting up justification under legal process against Ratliffe, and undertakes to allege a fraudulent transfer, without stating facts constituting such a fraud.

Plea 8 was filed on August 15, 1911, during the trial of the cause, and is as follows: "Defendant says that, shortly before the levy of the writ of attachment heretofore mentioned in pleas of defendant, Warren Ratliffe, for the purpose of hindering, delaying, or defrauding the defendant, who was at that time a creditor of said Ratliffe, with knowledge on the part of plaintiff, transferred to plaintiff a certain stock of goods upon which said writ of attachment was levied, and that the plaintiff in this cause well knew all these facts, and for the purpose of aiding and assisting the said Ratliffe in perpetrating said fraud on the defendant Southern Cotton Oil Company received said goods, and intermingled the same with a certain stock of goods belonging to the plaintiff, and claimed all of said goods as the property of the plaintiff."

In his oral charge to the jury the court said the attachment issued January 3, 1908, is insufficient to sustain the defendant's plea of justification under process, for the reason that it was levied upon the property which had been claimed as exempt by Ratliffe by a claim of exemptions filed in the office of the judge of probate. Therefore the levy in the first instance was wrongful, and constituted a trespass, if nothing else appeared.

The following is charge 1, given at the request of the plaintiff: "If the jury believe from the evidence in this case that at the

time plaintiff purchased the goods, the subject of this suit, Warren Ratliffe owed him a bona fide debt of about \$1,000, and that plaintiff purchased said stock of goods from the said Ratliffe in satisfaction of said indebtedness, and that the amount of said indebtedness was a fair and adequate price for said goods, and that under said sale the said Ratliffe was to receive no benefit from said transaction, except the cancellation of said indebtedness, then your verdict must be for the plaintiff for the value of the goods at the time of the taking, with interest to date." The disputed question seems to be whether or not the stock of goods levied upon was that purchased by Harris from Ratliffe, and as to Ratliffe's solvency at the time, and Harris' knowledge thereof, and as to whether Harris was attempting to assist Ratliffe in covering up, or whether his purchase was for a bona fide debt owing him by Ratliffe. The other facts sufficiently appear in the opinion of the court.

F. E. St. John and Steiner, Crum & Well, for appellants. Ward & Weaver, for appellee.

SIMPSON, J. This action is in trespass, by the appellee against the appellants, for wrongfully taking a stock of goods, wares, and merchandise.

[1, 2] Plea 3, besides being confusing in alleging that the "plaintiff" alleges the property to be the property of J. W. Ratliffe, is subject to the grounds of demurrer that it does not describe the suit, etc., with sufficient certainty (not stating against whom the suit was), and fails to show that the writ of attachment was ever returned into court. *Olmstead v. Thompson*, 91 Ala. 130, 8 South. 755; *Daniel v. Hardwick*, 88 Ala. 557, 7 South. 188; *Womack v. Bird*, 63 Ala. 500.

[3] Moreover, the defendants had the benefit of the facts attempted to be set up in said plea by pleas 5, 6, and 7. There was no reversible error in sustaining the demurrer to said third plea.

[4] The demurrer to plea 4 was properly sustained. Said plea does not show under what process the property was sold, nor whether there was any order or process authorizing him to sell the same, nor that any process was returned into court.

[5, 6] It also undertakes to state the facts constituting the fraud, and the facts stated do not show fraud. While, in a case at law, in which the issue is as to the title to real or personal property, one party claiming that his title is superior to that of the other because the other's was acquired under a fraudulent conveyance, it is not necessary to allege in the pleadings the facts constituting the fraud with the same degree of particularity that is requisite in a bill in chancery to cancel a conveyance, this being a matter of proof on the issue of title *vel non* (*Pollak v. Searcy*, 84 Ala. 259, 261, et seq.,

4 South. 187; Moore, Marsh & Co. v. Penn & Co., 95 Ala. 200, 202, 10 South. 343; Montgomery, Dryer & Co. v. Bayliss, 96 Ala. 342, 11 South. 198; Teague, Barnett & Co. v. Bass, 131 Ala. 422, 426, 31 South. 4; Gunn v. Hardy et al., 130 Ala. 642, 652, 31 South. 443; Reed v. Smith, 14 Ala. 380; Gilliland v. Fenn, 90 Ala. 230, 8 South. 15, 9 L. R. A. 413; High et al. v. Nelms, 14 Ala. 350, 48 Am. Dec. 103; Mason v. Vestal, 88 Cal. 396, 26 Pac. 213, 22 Am. St. Rep. 310; Code, § 4293, yet, when the pleader undertakes to state the facts, the facts must show fraud. 8 Mayf. Dig. p. 886, and cases cited.

There is nothing in the case of Gillespie v. McClesky, 160 Ala. 289, 49 South. 362, in conflict with this statement. In that case the plaintiff was claiming under a mortgage, fraudulent on its face—the pleadings are not all set out—and, after discussing the points on pleadings and charges, the court merely states that “there is another principle, which is brought out by some of the pleadings,” which is conclusive of the general proposition that the plaintiff could not recover in any event. The court did not discuss at all what was a necessary averment on that issue.

[7] There was no error in the action of the court in regard to the statement by counsel for defendants that he “proposed to show that Mr. Harris married stock of goods and continued in business.” The question is unintelligible. It was probably intended to bring out the facts treated of in subsequent questions.

[8] The subsequent questions as to whether the witness' wife had a stock of goods when he married her, and whether he started business on that stock of goods, were objected to, and the objections sustained. In this there was no error. It is not disputed that the witness was in business himself, and as to whether he got the goods from his wife to start business on was a question between him and his wife, and had no bearing on the question as to whether he had purchased the goods in question from Ratliffe. The fact that he got a stock of goods from his wife has no tendency to show that he had no means.

[9] There was no error in sustaining the objections to the questions to the witness, Ratliffe, as to his insolvency and as to his informing the plaintiff of his condition. It has long been the law of this state that a debtor has a right to prefer one creditor, and that though he be insolvent, and though that fact be known to the purchaser, he may sell his property for a fair consideration to his creditor, in payment of an existing debt. Consequently the matters were irrelevant in this case. Crawford et al. v. Kirksey et al., 55 Ala. 282, 293, 28 Am. Rep. 704; Danner & Co. v. Brewer & Co., 69 Ala. 200; Spira v. Hornthall, W. & W. Co.,

77 Ala. 145; Tryon et al. v. Flournoy & Epping et al., 80 Ala. 325, 326; Carter Bros. & Co. v. Coleman et al., 84 Ala. 258, 4 South. 151.

[10] Plea 8 was not filed until after this testimony was offered, and, without deciding whether that plea raised any issue, it cannot be looked to in determining the correctness of the court's action in this particular.

[11, 12] As to the overruling of the objection to the question to the witness Graves (the sheriff), as to whether he had given the plaintiff notice of the second levy, there was no reversible error. The matter was immaterial to the issues in this case, and, at any rate, the answer was that the witness did not know. Brown v. Johnston Bros., 135 Ala. 609, 613, 33 South. 683.

[13] There was no reversible error in that part of the court's oral charge to the effect that the statement issued January 3, 1908, was not sufficient to sustain the defendants' plea of justification under process. The record of the proceedings, under which the justification is claimed, shows that the levy was quashed under claim of exemptions, and it is difficult to see how such a record could support the claim that the property was subject to the levy. Daniel v. Hardwick, 88 Ala. 557, 7 South. 188.

[14, 15] While charge 1, given at the request of the plaintiff, possibly might have been expressed with more strict accuracy, yet the words, “the goods the subject of this suit,” evidently refer to the goods purchased from Ratliffe by Harris, as the whole subject of the litigation is as to the validity of that purchase, although the defendants do claim that the whole stock of goods in the store is liable to the levy by reason of the purchased goods having been mingled with the others. As to assuming the fact that the goods had been purchased, there is no conflict in the evidence on that subject. All the witnesses who testify on that subject agree that they were purchased, the only question being whether the purchase was valid. Also the subsequent part of the charge requires the jury to find “that plaintiff purchased said stock of goods,” etc.

The judgment of the court is affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

PARRIS v. STATE.

(Supreme Court of Alabama. Dec. 21, 1911.
Rehearing Denied Feb. 17, 1912.)

1. CRIMINAL LAW (§ 280*)—PLEA IN ABATEMENT—FORM.

A plea in abatement that the trial judge did not draw the grand jury “before the last term of the present term of the circuit court adjourned” was properly stricken out as unintelligible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 645-651; Dec. Dig. § 280.*]

2. INDICTMENT AND INFORMATION (§ 33*)—INDORSEMENT—FORM.

Where the record showed that R. had been appointed foreman of the grand jury, the fact that his name was written under the words, "foreman of the grand jury," in place of over such words in the indorsement of an indictment, was no ground for quashing the same.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 132-137; Dec. Dig. § 33.*]

3. JURY (§ 70*)—SPECIAL VENIRE—PERSONS EXCUSED FROM REGULAR PANEL.

That two persons summoned as regular jurors were excused from serving on the regular panel did not prevent their being properly placed on the special venire.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 310-330; Dec. Dig. § 70.*]

4. CRIMINAL LAW (§ 366*)—HOMICIDE (§ 169*)—EVIDENCE—RELEVANCY—RES GESTÆ.

Evidence that deceased was shooting craps at the house of the witness 30 minutes before a shooting occurred in which he was killed was properly excluded as neither relevant nor res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 811, 814, 819, 820, 1441-1450; Dec. Dig. § 366.* Homicide, Cent. Dig. §§ 341-350; Dec. Dig. § 169.*]

5. WITNESSES (§ 337*)—TESTIMONY OF ACCUSED—IMPEACHMENT.

Where defendant testified in his own behalf, he was subject to impeachment by proof that his general moral character was bad.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1113, 1129-1132, 1140-1142, 1146-1148; Dec. Dig. § 337.*]

6. WITNESSES (§ 352*)—WEAKENING TESTIMONY.

Where two witnesses both detailed circumstances in regard to the killing, evidence that they were drinking shortly after the difficulty was admissible to weaken their testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1152; Dec. Dig. § 352.*]

7. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

The court charged that, while the law requires the guilt of accused to be proven beyond a reasonable doubt, it does not require that each fact which may aid the jury in reaching the conclusion of guilt shall be clearly proved, but that, on the whole evidence, the jury must be able to pronounce guilt beyond a reasonable doubt; that the state is only required to prove guilt beyond a reasonable doubt; and that a doubt sufficient to acquit must be actual and substantial, and not a mere possibility or speculation. *Held*, a proper presentation of the law of reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. § 789.*]

8. HOMICIDE (§ 300*)—SELF-DEFENSE—INSTRUCTIONS.

An instruction that if deceased stated to defendant that there was an old grudge between them, that he was going to kill defendant and threw his hand in his hip pocket in a manner to indicate to defendant that he was attempting to draw a weapon, and if the manner of deceased was such as to create in defendant's mind an impression that he was in danger of losing his life or receiving bodily harm, then defendant had a right to shoot in self-defense, and was not required to retreat, was properly refused as eliminating whether

defendant was without fault in bringing on the difficulty and also whether defendant's mind was impressed that he was in imminent danger and whether he could retreat without increasing his danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

9. CRIMINAL LAW (§ 811*)—INSTRUCTIONS—PARTICULAR EVIDENCE.

An instruction that if deceased made threats against defendant, which were not communicated to him until after the killing, and if deceased said to defendant, "I am going to kill you," and threw his hand to his hip pocket at the time defendant fired the fatal shot, the jury could consider such threats as directing the nature thereof, was properly refused as singling out a part of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. § 811.*]

10. HOMICIDE (§ 300*)—INSTRUCTIONS—FORM.

A request to charge that the rule that the defendant may and must act on reasonable appearance of danger, for the law of self-preservation would be very incomplete, if defendant, when threatened or being beaten and assailed by deceased and other parties, was required to wait and see whether they were going to inflict great bodily harm or take his life, he may act upon a reasonable appearance of same, and defend himself even to the taking of the life of the assailant, if he is free from fault in bringing on the difficulty, and there is only one mode of escape, was properly refused as elliptical and argumentative.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

11. HOMICIDE (§ 300*)—INSTRUCTIONS—FORM.

An instruction that if the jury believed defendant was justified, under all the evidence, in shooting deceased while deceased was facing him, and that he was using an automatic gun which shot in rapid succession, and that some of the bullets struck deceased in the back, this would deprive defendant of his right to a plea of self-defense, was properly refused as argumentative, unintelligible, and elliptical.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

12. HOMICIDE (§ 300*)—INSTRUCTIONS—FORM.

A request to charge that if defendant was free from fault in bringing on the difficulty, and deceased said to him, "I am going to kill you," and placed his right hand at or near his hip pocket, and that deceased's manner was such as to create in defendant's mind the idea that he was in danger of losing his life or receiving great bodily harm, then defendant had a right to shoot in self-defense, even to the taking of deceased's life, and that the fact that he fired more than one shot did not deprive him of his right of self-defense, was properly refused as ignoring the duty to retreat, and also whether defendant was impressed that he was in imminent danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

13. HOMICIDE (§ 300*)—INSTRUCTIONS—FORM.

A request to charge that the law is a reasonable master, having equal regard for every human life under its jurisdiction, recognizes love of life as a natural and legitimate sentiment, and that, while it cannot be molded or controlled by notions of chivalry, it permits every one who is without fault and who has adopted every reasonable expedient to avert the necessity to take the life of his assailant, rather than to lose his own, the divine law not requiring us to love our neighbor better than

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ourselves, was properly refused as argumentative.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 800.*]

Appeal from Circuit Court, Fayette County; Bernard Harwood, Judge.

Henry Parris was convicted of murder in the second degree, and he appeals. Affirmed.

[1] The plea in abatement is based on the fact that the judge of the circuit court, whose duty it was to draw the grand jury which returned the indictment, did not draw it before the last term before the present term of the circuit court adjourned, but that the court, on about the 24th day of March, 1910, drew from the jury box of Fayette county the grand jury. The other grounds are that the judge did not draw the jury in Fayette county, Ala., but had the jury box of Fayette county, Ala., sent to Livingston, which is in Sumter county, Ala., and the judge in Sumter county drew the jury from the box and mailed or expressed them to the clerk of the circuit court of Fayette county. Motion was made to strike the names of Hardy Mitchell and Franklin Mills from the venire, because they were regularly drawn and summoned for the week in which defendant's case was set for trial, and before selecting the panel to try the cause the court excused them, and after excluding them they were resummoned as jurors, and placed on the venire to try the cause. The motion to quash the venire sufficiently appears from the opinion.

The following charges were given at the instance of the state: (A) "While the law requires the guilt of the accused to be proven beyond a reasonable doubt, it does not require that each fact which may aid the jury in reaching the conclusion of guilt shall be clearly proved; but, on the whole evidence, the jury must be able to pronounce guilt beyond a reasonable doubt." (B) "The state is not required to prove the defendant's guilt beyond all doubt, but beyond a reasonable doubt." (C) "The court charges the jury that a doubt, to acquit the defendant, must be actual and substantial, not mere possibility or speculation. It is not a mere possibility, or possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt."

The following charges were refused to the defendant: (27) "If the jury believe from the evidence that the deceased stated to the defendant that 'there is an old grudge between us, and I am going to kill you,' and threw his hand to his hip pocket in such a manner as to indicate to the defendant that the deceased was attempting to draw a pistol or a weapon, and if the manner of the deceased was such as to create in the mind of de-

fendant that he was in danger of losing his life or receiving bodily harm, then the defendant had a right to shoot in self-defense, and the law does not require him to retreat."

(30) "If the jury believe from the evidence that deceased made threats against the defendant, which were not communicated to him until after the killing, and if the jury believe that the deceased said to the defendant that 'I am going to kill you,' and threw his hand to his hip pocket at the time the defendant fired the fatal shot, you can consider such threats as directing the nature of such threats." (31) "I charge you, gentlemen of the jury, that the rule of law governing self-defense that the defendant may and must act upon reasonable appearance of same, for the law of self-preservation would be very incomplete if the defendant, then threatened or being beaten and assailed by the deceased and other parties, was required to wait to see whether they were going to inflict great bodily harm or take his life. He may act upon a reasonable appearance of same, and defend himself, even to the taking the life of the assailant, if he was free and without fault in bringing on the difficulty, and there was no reasonable mode of escape." (33) "If the jury believe from the evidence that the defendant was justified under all the evidence in shooting deceased while deceased was facing him, and that he was using an automatic gun which shot in rapid succession, and that some of the bullets struck the deceased in the back, this would deprive the defendant of his right to a plea of self-defense." (36) "If you believe from the evidence that the defendant was free from fault in bringing on the difficulty, and the deceased said to him, 'I am going to kill you,' and placed his right hand at or near his hip pocket, and that the manner of the deceased was such as to create in the mind of the defendant that he was in danger of losing his life or receiving very great bodily harm, then the defendant had a right to shoot in self-defense, even to taking the life of deceased, and the fact that he fired more than one shot did not deprive him of his right of self-defense." (38) "I charge you, gentlemen of the jury, that the law is a reasonable master, and has equal regard for every human life under its jurisdiction. It recognizes love of life as a natural and legitimate sentiment; and, while it cannot be molded or controlled by notions of chivalry, it permits every one who is without fault, and who has adopted every reasonable expedient, to avert the necessity to take the life of his assailant, rather than to lose his own. The divine law does not require us to love our neighbor better than ourselves."

McNeal & Nesmith and Norman Gunn, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

SIMPSON, J. The appellant was convicted of the crime of murder in the second degree.

[1] There was no error in the action of the court in sustaining the motion to strike the first plea in abatement. Said plea is unintelligible in that it states that the judge "did not draw the grand jury * * * before the last term of the present term of the circuit court adjourned."

In addition, section 15 of the jury act 1909 (page 310) expressly provides for drawing juries at times subsequent to the adjournment of the previous term, and section 29 (page 317) declares expressly that the provisions in regard to drawing, etc., of jurors are merely directory and that "no objection can be taken to any venire of jurors except for fraud in drawing or summoning the jurors."

The plea does not raise the point that the jury was not drawn "in the presence of the officers designated by law." Code, § 7572.

[2] There was no error in overruling the motion to quash the indictment. The fact that the name of M. E. Reeves appeared in the indorsement *under* the words, "foreman of grand jury," in place of *over* said words, did not affect the validity of his indorsement. The record shows that said M. E. Reeves had been by the court appointed foreman of the grand jury.

[3] The fact that two persons summoned as regular jurors were excused from serving on the regular panel did not render the placing of their names upon the special venire illegal.

[4] There was no error in excluding the testimony as to the deceased's shooting craps in the house of witness 30 minutes before the shooting occurred, the testimony not being relevant and not part of the *res gestæ*.

[5] The defendant having been placed upon the stand, and having testified as a witness, was subject to impeachment by proof of bad character, just as any other witness would be (*Mitchell v. State*, 148 Ala. 618, 42 South. 1014), consequently there was no error in allowing the witness to testify that defendant's general character was bad.

[6] There was no error in overruling the motion to exclude the statement by the witness Tidwell that Bud Parris and John Parris were drinking shortly after the killing, as they had both detailed circumstances in regard to the killing, and the facts mentioned were proper to be considered by the jury in determining whether said witnesses were in a condition to remember accurately what transpired.

[7] Charges A, B, and C, given on request by the state, were properly given. *Pitts v. State*, 140 Ala. 70, 77, 83, 37 South. 101; *Jones v. State*, 79 Ala. 23, 25; *Mose v. State*, 36 Ala. 211, 231; *Owens v. State*, 52 Ala. 400, 405.

[8] Charge 27, requested by the defendant, was properly refused as it ignores the questions as to whether the defendant was without fault in bringing on the difficulty, also as to whether the defendant's mind was impressed that he was in imminent danger, also as to whether he could retreat without increasing his danger.

[9] Charge 30, requested by the defendant, was properly refused. It singled out a part of the evidence, and was otherwise faulty.

[10] Charge 31 is elliptical and argumentative, and was properly refused.

[11] Charge 33 is unintelligible and elliptical, besides being argumentative, and was properly refused.

[12] Charge 36 ignored the duty to retreat, and also the question as to whether the defendant was, in fact, impressed that he was in imminent danger, and was properly refused.

[13] Charge 38 is argumentative, and was properly refused.

The judgment of the court is affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

BROOM v. DOUGLASS et al.

(Supreme Court of Alabama. Feb. 15, 1912.)

1. JUDGES (§ 36*)—LIABILITIES FOR OFFICIAL ACTS.

The judge of a court of general jurisdiction is not liable for any judicial act in excess of his jurisdiction which involves an affirmative decision of the fact of jurisdiction, though the decision is erroneous, and though he acts maliciously, provided there is not a clear absence of all jurisdiction.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 165-173, 178, 179; Dec. Dig. § 36.*]

2. JUDGES (§ 36*)—CIVIL LIABILITY.

A judge of a court of limited jurisdiction is civilly liable when he acts without a general jurisdiction of the subject-matter, though his act involves a decision, made in good faith, that he has such jurisdiction.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 165-173, 178, 179; Dec. Dig. § 36.*]

3. JUDGES (§ 36*)—CIVIL LIABILITY.

A judge of an inferior court who acts fully within his jurisdiction of the subject-matter, and who has acquired jurisdiction of the person in the particular case, is not civilly liable, though he acts maliciously and corruptly.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 165-173, 178, 179; Dec. Dig. § 36.*]

4. JUDGES (§ 36*)—CIVIL LIABILITY.

A judge of an inferior court who acts judicially as to a subject-matter of which he has a general jurisdiction, but in the particular case has not acquired jurisdiction of the person affected, is not civilly liable where the act involves an affirmative decision that he has jurisdiction of the person and authority to proceed, provided a colorable case has been presented to him calling for the exercise of judgment, and he has determined, in good faith,

that the case calls for the exercise of general jurisdiction.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 165-173, 178, 179; Dec. Dig. § 36.*]

5. COURTS (§ 2*)—JURISDICTION—"EXCESS OF JURISDICTION."

"Excess of jurisdiction," as distinguished from absence of jurisdiction, means that an act, though within the general power of the judge, is not authorized and is void, with respect to the particular case, because the conditions which alone authorize the exercise of his general power in the case are wanting.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1; Dec. Dig. § 2.*]

6. COURTS (§ 2*)—JURISDICTION—"COLORABLE CAUSE"—"COLORABLE INVOCATION OF JURISDICTION."

A "colorable cause" or a "colorable invocation of jurisdiction," as applied to the jurisdiction of an inferior court, means that some person apparently qualified to do so has appeared before the judge and made complaint under oath, stating some fact which may, with other facts unstated, constitute a criminal offense, or stating some fact which bears some general similitude to a fact designated by law as an offense, calling on the judge to pass on the sufficiency of the affidavit to elicit the process issued.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1; Dec. Dig. § 2.*]

7. JUDGES (§ 36*)—CIVIL LIABILITY—QUESTION FOR THE COURT.

Whether a judge of an inferior court had colorable cause for acting, so as to be relieved from civil liability, is a question of law.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 165-173, 178, 179; Dec. Dig. § 36.*]

8. JUDGES (§ 36*)—CIVIL LIABILITY—QUESTION FOR JURY.

The question of good faith, malice, or corruption on the part of a judge of an inferior court having only colorable cause for acting is ordinarily for the jury in determining the question of his civil liability.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 165-173, 178, 179; Dec. Dig. § 36.*]

9. FALSE IMPRISONMENT (§ 7*)—CIVIL LIABILITY—JURISDICTION.

A justice of the peace who, in good faith, issues a warrant for the arrest of accused on an affidavit of a third person, averring that accused threatened to trespass on and occupy land described, of which affiant has been in possession under claim of ownership, and who, in good faith, commits accused, after hearing, to jail, unless he gives bond to keep the peace, acts judicially, and is not civilly liable, though the affidavit is wholly insufficient to charge any criminal offense.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5-51, 79; Dec. Dig. § 7.*]

10. FALSE IMPRISONMENT (§ 22*)—CIVIL LIABILITY—BURDEN OF PROOF.

One suing a justice of the peace for damages for issuing a warrant on an affidavit wholly insufficient to charge any criminal offense has the burden of proving want of good faith.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 98, 99; Dec. Dig. § 22.*]

Mayfield, J., dissenting.

Appeal from Circuit Court, Morgan County; E. W. Speake, Judge.

Action by Henry Broom against W. H. Douglass and another. From a judgment for defendants, plaintiff appeals. Affirmed, and application for rehearing overruled.

Kyle & Hutson, for appellant. Wert & Lynne and Callahan & Harris, for appellees.

SOMERVILLE, J. Appellant sued appellee in trespass for a false imprisonment, done under color of appellee's official authority as a justice of the peace.

Defendant's plea No. 2 set up an alleged justification, and showed that one Johnson appeared before him (defendant) while he was acting as a justice of the peace, and made affidavit "that Henry Broom [the plaintiff here] has threatened to trespass upon and occupy a certain parcel of land situated in this county, and known as the Dick Mitchell or Dick Bouldin place, which affiant has the past two or three years been in possession under claim of ownership;" that on this affidavit the justice issued a warrant of arrest for said Broom; that Broom was arrested on this warrant and brought before the justice; that on the hearing of the cause the justice adjudged that said Broom should be committed to the county jail for 12 months, unless he gave a bond to keep the peace; and that in doing these things he (defendant) was acting judicially. Plaintiff demurred to this plea on the grounds substantially (1) that the affidavit conferred on the justice no jurisdiction to issue the warrant; and (2) that the affidavit did not charge that any criminal offense had been committed or threatened. The trial court overruled the demurrer, and this action is assigned as error.

Conceding, as we must, that the affidavit shown did not charge that Broom had threatened, or was about to commit, "an offense on the person or property of another," the threat shown being, if executed, only a civil wrong, and that the warrant of arrest was for this reason void, the question to be determined is: Is a judge of inferior and limited jurisdiction liable in trespass when, acting within his general jurisdiction of the subject-matter, but without conformity to the preliminary requirements which alone give him jurisdiction of the person and authorize him to proceed to exercise his general jurisdiction in the particular case, he issues process actually void, under which such person is unlawfully taken and restrained of his liberty? The answer, we think, will depend upon a consideration to be stated hereafter.

The general question above mooted has been the subject of much discussion by courts and text-writers, and the books exhibit great diversity of opinion as to its proper solution. It involves and draws into sharp

conflict two fundamental and equally cherished principles of our legal system—the inviolability of personal liberty, except under the strictest forms of law, on the one hand, and the dignity and independence of the judiciary, on the other. It is complicated, also, by much confusion of thought with respect to the theory of jurisdiction in its twofold aspect of subject-matter and person.

We need hardly say that the question is not merely whether the injurious process is irregular or utterly void, but, primarily, it is whether, on principles of sound public policy, the judge should be held liable for his action as a judge. Whether or not an executive officer would be liable for the execution of the process is an altogether different question, and is unaffected by the decisive considerations of policy here involved. These considerations have been so often and so well stated that anything more than a brief recapitulation of settled conclusions is now unnecessary.

We deduce from approved authorities the following principles as pertinent to the present case:

[1] (1) The judge of a court of superior or general jurisdiction is not liable for any judicial act in excess of his jurisdiction which involves a present or previous affirmative decision of the fact of his jurisdiction, even though such decision is wholly erroneous, provided there is not a clear absence of all jurisdiction. *Busteed v. Parsons*, 54 Ala. 393, 25 Am. Rep. 688; *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646 (leading case); *Yates v. Lansing*, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80.

(2) The fact that such judge acts maliciously or corruptly in such cases does not render him liable. *Busteed v. Parsons*; *Bradley v. Fisher*, *supra*; 19 Cyc. 333; note to *Lacey v. Hendricks*, 137 Am. St. Rep. 47.

[2] (3) A fortiori, the judge of a court of inferior or limited jurisdiction is liable when he acts without a general jurisdiction of the subject-matter, even though his act involves his decision, made in perfect good faith, that he has such jurisdiction.

[3] (4) When such judge acts fully within his jurisdiction, i. e., when he has jurisdiction of the subject-matter, and has also acquired jurisdiction of the person in the particular case, he is not liable, though he act both maliciously and corruptly. *Irion v. Lewis*, 56 Ala. 190; *Heard v. Harris*, 68 Ala. 43; *Coleman v. Roberts*, 113 Ala. 323, 21 South. 449, 36 L. R. A. 84, 59 Am. St. Rep. 111; *Woodruff v. Stewart*, 63 Ala. 206; *Lacey v. Hendricks*, 164 Ala. 280, 51 South. 157, 137 Am. St. Rep. 45.

[4] (5) When such judge acts judicially with respect to a subject-matter of which he has a general jurisdiction, but in the particular case he has acquired no jurisdiction of the person affected, he is not liable if the act involves his present or previous affirma-

tive decision that he has jurisdiction of such person and authority to proceed in the particular case, provided (1) a colorable case has been presented to him which fairly calls for or permits the exercise of his judgment with respect thereto; and provided (2) he has determined in good faith, without malice or corruption, that the case presented calls for the exercise of his general jurisdiction. *Grove v. Van Duyn*, 44 N. J. Law, 654, 43 Am. Rep. 412 (leading case); *Rush v. Buckley*, 100 Me. 322, 61 Atl. 774, 70 L. R. A. 464, 4 Ann. Cas. 818; *McCall v. Cohen*, 16 S. C. 445, 42 Am. Rep. 641; *Bell v. McKinney*, 63 Miss. 187; *Gardner v. Couch*, 137 Mich. 358, 100 N. W. 673, 109 Am. St. Rep. 684; *Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084; *Thompson v. Jackson*, 93 Iowa, 376, 61 N. W. 1004, 27 L. R. A. 92; *Robertson v. Parker*, 99 Wis. 652, 75 N. W. 423, 67 Am. St. Rep. 589; *Calhoun v. Little*, 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 630, 71 Am. St. Rep. 254; *Stewart v. Hawley*, 21 Wend. (N. Y.) 552; *Landt v. Hilts*, 19 Barb. (N. Y.) 283; *Ayers v. Russell*, 50 Hun, 282, 3 N. Y. Supp. 338; *Bocock v. Cochran*, 32 Hun (N. Y.) 523; *Harman v. Brotherson*, 1 Denio (N. Y.) 537; *Gillett v. Thiebald*, 9 Kan. 427.

We, of course, do not affirm that all of these cases have elaborated the principle in precise terms. Some of them have, and others clearly illustrate its operation.

There are numerous cases which support the view that a judge of limited and inferior jurisdiction is liable in every case where he acts merely in excess of his actual jurisdiction, so that his act is void, as distinguished from voidable or irregular. *Bigelow v. Stearns*, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189; *Yates v. Lansing*, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; *Gruman v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200; *De Courcey v. Cox*, 94 Cal. 665, 80 Pac. 95; and many other cases cited in notes to *Rush v. Buckley*, 4 Ann. Cas. 325-332; *Tryon v. Pingree*, 67 Am. St. Rep. 423; and *Austin v. Vrooman*, 14 L. R. A. 138.

These cases, however, proceed in general on the narrow view that a void act necessarily imposes liability, which assumes, in accordance with a once much favored theory, that there is a radical distinction between the acts of judges of high and judges of low degree in excess of their jurisdiction, to the extent that the one class should never be held liable, while the other should always be. That there is in reason, justice, or policy any such radical distinction has long been subject to doubt, and is increasingly denied by the best-considered modern cases and by standard text-writers. *Rush v. Buckley*, 100 Me. 322, 61 Atl. 774, 70 L. R. A. 464, 4 Ann. Cas. 818; *Thompson v. Jackson*, 93 Iowa, 376, 61 N. W. 1004, 27 L. R. A. 92, and editorial note; *Calhoun v. Little*, 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 630, 71 Am. St. Rep. 254; *Bishop's Noncontract Law*, § 783; *Throop on Public Officers*, § 720; 1

Jaggard on Torts, 122. And there can be no doubt, we think, but that the distinction is sufficiently emphasized and public policy fully subserved by the requirement of good faith, without malice or corruption, with at least a colorable invocation of the judicial function in the particular case.

Our views upon this subject are so fully and satisfactorily stated by Beasley, C. J., in *Grove v. Van Duyn*, 44 N. J. Law, 654, 43 Am. Rep. 412, that we adopt his language as a part of this opinion. He said, in part:

"It is said everywhere in the text-books and decisions that the officer, in order to entitle himself to claim the immunity that belongs to judicial conduct, must restrict his action within the bounds of his jurisdiction, and jurisdiction has been defined to be 'the authority of law to act officially in the particular matter at hand.' Cooley on Torts, 417. But these maxims, although true in a general way, are not sufficiently broad to embrace the principle of immunity that appertains to a court or judge exercising a general authority. Their defect is that they leave out of the account all those cases in which the officer in the discharge of his public duty is bound to decide whether or not the particular case, under the circumstances as presented to him, is within his jurisdiction, and he falls into error in arriving at his conclusion. In such instance, the judge, in point of fact and law, has no jurisdiction, according to the definition just given, over 'the particular matter in hand,' and yet, in my opinion, very plainly he is not responsible for the results that wait upon his mistake. And it is upon this precise point that we find confusion in the decisions. There are certainly cases which hold that if a magistrate, in the regular discharge of his functions, causes an arrest to be made under his warrant on a complaint which does not contain the charge of a crime cognizable by him he is answerable in an action for the injury that has ensued. But I think these cases are defections from the correct rule; they make no allowance for matters of doubt and difficulty. If the facts presented for the decision of the justice are of uncertain signification with respect to their legal effect, and he decides one way, and exercises a cognizance over the case, if the superior court, in which the question arises in a suit against the justice differs with him on this close legal question, is he open, by reason of his error, to an attack by action? If the officer's exemption from liability is to depend on the question whether he had jurisdiction over the particular case, it is clear that such officer is often liable under such conditions, because the higher court, in deciding a doubtful point of law, may have declared that some element was wanting in the complaint which was essential to bring this case within the judicial competency of the magistrate. But there are many decisions which, perhaps, without defining any

very clear rule on the subject, have maintained that the judicial officer was not liable under such conditions. The very copious brief of the counsel of the defendants abounds in such illustrations. * * *

"These decisions, in my estimation, stand upon a proper footing, and many others of the same kind might be referred to; but such course is not called for, as it must be admitted that there is much contrariety of results in this field, and the references above given are amply sufficient as illustrations for my present purposes. The assertion, I think, may be safely made that the great weight of judicial opinion is in opposition to the theory that if a judge, as a matter of law and fact, has not jurisdiction over the particular case that thereby, in all cases, he incurs the liability to be sued by any one injuriously affected by his assumption of cognizance over it. The doctrine that an officer having general powers of judicature must, at his peril, pass upon the question, which is often one difficult of solution, whether the facts before him place the given case under his cognizance, is as unreasonable as it is impolitic. Such a regulation would be applicable alike to all courts and to all judicial officers acting under a general authority, and it would thus involve in its liabilities all tribunals, except those of last resort. It would also subject to suit persons participating in the execution of orders and judgments rendered in the absence of a real ground of jurisdiction. By force of such a rule, if the Supreme Court of this state, upon a writ being served in a certain manner, should declare that it acquired jurisdiction over the defendant, and judgment should be entered by default against him, and if, upon error brought, this court should reverse such judgment on the ground that the service of the writ in question did not give the inferior court jurisdiction in the case, no reason can be assigned why the justices of the Supreme Court should not be liable to suit for any injurious consequences to the defendant proceeding from their judgment. As I have said in my judgment, the jurisdictional test of the measure of judicial responsibility must be rejected.

"Nevertheless it must be conceded that it is also plain that in many cases a transgression of the boundaries of his jurisdiction by a judge will impose upon him a liability to an action in favor of the person who has been injured by such excess. If a magistrate should, of his own motion, without oath or complaint being made to him, on mere hearsay, issue a warrant and cause an arrest for an alleged larceny, it cannot be doubted that the person so illegally imprisoned could seek redress by a suit against such officer. It would be no legal answer for the magistrate to assert that he had a general cognizance over criminal offenses; for the conclusive reply would be that this particular case was

not, by any form of proceeding, put under his authority.

"From these legal conditions of the subject, my inference is that the true general rule with respect to the actionable responsibility of a judicial officer having the right to exercise general powers is that he is so responsible in any given case belonging to a class over which he has cognizance, unless such case is by complaint or other proceeding put at *least colorably* under his jurisdiction. Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable one; it protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically willful; such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression.

"The application of the above-stated rule to this case must obviously result in a judgment affirming the decision of the circuit judge. There was a complaint, under oath, before this justice, presenting for his consideration a set of facts to which it became his duty to apply the law. The essential things there stated were that the plaintiff, in combination with two other persons, entered upon certain lands, and 'with force and arms did unlawfully carry away about four hundred bundles of cornstalks, of the value,' etc., and were engaged in carrying other cornstalks from said lands. By a statute of this state (Rev. p. 244, § 99), it is declared to be an indictable offense 'if any person shall willfully, unlawfully and maliciously' set fire to or burn, *carry off*, or destroy any barrack, cock, crib, rick or stack of hay, corn, wheat, rye, barley, oats, or grain of any kind, or any trees, herbage, growing grass, hay or other vegetables, etc. Now, although the misconduct described in the complaint is not the misconduct described in this act, nevertheless the question of their identity was *colorably* before the magistrate, and it was his duty to decide it; and under the rule above formulated he is not answerable to the person injured for his erroneous application of the law to the case that was before him."

[5] By "excess of jurisdiction," as distinguished from the entire absence of jurisdiction, we understand and mean that the act, though within the general power of the

judge, is not authorized, and therefore void, with respect to the particular case, because the conditions which alone authorize the exercise of his general power in that particular case are wanting; and hence the judicial power is not in fact lawfully invoked.

[6] By a "colorable cause," or a "colorable invocation of jurisdiction," as applied to cases like the instant one, we understand and mean that some person, apparently qualified to do so, has appeared before the justice and made complaint under oath and in writing, stating at least some fact or facts which enter into and may, under some condition, or in co-operation with some other unstated fact or facts, constitute a criminal offense, or stating some fact or facts which bear some general similitude to a fact or facts designated by law as constituting an offense; in either case, calling upon the justice to pass upon their sufficiency, to elicit the process issued.

[7, 8] A less general definition is not practicable, even were it expedient, and what we have said will serve to illustrate the general scope of this requirement. Whether it is met is, of course, a question of law for the court; while the issue of good faith, malice, or corruption is ordinarily for the jury to determine. We have examined all the decisions of this court upon the general question under consideration, and, with a single exception, find none in conflict with the rule we now adopt.

In *Duckworth v. Johnston*, 7 Ala. 581, the warrant was held void, because the affidavit charged no offense. The justice was not sued, and the only conclusion was that the officer who executed it, and the party who caused it to be issued, were liable in trespass. To the same effect, is *Crumpton v. Newman*, 12 Ala. 199, 46 Am. Dec. 251.

In *Sasnatt v. Weathers*, 21 Ala. 674, the suit was in trespass against the justice and the constable. The justice had rendered a judgment for costs against the plaintiff in preliminary proceedings for a felony, which he had absolutely no authority to do in any phase of the case. On this void judgment, he issued an execution—a purely ministerial act. The writ was held void, and the justice was held liable for issuing it and the constable for executing it. The question of liability for judicial action was not presented.

In *Withers v. Coyles*, 36 Ala. 320, the mayor of Mobile was held liable for trespass to a slave whom he had imprisoned under an ordinance "for the punishment of vagrants and disorderly persons"; this court holding that the ordinance was applicable only to free persons, and not to slaves, although the word "persons" sometimes included slaves. Inasmuch as the magistrate was called upon to construe the ordinance as to its proper application to persons, and his decision of the question was a judicial act with a col-

orable foundation, we think the conclusion that he was liable for his erroneous construction of the language of the ordinance was not justified on principle, and is not supported by any authority. We are therefore unwilling to follow this decision.

In *Craig v. Burnett*, 32 Ala. 728, the members of the town council of Cahaba were ex officio justices of the peace. Sitting as a town council, and not as magistrates, they convicted the plaintiff of an offense within their jurisdiction as magistrates, and ordered him to be imprisoned in default of payment of the fine. This judgment was, of course, fundamentally void, as was also the town clerk's warrant of arrest. Under this pseudo-judgment, the mayor committed plaintiff to the custody of the town marshal, and he sued mayor, clerk, and marshal for the false imprisonment. There was here no judicial action, and liability attached as a matter of course. Comment is unnecessary; but the language of the opinion by Walker, J., is worthy of notice: "If it appeared that the fact, upon which the jurisdiction of the council over the matter of the imprisonment depended was *judicially* considered and adjudged by the council, then the defendants would not be liable for their mere error of judgment. Every judicial tribunal, invested with authority to be exercised in a certain contingency, has authority to inquire and ascertain whether the contingency has occurred. *Where jurisdiction depends upon the existence of a preliminary fact, there is authority to decide whether that fact exists.* A court is entitled to as full protection against an error of judgment in reference to the existence of the jurisdictional fact as in reference to the merits of the suit." (Italics ours.) It will be noted, also, that no distinction is recognized between superior and inferior judges. The loose, if not inaccurate, treatment of this subject in some of the early cases is well illustrated by the citation of this case in support of the conclusion reached in *Withers v. Coyles*, supra, with which it is evidently wholly inconsistent.

In *Woodall v. McMillan*, 38 Ala. 622, the action was trespass for a false imprisonment against the prosecutor for causing a justice of the peace to issue a warrant of arrest for plaintiff on an affidavit charging him with the commission of the crime of perjury at Huntsville, in a neighboring county. There being no jurisdiction of the *subject-matter*, the warrant was held void, and the prosecutor held liable. It would seem that the justice also would have been liable under the rule we announce.

In *Heard v. Harris*, 68 Ala. 43, the principle of the rule was expressly left undecided; Brickell, C. J., saying: "Whether it be true or not the personal protection the maxim [of judicial exemption] affords is confined, when the authority of an inferior jurisdictional officer, like a justice of the

peace, is drawn in question, to matters within their jurisdiction, or whether he is entitled to protection because he may have erroneously adjudged he had jurisdiction, and whether, at his peril, he adjudges that question, we do not consider."

In *McLendon v. A. F. L. M. Co.*, 119 Ala. 518, 24 South. 721, a justice of the peace was held liable for falsely certifying an acknowledgment to a deed; the grantor not having made the acknowledgment, nor even appeared before the justice for the purpose. Although the certificate of acknowledgment is, under our decisions, a judicial act, it is manifest that it was here without any *color of authority*, and there was nothing to challenge his judicial action. Indeed, it was *prima facie* malicious or corrupt.

In *Crosthwait v. Pitts*, 139 Ala. 421, 86 South. 88, the same conclusion, on the same facts, is reaffirmed.

In the recent case of *Earp v. Stephens*, 1 Ala. App. 447, 55 South. 270, a justice of the peace was held liable for issuing a writ of attachment against property *without either affidavit or bond*. Here there was nothing to provoke inquiry, and not even a colorable appeal to the authority exercised. The ruling is explained by Walker, P. J., in perfect accord with the instant case; for he says: "It is not to be supposed that the Legislature intended that the official should have the power to direct such a summary seizure of property without even a colorable attempt to require an observance of the precautions prescribed to prevent the issuance of the writ in cases in which the law did not authorize it, and to provide the prescribed means of indemnity for an abuse of the extraordinary process."

[9] Applying, now, the rule of liability above stated to the facts of the present case, we are of the opinion that the affidavit made before the defendant as a justice of the peace, though wholly insufficient to charge any criminal offense, or to justify the issuance of the warrant of arrest, nevertheless was clearly an attempt to charge a threatened criminal trespass on affiant's land. And, stating facts which were elements of that offense, and of legal significance and value in its proof, a colorable case was presented which fairly invoked the justice's judgment as to their sufficiency for the purpose intended. The issuance of the warrant was therefore a judicial act, involving his inquiry and affirmative conclusion as to his power and authority to do so, for which he cannot be held liable, if he acted in good faith. It follows that the special plea stated a good defense to the complaint as framed, and the demurrers were properly overruled.

[10] The question of good faith on the part of the defendant is not directly presented here by the pleadings; but we deem it necessary to any clear apprehension of the rule of nonliability to state, also, its

essential limitations. And in this connection it is to be noted that, since the law will always *prima facie* impute good faith to judicial action, the burden is upon the plaintiff, in a case like this, to both allege and prove the want of it.

Application for rehearing overruled.

DOWDELL, C. J., and SIMPSON, ANDERSON, and SAYRE, JJ., concur. McCLELLAN, J., concurs in the conclusion.

MAYFIELD, J. (dissenting). On rehearing, the majority decline to change the decision, but do change the opinion. To this changed opinion, I propose to reply.

This opinion, by my Brother SOMERVILLE, will be a splendid one when a case arises to which it can apply. It is not applicable to the case at bar, but is applicable to cases like those of *Grove v. Van Duyn*, 44 N. J. Law, 654, 43 Am. Rep. 412, and *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646. I fully concur with Brother SOMERVILLE that these are leading American cases, and among the best considered, by the ablest judges, as to the civil liability of inferior judges as for their judicial actions. There is not a sentence, a line, a word, in the opinions of those two cases in which I do not concur; nor do I think that there was error in the conclusion or decision of either.

The radical and controlling difference between these cases and the one under consideration is that the former were actions which sought to hold a judge of an inferior court liable for erroneous judicial actions; while this action seeks to hold the judge liable for a void and unauthorized ministerial act. If this had been an action for "an erroneous or corrupt exercise by the justice of the jurisdiction the law confers," then the opinion of the majority would be applicable, and sufficient answer to the contentions of appellant; but the fact remains unanswered, and this record, and the statutes, and the decisions of this and other courts, declare that it is not such a case, and must be distinguished from such.

This distinction is clearly pointed out by Brickell, J., in the case of *Kelly v. Moore*, 51 Ala. 364, 365. It is there made clear that actions like that there under consideration (which was exactly like this) were brought under the statute, nor for a corrupt or erroneous exercise of jurisdiction conferred by law, but for an abuse of the authority of the office, in acts done "under color of office." In the case stated, Brickell, J., treating of the wrong complained of, says: "'Under color of his office,' he arrests and imprisons the plaintiff. This was a misdemeanor at common law, and a tort for which an action could have been maintained against the justice. The sureties on his official bond would not, at common law, have been liable for this tort. The malfeasance of their principal, of

which misfeasance could not also be predicated, was not within the scope of their obligation. *Governor v. Hancock*, 2 Ala. 723; *McElhaney v. Gilleland*, 30 Ala. 183. This was deemed a defect in the common law, and to cure it the statute now extends the liability of sureties on official bonds to injuries from wrongful acts done by the officer under color of his office, as well as to the nonperformance or negligent performance of official duty. R. C. § 169."

The gravamen of the complaint in this case, to quote exactly, is as follows: "The said Douglass did, under color of his office as such justice of the peace, cause the plaintiff to be illegally arrested, by which he was deprived of his liberty for a long time," etc. No complaint whatever is made of any judicial action on the part of the justice, whether erroneous or corrupt. It is a ministerial act, done under color of office, of which complaint is made; and for such the statute makes the justice and his official bondsman liable.

It is true that the justice and the surety attempted to defend against this action by pleading that the acts of the justice were "judicial," and that therefore neither he nor the surety was liable civilly for damages consequent upon such acts. But the trouble as to this plea was that it set out the warrant issued by the justice, and under which the plaintiff was arrested and imprisoned, which warrant, as Brother SOMERVILLE very correctly holds, was void on its face. In issuing this warrant, the justice no more acted judicially than did the constable who executed it; both were equally ministerial acts, and the two officers are equally liable as for arrests made under the writ, if in fact and in law it is absolutely void.

A justice of the peace, in both civil and criminal proceedings before him, acts both judicially and ministerially; and as for his judicial acts, if within his jurisdiction or "colorably so," as stated by Justices Beasley and SOMERVILLE, he is not civilly liable, though the acts are both erroneous and corrupt; but as for his ministerial acts which are void and wholly unwarranted by law, he is civilly and personally liable, was so under the English common law, is so under all American common law, and, together with his official bondsmen, is in this state made liable by statute. 51 Ala. 365, 366.

A justice, in criminal proceedings, in hearing complaints, taking affidavits, examining witnesses to determine whether or not any offense has been committed, and if so, what offense, and who is probably guilty thereof, acts judicially, just as he does, on the hearing or the trial, when the accused is brought before him; and if the justice errs in such matters he is not civilly liable to any party injured by reason of his error, as long as he acts within his jurisdiction as justice. But when he undertakes the issuing of a warrant

of arrest which commands and secures the arrest, and possibly the imprisonment, of the person charged he quoad hoc acts ministerially; and if he issues a warrant which is absolutely void on its face, or a warrant which is valid, but not authorized by law to be issued by the justice in that particular case, he is civilly liable, just as a private citizen would be if he issued such a process, and thus procured wrongful arrests and imprisonment. From such liability, the justice cannot hide beneath his judicial ermine.

The effect of our statute is to make also liable the official bondsmen of the justice for all such unlawful and unwarranted acts done "under color of office." It is the "color of office" alone that makes the bondsmen liable, and, of course, they are not liable if the principal is not so liable. "Color of office" is necessary to render the surety liable as for ministerial acts, as well as is "color of jurisdiction" to excuse the justice as for judicial acts.

The law is well stated by the Supreme Court of New York, in the case of *Blythe v. Tompkins*, 2 Abb. Prac. (N. Y.) 472: "The defendant having jurisdiction to issue warrants for the apprehension of persons for violating the provisions of the 'act to prevent intemperance, pauperism, and crime' could not be made liable in a civil action for deciding that a warrant should issue on insufficient evidence. In determining whether there was sufficient evidence to authorize the issuing of a warrant, he acted judicially; and he is not liable while thus acting, even if he erred in judgment. *Horton v. Auchmoody*, 7 Wend. 200; *Tompkins v. Sands*, 8 Wend. 462 [24 Am. Dec. 46]; [*People v. Collins*] 19 Wend. 56; [*Harman v. Brotherson*] 1 Denio, 537, 540; [*Houghton v. Swarthout*, 1 Denio] 590; *Payne v. Barnes*, 5 Barb. 467; [*Weaver v. Devendorf*] 8 Denio, 117; [*People v. Sup'r of Chenango County*] 11 N. Y. 573. But in making the warrant and delivering it to the officer he acted *ministerially*. *Rogers v. Mulliner*, 6 Wend. 597, 603 [22 Am. Dec. 546], 8 Wend. 462 [24 Am. Dec. 46]; *Van Renselaer v. Witbeck*, 7 N. Y. 521; *Houghton v. Swarthout*, 1 Denio, 589. "Where *ministerial* duty is violated, the officer, although for most purposes a judge, is still civilly liable for such misconduct." *Wilson v. Mayor of N. Y.*, 1 Denio, 599 [43 Am. Dec. 719]; *Barb. Cr. Tr.* 429, 430, and cases cited. The main question to be decided is whether the warrant is void on its face. If it is, then it will not protect the defendant, although he acted in good faith, and was authorized by the evidence before him to issue a valid warrant."

The distinction between judicial and ministerial acts, and the liability as for each, is observed by all the text-writers and in all the decisions upon the subject. See *Words and Phrases, Ministerial Acts*, which collects the decisions. The same distinction between the two kinds of acts of the justice, and

his liability for each, has been repeatedly recognized by this court. "Justices are not liable for their judicial acts, however erroneous, and there can be no inquiry as to the motive for such acts. *Coleman v. Roberts*, 113 Ala. 323, 21 South. 449 [36 L. R. A. 84, 59 Am. St. Rep. 111]; [*Heard v. Harris*] 68 Ala. 43; *McLendon's Case*, 119 Ala. 518, 24 South. 721; *Irlon v. Lewis*, 56 Ala. 190. But they and their sureties are liable for their wrongful ministerial acts done under color of office. *Coleman v. Roberts*, supra; *McLendon's Case*, supra; *Kelly v. Moore*, 51 Ala. 364; *Mason v. Crabtree*, 71 Ala. 479. A justice of the peace who affixes an official certificate of acknowledgment to a deed, which is false and fraudulent, is guilty of a gross usurpation, for which he is liable on his official bond to the party injured. *McLendon's Case*, supra. Where a justice of the peace commits a wrong under color of this office, which is a usurpation of judicial authority, he will not be protected from responsibility on his bond because he acted in a judicial capacity. *Id.*; *Heard v. Harris*, 68 Ala. 47; *Woodruff v. Stewart*, 63 Ala. 215." 4 Mayf. Dig. 2.

If the action in this case had been based solely upon a judicial act of the justice, then the opinions of the majority (original, and that on the rehearing) would be applicable, or, at least, "colorably" applicable; but the action is for an unauthorized and illegal ministerial act done "under color of office." Hence the majority opinions are not "colorably" applicable to the case in hand.

So far as I know, but few courts or judges, during the last century, have doubted or denied the soundness of the proposition that an action will not lie against a judge for a wrongful commitment, nor for an erroneous judgment, nor for any other act performed or done by him in his "judicial capacity." Such absolution or exemption from liability is necessary to the independence, if not to the very existence, of the judiciary, as its sole duty is to pass upon and determine the rights and liberties of the citizens, among themselves, and as between them and the state, and if judges are to be held liable for their erroneous decisions we will soon have no judges, or, if any, they will all be bankrupts. Cases involving great interests, and the liberties and even the character of prominent parties, exciting the deepest feelings and prejudices, are constantly being determined by the courts. In such cases, there is often great conflict in the evidence, and great doubt as to the law which should control the decision, imposing upon the judges the severest tests of labor, care, and of painstaking consciousness of responsibility. And often, in such cases, the losing party feels the keenest disappointment, and therefore the more readily looks to anything, rather than to the reasoning or the soundness of the decision against him, to explain the action

of the judge or judges who decide against him. This intensified feeling of disappointment often finds vent in imputations against the character of the judges or of the court rendering the decision. This results, not always from bad motives of litigants, any more than from the bad motives of the judges or courts rendering the decisions, but is probably largely due to the imperfection of human nature. If an action would lie for the wrongful decision of a judge under such conditions, when the passions and prejudices of litigants are thus fired by disappointment, many litigants would not hesitate to ascribe any motive or character to the act or decision which was against them, their interest, liberty, or character, such is the frailty of human nature. For this reason, the law has seen fit to provide that judges shall not be liable for their judicial acts, though done corruptly and maliciously.

As was said by Justice Field, in *Bradley v. Fisher*, 13 Wall. 350, 20 L. Ed. 646: "In this country, the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions for the manner in which they discharge the great trusts of their office. If in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment and suspended or removed from office. In some states, they may be thus suspended or removed without impeachment by a vote of the two houses of the Legislature."

The only liability that attaches to an erroneous judicial act is when there is clearly no jurisdiction of the subject-matter, when, of course, any asserted authority is obviously usurped, and if the want of authority is known to the judge no excuse is permissible; but the manner in which, and the extent to which, the jurisdiction shall be exercised are questions peculiarly, if not exclusively, for the determination of the judge.

Justice Field (13 Wall. 353, 20 L. Ed. 646) quotes from the English justice, Blanc, that there is "a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction;" and goes on to say that Judge Blanc "held that, where the subject-matter was within the jurisdiction of the judge, and the conclusion was erroneous, although the party should, by reason of the error, be entitled to have the conclusion set aside, and to be restored to his former rights, yet he was not entitled to claim compensation in damages for the injury done by such erroneous conclusion, as if the court had proceeded without any jurisdiction."

While the immunity from liability of judges as for judicial acts is almost absolute, no such immunity exists as for their ministerial

acts. As to such latter class of acts, judges are liable, just like all other public officers; and to protect the people against the oppression of officers statutes have been enacted requiring certain officers to execute official bonds, conditioned to pay all such damages as may result to the people or to the state if the officer shall not faithfully perform and discharge the duties of the office. Among the officers required to give such bonds are justices of the peace and probate judges. While they and their bondsmen are not liable as for acts which are strictly judicial, if done within their jurisdiction, they are liable as for the ministerial acts, as such, just as are sheriffs or other officers.

The distinction which I have endeavored to draw between "judicial acts" and "ministerial acts" is clearly observed by all the cases cited and relied upon by the majority. The case of *Bradley v. Fisher*, supra, which the majority say is the leading case, was based solely upon "judicial acts" by reason of the "willful, malicious, oppressive, and tyrannical acts and conduct" of a judge in depriving the plaintiff of the right to practice law; that is, in disbarring the plaintiff from such practice. The other leading case relied upon is the New Jersey case quoted from at length. While the facts in that case are very similar to those in the case at bar, it is clearly distinguishable from this upon the sole ground of judicial action and ministerial action. There was no question in that case as to the validity of the warrant of arrest, but only as to whether it was lawfully issued under the affidavit and the evidence before the justice when he issued it. The affidavit is set out in that case, but the warrant is not; but the statement of facts says that the justice thereupon "issued his warrant in the ordinary form." If the warrant in that case had been void, as it was in this, the justice would have been held liable under the opinion there.

Chief Justice Beasley, in the case so much relied upon and cited by the majority (44 N. J. Law, 660, 43 Am. Rep. 412), says: "If a magistrate should, of his own motion, without oath or complaint being made to him, on mere hearsay, issue a warrant and cause an arrest for an alleged larceny, it cannot be doubted that the person so illegally imprisoned could seek redress by a suit against such officer. It would be no legal answer for the magistrate to assert that he had a general cognizance over criminal offenses; for the conclusive reply would be that this particular case was not, by any form of proceeding, put under his authority."

So in the case at bar, if the justice had issued a proper warrant for "a trespass after warning," or for a threatened breach of the peace, then his liability, if any, would have been as for a judicial act; but the warrant he issued was absolutely void, charging no criminal offense known to God or man; and had he taken a proper affidavit and fully examined the affiant and his witness under

oath, and their evidence had shown conclusively that a dozen criminal offenses had been committed, and that the person arrested was guilty of all, this would not have warranted him in issuing a warrant void on its face, and which was intended to, and did, procure the arrest and imprisonment of this plaintiff. Suppose the affidavit or other proof before the justice should show the offense of larceny, this would not authorize the issuance of a valid warrant charging murder, and would certainly not authorize or justify the issuing of a void warrant.

But the justice in this case is in a worse condition; the affidavit he took was as void as his warrant, and he failed to examine any witness before issuing the warrant, as the statute directs, but proceeded to issue an absolutely void warrant, and now attempts to escape liability by hiding under his judicial robes as for this unwarranted and illegal ministerial act of issuing a void warrant, and then directing the sheriff or constable to arrest and imprison the plaintiff under this void process issued by him, thus depriving the plaintiff of his liberty without due process of law, and rendering the sheriff or constable absolutely liable for obeying his orders and executing his process, as the law directs such executive officer to do.

What was said by the Supreme Court of New York, in *Blythe v. Tompkins*, 2 Abb. Prac. 472, is very appropriate here. The officer who issues or executes process must see that it is valid on its face, or he is liable for his acts under it. The law does not throw any protection around an officer or person who attempts to arrest by an illegal warrant.

The writ or warrant must not be deficient in the frame of it. It must at least be lawful on its face. It would be strikingly unjust to hold one officer liable for a ministerial act in executing process, but excuse the officer who issued it, who was charged with the duty and was under bond to issue it correctly. The latter is presumed to be, and should be, more competent to judge of the validity of the process which he himself issues than the former, whose duty the law makes it to execute all process issued by the latter. If the justice acted judicially in issuing the warrant, there might be some force in the reasoning of the majority opinion; but, as all the authorities, including our own, hold this act to be a ministerial one, I cannot see how the judicial immunity can protect the justice as to this act.

A justice who renders an erroneous or void judgment and sentence may not be liable therefor if the subject-matter and the party were within and under his jurisdiction; but if, in addition to that, he issues a void mittimus, committing the defendant to jail, or to the whipping post, or to be hung, as a justice once did in this state, and the mittimus should be executed, I apprehend there would be no doubt as to his liability as for this act. The same is true as for his render-

ing a void judgment in a civil action. He might not be liable if the judicial act was within his jurisdiction, or "colorably" so, if you please to so term it; but if he should thereafter issue a void execution, and the defendant's property should be sold thereunder wrongfully, I apprehend that there would be no doubt as to his liability in that instance. The issuance of a warrant upon affidavit or other ex parte judicial examination as to probability of guilt, is as much a ministerial act as is the issuance of an execution or mittimus after trial and judgment.

It was the warrant that caused the arrest and imprisonment of the plaintiff in this case, not the void affidavit, nor the failure to examine affiant or other witnesses before its issuance, or before any erroneous judicial judgment. If the warrant was void, as the court holds it was, it could not be cured because there was a sufficient affidavit or preliminary proof, and, if so, certainly it was not cured because there was a void affidavit and no preliminary examination of witnesses, as the statute contemplates and provides for.

To my mind, the only plausible theory upon which the decision and conclusion of the majority can rest is upon one thus far not suggested, though two opinions have thus far been written. That plausible theory is that the affidavit and warrant are not void, but valid, or at worst merely irregular or voidable only; but the trouble with this theory is that it runs counter to both the facts and the record in this case, as well as to scores of decisions of this court, and to hundreds, if not to thousands, of those of other courts. Many of these are cited in the opinion of Justice SOMERVILLE, and many in the brief of the appellant. I will cite here only a few, in which others are cited, showing beyond doubt that both the affidavit and the warrant are absolutely void for all or any purposes.⁴ *Duckworth v. Johnston*, 7 Ala. 578; *Crumpton v. Newnam*, 12 Ala. 199, 46 Am. Dec. 251; *Miles v. State*, 94 Ala. 106, 11 South. 403; *Johnson v. State*, 82 Ala. 29, 2 South. 466; *Monroe v. State*, 137 Ala. 88, 34 South. 382; *Butler v. State*, 130 Ala. 127, 30 South. 338.

Any doubt that I might otherwise have upon the questions whether or not this warrant was void on its face, and whether this court should now decide the inquiry affirmatively and reverse the case, is removed by what Chilton, C. J., said of a warrant which much more nearly approached validity, or was much more "colorable" of jurisdiction, than this one. In that case, the great Chief Justice said: "Is the warrant in this case void upon its face? Does it show, upon its face, that the justice had no jurisdiction of the complaint, the substance of which the law requires should be stated in it? Code, § 3341. Upon our first examination, we thought it was not void, but informal merely. Up-

on having our attention more particularly called to it by the counsel for the prisoner, we are fully satisfied that our first impression was wrong, and that it is wholly void.

* * * The warrant in this case appears, upon its face, to be predicated upon the affidavit of Mary Noles, wife of the prisoner, which merely states that she 'is afraid that her husband, Joseph Noles, of said county, laborer, will beat, wound, maim or kill her, or do her some bodily hurt.' It sets forth no other cause of complaint, than in the recital of this oath, and proceeds 'these are therefore to command you,' etc. This statute, being in restraint of liberty, and penal, must be strictly construed; that is, it may not be enlarged, by construction, beyond the plain import of the terms in which it is couched. We are aware that this looks like a technical ground upon which to reverse a cause of this grave importance; but it is our duty to decide the law, irrespective of consequences, and being satisfied that the warrant is void we have no alternative but to reverse the sentence and remand the cause, that the prisoner may be again tried." *Noles v. State*, 24 Ala. 696, 697.

To recapitulate: The error of the majority is that they treat the case as if the act of the justice complained of was a judicial one, when clearly it was a ministerial one. It was not the taking of the void affidavit that injured and damaged plaintiff, and it was not of that he complained. It was issuing the void warrant and placing it in the hands of the executive officer by the judicial officer, which caused plaintiff's arrest and incarceration. This was ministerial and not judicial, though done by a judge or justice of the peace. If a sufficient affidavit would not have saved him from liability as for this wrongful and void ministerial act, then certainly a void though colorable one could not. If the only wrong here complained of had been a judicial act, I would not contend that this justice was civilly liable; nor do I understand that plaintiff's counsel has ever so contended. It is liability for a void ministerial act that is sought to be enforced, a right, so far as the surety is concerned, that is given by statute; and I do not think that the court ought to thus take it away.

Justices of the peace and their sureties are not the only officers or parties the statute makes liable; but it extends the liability to other judges, and has been enforced by this court even against probate judges. In the case of *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65, this court drew clearly the distinction I am trying to draw here between judicial and ministerial acts, and defined the liability of the officers and their sureties as for each. This court in that case said: "It

is an unquestioned rule, founded on the public benefit, the necessity of maintaining the independence of the judiciary, and its untrammelled action in the administration of justice, that a judge cannot be held to answer in a civil suit for doing, or omitting or refusing to do, an official act in the exercise of judicial power. His responsibility for the manner in which he discharges the high trusts committed to him is to the sovereignty from whom he derives his authority. It is, also, an undisputed rule that an officer who is charged with the performance of ministerial duties is amenable to the law for his conduct, and is liable to any party specially injured by his acts of misfeasance or nonfeasance. When the law assigns to a judicial officer the performance of ministerial acts, he is as responsible for the manner in which he performs them, or for neglecting or refusing to perform them, as if no judicial functions were intrusted to him. The boundary of his judicial character is the line that marks and defines his exemption from civil liability. Our law, organic and statutory, confers on the probate judge large judicial powers, and there is also assigned to him the performance of many acts merely ministerial; he is both a judicial and a ministerial officer. In *Thompson v. Holt*, 52 Ala. 491, it is observed: 'A bond was, by legislation, demanded from him as a guaranty for diligence and fidelity in the performance of his ministerial duties, as it is exacted from other mere ministerial officers. It is not a guaranty for his integrity and fidelity as a judge. For this no other security is demanded from him than that demanded from all other judicial officers—his official oath, and the sense of responsibility which the power and dignity of the office inspire. The official bond stands as an indemnity against his errors, or his willful misconduct, as a ministerial officer only,' etc."

STATE ex rel. VANDIVER v. BURKE.

(Supreme Court of Alabama. Dec. 21, 1911.
Rehearing Denied Feb. 17, 1912.)

1. JUDGES (§ 4*)—STATE COURTS—QUALIFICATIONS OF JUDGE OF COUNTY COURT.

Const. 1875, art. 6, § 14, provided that the judges of the Supreme, circuit, and city courts shall be learned in the law. The corresponding provision of Const. 1901, § 154, requires chancellors and judges of all courts of record except judges of probate courts to be learned in the law, and section 139 provides that the judicial power of the state shall be vested in the Senate sitting as a court of impeachment, the Supreme Court, circuit, chancery, and probate courts, and such inferior courts as the Legislature may establish, and such persons as may be by law vested with powers of a judicial nature. Prior to the adoption of that Constitution, the Legislature had often made judges of probate courts ex officio judges of the county

court, although they were not learned in the law. *Held* that, as Constitutions should be construed in the light of conditions existing at the time of their adoption and the judicial history of the state, section 154 did not inhibit the Legislature from requiring judges of probate courts to act as judges of the county courts, even though that was a court of record and such judges were not learned in the law, for section 139 impliedly authorizes the Legislature to impose on probate judges and other persons the duties and functions of inferior courts.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 16-20; Dec. Dig. § 4.*]

2. CONSTITUTIONAL LAW (§ 48*)—STATUTES—PRESUMPTIONS OF VALIDITY.

An act of the Legislature is presumed to be constitutional until clearly shown to be otherwise.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

3. CONSTITUTIONAL LAW (§ 48*)—STATUTES—DETERMINATION OF VALIDITY.

A statute will not be declared unconstitutional unless shown to be so beyond a reasonable doubt; this being especially true where many similar acts have been sustained.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

4. JUDGES (§ 29*)—STATE COURTS—PROBATE COURT.

Const. 1901, § 280, providing that no person shall hold two offices at the same time in this state, does not preclude the Legislature from investing probate judges with the powers and duties of judges of the county court, for section 139, after providing that the judicial power of the state shall be vested in the Senate sitting as a court of impeachment, the Supreme Court, circuit, chancery, probate, and such inferior courts as the Legislature may establish, mentions such persons as may by law be invested with powers of a judicial nature.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 140-152; Dec. Dig. § 29.*]

5. CRIMINAL LAW (§ 1030*)—REVIEW—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW.

An information in the nature of quo warranto to test the right of the probate judge to exercise the duties of a county judge alleged that there was a county court; that it was a court of record; and that the probate judge was ineligible to discharge the functions of that office. *Held* that, on appeal from a judgment dismissing the information on sustaining a demurrer thereto, the constitutionality of local acts creating the county court could not be reviewed, for the sufficiency of the information was the only question presented for review, and, the question of the constitutionality of such act not having been raised in the court below, could not be raised on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2619-2621, 2629, 2632; Dec. Dig. § 1030.*]

Appeal from Circuit Court, Cullman County; D. W. Speake, Judge.

Information by the State, in the nature of quo warranto, on relation of W. T. Vandiver, directed against R. I. Burke. From a judgment sustaining a demurrer to the information, relator appeals. Affirmed.

J. B. Brown, for appellant. George H. Parker and Eyster & Eyster, for appellee.

MAYFIELD, J. This is a statutory information, in the nature of quo warranto, brought in the name of the state, on the relation of W. T. Vandiver, against R. I. Burke, to inquire into the right and title by which the latter holds or exercises the office and functions of judge of the county court of Cullman. The proceeding is expressly authorized by chapter 128, § 5453 et seq., of the Code of 1907.

The material allegation, together with the prayer of the information, is as follows: "That R. I. Burke, who is not 'learned in the law' as required by section 154 of the Constitution of Alabama, is holding and exercising the powers and functions, and receiving the emoluments of the office of judge of the county court of Cullman county, and plaintiffs aver that the said R. I. Burke usurps, intrudes into, and unlawfully holds or exercises the powers and functions of said office. The plaintiffs therefore pray that summons issue as required by law, directed to the said R. I. Burke, commanding him to appear before the honorable, the circuit court of Cullman county, and to show cause by what right, warrant, or authority he is holding and exercising the functions and powers of said office of judge of the county court of Cullman county."

The respondent first appeared specially, and moved the court to quash the information and proceedings, on the grounds that they were not instituted by the Attorney General, but on the relation of one W. T. Vandiver, who was without authority to institute the same, which motion was heard, and overruled, by the judge to whom it was addressed. Respondent also demurred to the information, assigning the same grounds set forth in his motion to quash, and additional grounds, among which were the following: "Because the allegation therein that defendant 'usurps, intrudes into, and unlawfully holds or exercises the powers and functions of said office,' is a conclusion of the pleader, and not a statement of facts. Because the judge of probate of Cullman county is made the judge of said court, and said petition does not allege that the defendant is not judge of the probate court of Cullman county. Because this court judicially knows that this defendant, R. I. Burke, is judge of probate of Cullman county, and that judges of the probate court were expressly exempted and excepted from the qualifications prescribed by section 154 of the Constitution that judges 'shall be learned in the law.' Said petition does not show that this defendant is holding and exercising the powers and functions and receiving emoluments of the office of judge of the county court of Cullman county, otherwise than as a duty devolving upon him by virtue of his occupancy of and holding the office of judge of probate of Cullman county. Said petition does not aver that said Robert

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

I. Burke is not the judge of probate of Cullman county. Because the functions and powers exercised by the judge of the county court of Cullman county is not an independent jurisdiction, but attaches to and is a part of the duty devolving upon the judge of probate, who is excepted and exempted by section 154 of the Constitution. Because said county court of Cullman county was existing and the duties of the judge performed by the judge of probate at the time of the adoption of the Constitution, and the adoption of the Constitution was a recognition of the right of the probate judge to exercise the powers and functions as presiding officer of the county court, and the judge of probate or judge of probate court was excepted and exempted from the provisions of said section 154."

The judge to whom the information was addressed sustained the respondent's demurrer, and the relator declined to plead further, and suffered final judgment; and from such judgment the relator prosecutes this appeal.

The proceeding in question, in the name of the relator, is expressly authorized by the statutes and Code procedure to which we have above referred; and the appeal to this court is likewise authorized by sections 5470 et seq. of the Code. It is distinguishable from that of mandamus to a judge to control his judicial action, which was considered and decided in the cases of *State ex rel. Almon v. Burke*, 160 Ala. 103, 48 South. 1035, and *In re Stephenson*, 113 Ala. 85, 21 South. 210. In this case the proceeding is in the nature of quo warranto, and is by statute explicitly authorized to be instituted, in the name of the state, on the relation of "any person giving security for costs," whereas there is no such authorization as to mandamus proceedings against a judge. So the important and material question presented by the information and the demurrer thereto was, Can the respondent, who is probate judge of Cullman county, and is "not learned in the law," constitutionally exercise or discharge the judicial functions imposed, or attempted to be imposed, by statute, upon probate judges, as to the county court of Cullman?

[1] It is contended by the relator that the county court of Cullman is "a court of record" within the meaning of section 154 of the Constitution, and that respondent cannot therefore constitutionally exercise, perform, or discharge the duties of such office. On the other hand, the contention of the respondent probate judge is set forth in his special grounds of demurrer. Section 154 of the Constitution of Alabama of 1901 reads as follows: "Chancellors and judges of all courts of record, shall have been citizens of the United States and of this state for five years next preceding their election or appointment, and shall be not less than twenty-five years of age, and, except judges of

probate courts, shall be learned in the law." The corresponding section of the Constitution of 1875 reads as follows: "Sec. 14. The judges of the Supreme Court, circuit courts, and chancellors and the judges of city courts shall have been citizens of the United States and of this state for five years next preceding their election or appointment, and shall be not less than twenty-five years of age, and learned in the law." Under this constitutional provision as it was written in the Constitution of 1875, it was certain—beyond doubt—that it was not a constitutional requisite that the judge of a county court or the person exercising the powers and discharging the functions conferred upon such courts, whether a probate judge or not, should be learned in the law. Did the Constitution of 1901 work such a change as to require the officer or person discharging such functions to be "learned in the law," if such county court be, or is made, a "court of record," and the officer or person discharging such functions be the probate judge of such county? This is the serious, the important, question propounded to the circuit judge below, and to us by this appeal.

Section 139 of the Constitution which names or prescribes the tribunals in which the judicial power of the state shall be vested names the Senate sitting as a court of impeachment, the Supreme Court, and circuit, chancery, probate, and such inferior courts as the Legislature may establish; and concludes by adding the phrase, "*and such persons as may be by law invested with powers of a judicial nature,*" with certain conditions as to the establishment of such inferior courts, not here important to be discussed. The quoted and italicized provision of section 139 of the Constitution first appeared in the Constitution of 1875. Since the Constitution of 1875, the Legislature has had this express authority for conferring certain parts of the judicial power of the state—theretofore conferred or conferable only upon the tribunals or courts mentioned or provided for in the previous Constitutions of 1819, 1861, and 1865—upon certain designated persons. This change of the Constitution was no doubt suggested, and rendered proper and appropriate, if not necessary, by the first penal Code of the state, which was adopted by the Legislature in the year 1866. As is well known, this Code provided for a new system of criminal procedure in this state. Such was the undoubted purpose of the act providing for the codification, and also of the act subsequently adopting the Penal Code. See Penal Code 1866.

In the case of *Balkum v. State*, 40 Ala. 671, 675, this court spoke as follows: "A constitutional question is presented in this case, viz., that the Legislature had not the power to establish a county court in the several counties in this state, and make the judges of probate ex officio judges of said

courts, and that the county courts thus established, being independent courts of inferior jurisdiction, can be presided over by none other than separate judges elected for that purpose. This question has been in effect decided at the present term of this court. A county court of different powers and jurisdiction from the county courts as now existing was established by the Legislature for the county of Montgomery on the 24th of February, 1890; and the judge of probate in said county was made ex officio the judge of said county court. Acts 1859-60, p. 564. On appeal to this court from a judgment rendered by the said county court, the question raised in the present case was presented, and we then held as follows: 'No one questions the power of the General Assembly to establish by law inferior courts with common-law jurisdiction within a county, city, or district, and, should it do so, we see no good reason why the Legislature cannot authorize any judicial officer who, has been elected by the people to preside in such inferior court, if such officer has been elected by the people under the jurisdiction of the court thus established.' *Randolph v. Baldwin*, at the present term," 41 Ala. 305, 309. In the case last cited the court further said: "In the case of *Gaines v. Harvin*, 19 Ala. 498, this court said: 'To hold all such acts as are performed by inferior officers void, because such officers have not been commissioned or qualified as the Constitution requires judges to be elected and qualified, would be to unsettle the titles of the country, and to introduce a scene of confusion which would greatly disturb the public repose.' This announces a doctrine stronger than is required to sustain the validity of these judgments."

In the case of *Ex parte Roundtree and Orr*, 51 Ala. 42, the constitutional question as to the qualification of the judge of the circuit court ex officio to discharge the duties of the inferior court created by the Legislature for Morgan county was different from the question in this case, and from the questions involved in the two cases last above quoted from. In the *Roundtree Case* the question was that the Constitution required that all judges should be elected by the people, and that the judge provided was not elected by the people of Morgan county, but by the people of the then Fourth judicial circuit, and that this was not a compliance with the Constitution notwithstanding Morgan county was a part of the Fourth judicial circuit. That part of the act providing that the judge of the Fourth circuit should be the judge of the inferior court created was declared void. That case was distinguished from the other cases, and therefore from this, by *Brickell, C. J.*, as follows: "The decisions in the cases of *Balkum v. State*, 40 Ala. 671, and *Randolph v. Baldwin*, 41 Ala. 305, are not inconsistent with, but support, the views we have expressed.

The courts, the jurisdiction of which was involved in those cases, were presided over by a judge deriving his title from an election by the qualified voters only of the districts for which the courts were established. It is apparent, if such had not been the fact, the jurisdiction of the courts would not have been maintained."

In speaking of the power of the Legislature to establish inferior courts, and of the effect and result of the Constitution being subsequently adopted with such provisions as to inferior courts, this court in *Roundtree's Case*, above, at pages 47, 48, of 51 Ala., said: "The question was the subject of deliberate consideration in *Nugent v. State*, 18 Ala. 521, and it was declared that a court, the judgments of which were subject to revision by a higher tribunal, was an inferior court within the meaning of this clause of the Constitution, and that it is the relation the court bears to the superior tribunal, and not the character or extent of its jurisdiction, which is contemplated. The conclusiveness of this decision has never been questioned. It has been repeatedly acted on by the General Assembly, and acquiesced in by this court. With full knowledge of it, the same provision in the same terms was incorporated in the present Constitution. We are not at liberty therefore, to depart from it, and must pronounce it within legislative competency to ordain and establish an inferior court, clothed with the jurisdiction the statute confers on this court."

It is a well-settled canon of construction that Constitutions should be construed in the light of the conditions existing at the time of their adoption, and of the judicial history of the state. In the light of the long established usage and practice of probate judges to perform the duties pertaining to the county courts, and of the long continued and almost unvarying practice of the Legislature to confer such duties upon the probate judges, we cannot believe that it was the intention of the Constitution makers to inhibit the continuance of the practice, particularly as no provisions were made, for abolishing such courts, or designating other persons or officers to discharge the duties and functions thereof.

[2] "In pronouncing on the constitutionality of an act which has received the sanction of a co-ordinate department of the government—the legislative department—the courts will indulge the presumption that such act is constitutional until clearly convinced to the contrary. *Zeigler v. S. & N. A. R. R. Co.*, 58 Ala. 594; *S. & N. R. R. Co. v. Morris*, 65 Ala. 193; *Edwards v. Williamson*, 70 Ala. 145." 2 Mayf. Dig. p. 690.

[3] It is another sound rule of construction that when called upon to pronounce the invalidity of an act of the Legislature, passed with all the forms and solemnities requisite to give it the force of law—and especially as in this case, where like acts or acts of simi-

lar kind have been repeatedly so passed by successive Legislatures—courts approach the question with very great caution, and examine it in every possible aspect, and ponder it as long as deliberation and patient attention can throw any new light on the subject, and will never declare such statutes void unless the invalidity is considered beyond reasonable doubt.

Applying these principles to the case at bar, we are constrained to hold that it was not the intention of the makers of the Constitution to render probate judges ineligible to perform the functions or discharge the duties imposed on them by the Code or by special statutes as to county courts unless they were learned in the law. The Constitution expressly excepts probate judges from the requirement of being learned in the law. It was, of course, known to the Constitution makers at the time of the framing and adoption of the Constitution of 1901 that in many of the counties the functions and duties of the county court were being performed and discharged by the probate judge, and that in most cases they were not learned in the law. There is no express prohibition in the Constitution against the practice; and the fact that probate judges are explicitly excepted from the provision that judges of courts of record shall be learned in the law would seem to have been a recognition of the practice, if not an authorization of it. There is certainly very little (if any) more reason for requiring the judge of a county court who tries only misdemeanors to be learned in the law than there is for requiring judges of the probate courts to be so learned. The duties and functions of the probate court are without doubt of as much importance and sacredness as those of the county court; and their proper discharge requires as much legal lore as the proper discharge of those of the latter court requires. Many of the functions and duties of the county court are now, and have always been, discharged by justices of the peace, who are not required to be learned in the law, and to whom we think it unquestionable that the Constitution does not, and was not intended to, apply.

Moreover, we think section 139 of the Constitution clearly authorizes the Legislature to impose upon the probate judges or other officers or persons the duties and functions of the county court. But we do not think that the fact that the county court might, for some purposes, be considered a court of record, requires that probate judges shall be learned in the law, whatever might be the result as to other persons if the county court should be considered a court of record. So far as the probate judges are concerned, it is immaterial, we think, whether the county court, the duties and functions of which they are required to perform and discharge, is, or is not, a court of record. They are not judges of such county courts, though they, as probate judges, are required to discharge

the duties thereof. They do not thereby hold two judicial offices—holding only one office, but by law being required to discharge the duties of three courts, the probate, the county, and the commissioners'.

[4] Unless otherwise provided by special statute, it now is, and ever since 1866 has been, as obligatory upon a probate judge to perform the duties pertaining to a county court, together with those imposed upon him as a member of the commissioners' court, as it is the duties pertaining to the probate office. He is required to give two separate bonds for the faithful discharge of these duties. The probate judge might be required to give other bonds for the performance of other duties in addition. But the fact that he discharges the duties of two or more courts does not make him hold two offices in violation of the Constitution. There is in such cases a multiplicity of duties and functions, but no multiplicity of offices. If it should be considered that the probate judgeship and the county court judgeship were separate and distinct offices of profit and trust, any one person might be ineligible to hold both at the same time, and ineligible to hold the latter office unless he were learned in the law, because of sections 154 and 230 of the Constitution. We are aware that there are authorities and decisions to the effect that one officer or person cannot ex officio discharge the duties or functions of two offices of public trust and profit at the same time because violative of the constitutional provision; but we are not willing to follow these to the extent of holding that a probate judge cannot under our Constitution ex officio discharge the duties pertaining to either the commissioners' court or the county court. The practice and custom has too long prevailed, has been sanctioned, if not expressly authorized, by too many different Constitutions and constitutional conventions, to be now stricken down. We think it not open to question that our Constitution makers intended, and that the Constitution should be interpreted to mean, that such statutes are multiplicative of duties and functions, rather than of offices. In our opinion it does not necessarily follow that, because the judge of one court is by statute required to perform certain duties and exercise certain functions pertaining to another, he thereby holds two offices, or that he is judge of both courts. The Legislature, unless prohibited, may establish a court without providing for the election or appointment of any officers thereof. It may, unless prohibited by the Constitution, prescribe that the work of a court thus created shall be performed by other officers. This is what was done when county courts were created by the Penal Code of 1866. No officers of the county court were then provided, the Code merely providing that the probate judges should do the work and business of the court so created. It was, in fact, merely

taking from the circuit and the justice courts a certain part of their jurisdiction and duties, and transferring the same to the probate courts or the judges thereof. No new office was thereby created, although a new court was erected.

It is true that certain local acts creating county courts provided for separate officers, but we are speaking of the general law as to county courts, and, if the local act provided that the judge of probate should discharge the duties pertaining to the county court, then, of course, the rule would be the same, whether the local law conferred more or less jurisdiction than the general law. That this is the proper construction to be placed upon our Constitution, considered as a whole, we feel no doubt. The Constitution expressly confers upon the Legislature the power to create courts of inferior jurisdiction (within certain limitations not necessary to be here mentioned), together with the authority to define and prescribe the powers and duties of the officers thereof; and provides that the judges of such court "shall be elected or appointed in such mode as the Legislature may prescribe." This charge was evidently devised to meet the decision of this court in *Roundtree's Case*, 51 Ala. 51. It is, as we have before said, a part of the judicial history of this state that the duties and functions of county courts have been performed or discharged by the probate judges with but few instances of exception; and that, as a matter of fact known to all men, such judges as a rule have not been learned in the law—in other words, have not been lawyers. Again, certain judicial functions from the beginning of our state government have been conferred by the Legislature upon certain persons or officers well known not to be learned in the law—as, for instance, clerks, registers, masters of the courts, and sheriffs. And evidently to obviate all doubt upon this subject the Constitution of 1875 (section 139) expressly authorized such investiture of the judicial power. As examples of legislative availment of this authority, it may be noted that by statute many judicial functions are conferred upon registers in chancery, in addition to their clerical duties, and they are made *ex officio* judges of the probate court, when the judge thereof is disqualified. Coroners are made both judicial and executive officers, and are *ex officio* sheriffs, when there is no sheriff to act. The constitutionality of these statutes has never been questioned nor doubted, so far as we are advised. Nor was it ever supposed that the register or the coroner, in such cases was holding two offices. These and similar statutes have stood too long, been sanctioned by too many new Constitutions and different Legislatures, and sustained by too many decisions of this court, to be now successfully assailed. Nor do we think it was the purpose or effect of the change in section 154 of the Constitution—whereby judges of courts

of record are required to be learned in the law—to strike down these various statutes or prevent the passage of similar ones.

The Supreme Court of Massachusetts has taken the same view of a similar provision of the Constitution of that state. That Constitution provided that "judges of the court of common pleas shall hold no other office under the government of this commonwealth." The Legislature of 1843 provided that all the duties of municipal courts should be performed by the justices of the court of common pleas; and the act was held not to be violative of the constitutional provision. *Brien v. Com.*, 5 Metc. (Mass.) 508. The court in that case said: "We think the St. of 1843, c. 7, must be understood and construed as a general and entire transfer to the court of common pleas of all criminal matters which had heretofore been cognizable by the judge of the municipal court; and therefore, if an appointment could now be made of a municipal judge, for the reason that the office has not been specially abrogated, yet the individual holding such office would exist as a judge in name only, and without any authority or jurisdiction. It seems, however, to result from the considerations we have suggested that the office of judge of the municipal court was virtually abrogated by the act transferring its duties to the court of common pleas. The result to which we have come is, therefore, that the act in question does not violate the constitutional provision contained in the amendments to the Constitution, art. 8, and is not void for that cause." We think these remarks of the Massachusetts court applicable to the case at bar. If a judge should be elected or appointed to the county court of Cullman, without amending the general or the special statute, however learned in the law he might be, he would be a judge without a "job." We see no reason in the law or in fact why the Legislature cannot by either general or special statute authorize the probate judge of Cullman county to perform the duties and to discharge the functions relating to the county court of that county; and it seems to us wholly immaterial whether or not the latter be considered a court of record, probate judges being specially excepted by the Constitution from the general requirement that judges of courts of record shall be learned in the law. Moreover, he is not judge of the county court, but judge of the probate court, who is required to do the work of the county court.

[5] We cannot on this appeal consider or pass upon the constitutionality of the local acts of the Legislature pertaining to the county court of Cullman, for the reason that the question was not raised or passed upon by the lower court. The only ruling of the lower court complained of on this appeal was that of sustaining a demurrer to the information. The information conceded, alleged, or informed the lower court that there

was a county court for Cullman county by virtue of these statutes; that it was a court of record; and that the judge of probate of that county was not "learned in the law," and that, by virtue of section 154 of the Constitution, he was therefore ineligible to perform the duties or discharge the functions of that office. The respondent demurred to this petition, the judge below sustained the demurrer, and the relator declined to amend his information or to plead further, and suffered a final judgment, from which he appeals. So it is only the sufficiency of that information which we can examine on this appeal. Of course, when the relator declined to amend or to plead further, the only thing left for the judge to do was to dismiss the information or to render a judgment against the relator. The latter course, in this case, was pursued, evidently for the benefit of the relator, so that he could have the correctness of the ruling on the demurrer tested by this court on appeal. This court will never, on appeal, investigate or inquire into the constitutionality of statutes in civil cases, where the questions were not raised or passed upon below, unless the statute is necessary to the jurisdiction of this court or to that of the court below.

The only questions raised or attempted to be raised in the court below were whether or not the probate judge of Cullman county could discharge the duties of the county court of Cullman, if he was not "learned in the law," and whether or not the county court of Cullman was a court of record. The question whether or not there was a county court for Cullman was not raised nor attempted to be raised in the court below, and therefore was not decided by the judge below; and, of course, that question cannot be properly presented for the first time on this appeal. So far as the questions presented by this appeal are concerned, it is, we think, wholly immaterial whether the county court of Cullman county exists by virtue of the general, or by virtue of a special law, each providing, as it does, that the judge of the probate court shall discharge the duties and perform the functions of the county court.

We find no error in the ruling or judgment of the trial judge, and the same is in all things affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

BIRMINGHAM RY., LIGHT & POWER CO. v. DRENNEN.

(Supreme Court of Alabama. June 3, 1911.
Rehearing Denied Feb. 17, 1912.)

1. NEGLIGENCE (§ 11*)—"WANTON INJURY."
Where an act is done or omitted under circumstances and conditions, known to the person, that his conduct is likely to or prob-

ably will result in injury, and through reckless indifference to consequences, or consciously and intentionally, he does a wrongful act, or omits an act which he ought to have done, the injury inflicted is wanton.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 13; Dec. Dig. § 11.*]

For other definitions, see *Words and Phrases*, vol. 8, p. 7832.]

2. STREET RAILROADS (§ 117*)—INJURIES TO TRAVELERS—COLLISION—WANTON INJURY.

In an action for death of decedent by his carriage being struck by a street car, evidence held to require submission of the issues of wanton injury, negligence, and contributory negligence to the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 117.*]

3. TRIAL (§§ 194, 253*) — INSTRUCTIONS — PLEADING—COUNTS OF COMPLAINT.

Where a complaint against a street railroad company for death in a collision stated two causes of action in different counts, an instruction that, if the jury were reasonably satisfied that either one or the other of the counts was true, plaintiff's case was made out was proper, and was not objectionable as directing a verdict for plaintiff, or as ignoring pleas of contributory negligence.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. §§ 194, 253.*]

4. TRIAL (§ 248*) — STREET RAILROADS (§ 118*) — INSTRUCTIONS — FORM — ABSTRACT AND MISLEADING CHARGES.

In an action for death in a collision between decedent's carriage and a street car, an instruction that, if decedent pulled his horse on the track, and was guilty of contributory negligence in that regard, yet if the motorman saw the peril in time to have avoided the danger by exercising due care, and negligently failed, after discovering the peril, to do what he could in the exercise of due care in managing the car, and such negligence, if any, proximately caused the death, then decedent's previous negligence, if any, in getting into danger would be no defense to the subsequent negligence of the motorman, even if the motorman was not guilty of wantonness nor of intentional wrong, was not objectionable as abstract or misleading.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 248;* *Street Railroads*, Dec. Dig. § 118.*]

5. APPEAL AND ERROR (§ 1060*)—HARMLESS ERROR—MISCONDUCT OF COUNSEL—ARGUMENT.

Plaintiff's counsel, in an action against a street railway company for death in a collision, referring to defendant's attorney, used the following language: "I know Hugh Morrow, and I know what I am going to tell you about him is true. I know that if he was on the jury trying this case that he would render a verdict in favor of the plaintiff in a large amount." Defendant's counsel objected. The objection was sustained, but the court did not exclude the argument or reprimand counsel for using it; nor did counsel retract it after the objection had been sustained; nor did defendant's counsel further move the court to exclude, but assigned the same as a ground for new trial, which was overruled. *Held*, that the argument was prejudicially erroneous, and that the court, not having more forcibly excluded the same and reprimanded counsel, erred in refusing to grant a new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1060.*]

6. JURY (§ 90*)—JURORS—DISQUALIFICATION—BOARDERS.

Where, in an action for the death of plaintiff's husband, one of the jurors was a boarder at her house, which fact was unknown to defendant at the time of or before the trial, he was disqualified; and the fact that he sat in the case was sufficient to vitiate the verdict.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 90.*]

7. INNKEEPERS (§ 3*) — "INN" — "BOARDING HOUSE."

The term "inn" was formerly defined to mean a house where a traveler is furnished with everything he has occasion for while on his way, and, though such definition has been somewhat modified by the progress of time, an inn, when unlicensed, is distinguished from a "boarding house," in that the guest of the latter is under an express contract, at a certain rate and for a specified time, and the keeper of the boarding house may select his guests and fix full terms; while the inn is for the entertainment of all who come lawfully and pay regularly.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 3-5; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 1, pp. 815, 816; vol. 4, pp. 3624-3626.]

Mayfield, J., dissenting in part.

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Kate B. Drennen, as administratrix, against the Birmingham Railway, Light & Power Company for damages for death of her intestate, alleged to have been caused by a collision with one of defendant's cars. Judgment for plaintiff in the sum of \$7,000, and defendant appeals. Reversed and remanded.

The facts sufficiently appear from the opinion of the court. The oral charge of the court, excepted to, is as follows: "Willful injury exists where there is a purpose on the part of the party complained of to inflict the injury. Wanton injury does not necessarily include any design or purpose to injure any one; but if the person in charge of the car, which is being operated and run along a public street, knows that to run the car without stopping is liable to injure a person in front of the car, and if he is conscious of his conduct at the time, continues to run the car with a reckless indifference to consequences, without making proper efforts to stop it, or without using the means at hand to stop it, and prevent the collision, that would constitute wantonness, if the act or omission to act was the proximate cause of the injury. You see, in willful injury there must be design or purpose; whereas, to constitute wanton injury, there need not be a design to injure, but a reckless indifference to consequences, knowing at the time that the doing of certain acts, or failure to do certain acts, would result in personal injury or death, and he consciously does the act, or consciously fails to act, and such act, or failure to act, results in injury or death, that would constitute wantonness, if that act

or failure to act was the proximate cause of the injury."

Charge 7 is as follows, and was given for the plaintiff: "Even if Mr. Drennen pulled his horse on the track, and was guilty of contributory negligence in that regard, yet if the motorman saw the peril in time to avoid the danger by the exercise of due care, and negligently failed after discovering the peril to do what he could in the exercise of due care in the management or control of the car, and that such negligent failure, if there was such, proximately caused the death, then the previous negligence, if any, of Drennen in getting into danger, would be no defense to such subsequent negligence of the motorman, even if the motorman was not guilty of any wantonness, nor of any intentional wrong."

Tillman, Bradley & Morrow, for appellant. Bowman, Harsh & Beddow, for appellee.

MAYFIELD, J. Appellee, as administratrix, sued appellant street car company, under the homicide statute, to recover damages for the wrongful death of her intestate, who was her husband.

The complaint contained two counts; one charging simple negligence, and the other wantonness. The gravamen of the complaint is that the motorman in charge of the defendant's car, either negligently, as charged in the first count, or wantonly or intentionally, as charged in the second, caused the car to run against a buggy in which the intestate was riding, thus throwing him from the buggy, or causing him to jump therefrom, and thereby killing him.

The deceased, on the day of the fatal injury, was driving in a buggy on the north side of Avenue F., in the city of Birmingham, going in an easterly direction towards Avondale, while the defendant's car was proceeding in the opposite direction along the same avenue, and when at a point between Twenty-Second and Twenty-Third streets the horse of the deceased became frightened and unruly, and while deceased was attempting to control the animal the buggy was run into by the street car, or ran against the car.

The evidence is conflicting as to the exact manner of the collision; that is to say, whether the car was standing still at the time, and was struck by the buggy, or whether the car ran into the buggy. Some of the evidence shows that the car moved about six inches after the collision, and other evidence that it moved three or four feet, and still other that it moved six or eight feet. There was testimony tending to show that the deceased pulled the horse across the track in front of the car, or that the horse, becoming unmanageable, went across the track in front of the car, while deceased was trying to prevent it from so crossing. The

deceased either was thrown, or jumped, from the buggy at the time of the collision, and it was from this fall that he received the injuries that caused his death.

The substance and effect of the testimony of the first witness for plaintiff, a negro woman named Wille Brown, was that she witnessed the collision and accident; that just before and at the time of the accident the motorman in charge of the car was looking backward, and therefore could not and did not see the deceased nor know of his peril. For what purpose he was looking backward was not made to appear by her evidence; and it should be said that her testimony here is contradicted by all the other witnesses. Moreover, she puts the deceased on the side of the track opposite to that indicated in the testimony of other witnesses, and states that the deceased pulled the horse across the track to avoid meeting an automobile. None of the other witnesses testify to seeing an automobile, or to the circumstances of the crossing of the track. She says that the car did not slow up, because the motorman was looking backward. She does not say how far the car moved, after striking the buggy; but her testimony tends to show that the deceased pulled the horse across the track in front of the car. Many of the witnesses say that the horse was shying or attempting to run, and that deceased was trying to keep it off the track at the time of the collision.

Another witness, Mrs. Connybear, testifies that she did not see the car strike the buggy; that when she first saw it the car was pushing the buggy toward Twenty-Fourth street, and went three or four feet. She does not attempt to show how close the car was to deceased when he went upon the track.

Another witness for the plaintiff, Mrs. Massey, testifies that she was in her house near the scene of the accident, and that she reached her door just in time to see the collision; that the car pushed the buggy about three feet.

Nellie Luna, another witness, testifies that the car had stopped when she first saw it, and that she did not see the collision.

Another witness for the plaintiff, Ed Shriver, testifies that he did not see the collision, but witnessed some of the circumstances; that the car was running at a moderate speed, he being in it, and that he did not see the buggy until the collision; that he did not feel any crash, but only the usual sensation of a stopping car.

The defendant's witness Erhart testifies that the car was standing still, and that the buggy collided with it. Another witness, Hunter, testifies that the horse was trying to cross the track; the car being within six feet of it. Another witness testifies that he

the horse jump across, about six feet in front of the car, and that the buggy hit

the end of the car just about the time it got on the track.

Another witness, Miller, testifies that the horse shied across the track, and that the car was stopped after it pushed the buggy about six inches, and that the horse was about 15 or 20 feet from the car.

Witness M. F. Oeser testifies that the crash and the stopping of the car occurred at the same time, and that deceased was about 10 yards in front of the car when he fell.

The testimony of the witness Parker, the motorman, is to the effect that he noticed the deceased coming up the avenue, but not on the track, and that as the horse got closer to the car it became frightened at something on the sidewalk, and attempted to cross the track, the deceased trying to prevent this; and that he (the motorman) attempted to slow up the car as soon as he saw that the horse was trying to cross the track; that the car was still when the buggy struck it, and that the left hind wheel was knocked off; that the horse was going very fast; that the car was stopped by the time the horse was within 15 or 20 feet of it; that he had time to stop the car, but not to back it.

We do not find any evidence in this record, standing alone, or connected with all the other evidence, which would justify the trial court in submitting the question of wanton negligence or willful injury under the second count, which ascribed the injury to the wantonness or willfulness of the motorman. While some of the evidence may tend to show simple negligence on the part of the motorman, we find none showing, or even tending to show, wanton negligence or willful injury, as has been defined by this court. The most that any of it shows or tends to show is that he was looking backward, and therefore failed to observe the danger to which the deceased was exposed, or to know and appreciate the danger of not stopping the car. There is nothing to show that his looking backward was wanton, or to justify any inference that it was with the intent to injure the deceased or any one else. The most that this or any other evidence shows is simple negligence, or failure to observe due care. Other evidence shows that he failed to sound the gong, or to give warning of the approach of the car; but this, at most, was simple negligence, and all the other evidence shows or tends to show that he did attempt, as best he could, to prevent the injury, after becoming aware of the danger and peril of the deceased.

[1] It follows, therefore, that the court should have given the affirmative charge for the defendant, as requested, as to the count charging wantonness or willful injury. Wanton negligence or willful injury has been often defined by this court; and those phases of it applying to this case have been stated by this court as follows:

When an act is done or omitted under circumstances and conditions, known to the person, that his conduct is likely to or probably will result in injury, and through reckless indifference to consequences, or consciously and intentionally, one does a wrongful act, or omits an act which he ought to have done, the injury inflicted may be said to be wanton. In such cases, it is, however, essential that the act done or omitted should be done or omitted with a knowledge and present consciousness that injury would probably result; and this consciousness is not to be implied from a mere knowledge of the dangerous situation. *M., J. & K. C. R. R. Co. v. Smith*, 153 Ala. 127, 45 South. 57, 127 Am. St. Rep. 22.

In order that one may be held guilty of willful or wanton conduct, it must be shown that he was conscious of his conduct and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that, with reckless indifference to consequences, he consciously and intentionally did some wrongful act, or omitted some known duty, which produced the injurious result. *Montgomery St. Ry. Co. v. Rice*, 144 Ala. 610, 38 South. 857.

Before one can be convicted of wantonness, the facts must show that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely result from his conduct; that, with reckless indifference to consequences, he consciously and intentionally did some wrongful act, or omitted some known duty, which produced the injury. *Peters v. Southern Ry. Co.*, 135 Ala. 537, 33 South. 332. See *M. & O. R. R. Co. v. Martin*, 117 Ala. 367, 23 South. 231; *Burson v. L. & N. R. R. Co.*, 116 Ala. 198, 22 South. 457; *Birmingham Co. v. Bowers*, 110 Ala. 328, 20 South. 345.

Where there is no evidence of knowledge on the part of the engineer of the presence or peril of the person on the track, or knowledge from existing conditions at the time and place of the accident that injury would likely or probably result to such person from the speed at which the engineer was running the train, he could not be said to be guilty of wanton negligence. *Peters v. Southern Ry. Co.*, supra.

The running of a train at a dangerous rate of speed through an incorporated city or town, or across a public highway along which persons in large numbers are continually passing, and without sounding the whistle or ringing the bell, or giving any alarm, does not necessarily involve an intention to kill, or such reckless disregard as to probable consequences as to amount to wantonness. *L. & N. R. R. Co. v. Mitchell*, 134 Ala. 266, 32 South. 735; *L. & N. R. R. Co. v. Orr*, 121 Ala. 489, 26 South. 35.

It is only after those who are operating a train fail to exercise reasonable care to avoid injuring a trespasser, after he is discovered and his peril becomes apparent, that they

are held to be guilty of wantonness or recklessness, such as to overcome contributory negligence of the trespasser. *L. & N. R. R. Co. v. Mitchell*, 134 Ala. 266, 32 South. 735; *Haley v. K. C., M. & B. R. R. Co.*, 113 Ala. 649, 21 South. 357.

It is essential, to constitute wanton negligence, that the act done or omitted should be done or omitted with a knowledge and a present consciousness that injury will probably result, and this knowledge is not to be implied from mere knowledge of elements of the dangerous situation. *L. & N. R. R. Co. v. Brown*, 121 Ala. 221, 25 South. 609; *Burgess' Case*, 114 Ala. 587, 22 South. 169; *Markee's Case*, 103 Ala. 160, 15 South. 511, 49 Am. St. Rep. 21; *Swope's Case*, 115 Ala. 287, 22 South. 174; *Burgess' Case*, 116 Ala. 509, 22 South. 913.

A mere error of judgment, or omission to act, without more, cannot rise to the degree of wanton negligence or willful wrong. Authorities, supra; *Georgia Pac. R. Co. v. Lee*, 92 Ala. 272, 9 South. 230; *Louisville & N. R. Co. v. Webb*, 97 Ala. 308, 12 South. 374; *Highland Avenue & Belt R. Co. v. Sampson*, 91 Ala. 560, 8 South. 778.

Where a person is killed on the side track by a backing train moving at the rate of from three to six miles per hour, the fact that a proper lookout was not kept, or that the bell was not rung, held, as a matter of law, not to be wanton negligence. *L. & N. R. R. Co. v. Richards*, 100 Ala. 366, 13 South. 944.

[2] On further consideration of this case, on the application for a rehearing, the majority of the court are of the opinion that the trial court did not err in submitting the question of wantonness to the jury, and therefore do not agree to what is said by the writer on the subject of wantonness. The writer, however, adheres to the views above expressed upon this subject. He has read the evidence—every word of it—and he fails to find any tendency therein to show wantonness; and the only evidence he finds, tending to show simply negligence, is that going to show that the motorman was looking backward, and not forward, when the accident occurred. This would repel any idea of wantonness or willfulness, and show, at most, but inattention. There is, in his opinion, not a syllable of the other testimony that tends to show negligence, and nothing in the entire evidence, excepting this testimony as to the motorman's looking backward, but what would show the accident to have been an unavoidable one, for which no one would be liable. The questions of simple negligence on the part of the motorman, and contributory negligence on the part of the deceased, were matters for the jury. The court did not err in submitting these questions to the jury, nor in declining to instruct the jury affirmatively for the defendant upon these issues.

We find no reversible error in those parts of the oral charge to which exceptions were reserved by defendant. They assert correct propositions of law, and, when referred to the whole charge of which they are parts, we cannot say that they were misleading, certainly not so, to the extent to justify a reversal. The defendant could and should have requested explanatory instructions which would have cured the charges of any possible misleading tendencies.

[3] There was no error in charging the jury that, if they were reasonably satisfied from the evidence that either one or the other of the counts of plaintiff's complaint is true, then plaintiff's case is made out. This is undoubtedly the law, as has been many times said by this and other courts. It did not request a verdict for plaintiff, and therefore did not ignore the pleas or defense as to contributory negligence; and, besides, the court, at the request of the defendant, gave an explanatory charge, curing it of any misleading tendency.

[4] There was no error in giving charge No. 7. It stated a correct proposition of law, and it was neither abstract nor misleading; but, even if it were, we would not reverse for these faults, if otherwise correct. We have repeatedly ruled that there is no error in refusing charges which instruct the jury that there is no evidence of a given fact.

[5] The bill of exceptions contains the following recitals: "Mr. Harsh, in making the closing argument for the plaintiff in the case, said to the jury: 'I know Hugh Morrow, and I know what I am going to tell you about him is true. I know that if he was on the jury trying this case that he would render a verdict in favor of the plaintiff in a large amount.' The defendant, by its attorney, Hugh Morrow, who tried the case, objected to the foregoing argument of plaintiff's counsel, and the court sustained the objection. At the time of making the objection, defendant's attorney stated to the court, in the presence of the jury, that the facts stated by Mr. Harsh were not in evidence, and were not true in substance and in fact." This was clearly and wholly illegitimate argument. It was matter stated as a fact to the jury, of which there was no evidence, and of which fact evidence would not have been admissible, if offered. Its only tendency and effect was to prejudice the jury against the defense of the defendant, and against the sincerity of its counsel in so defending. Its natural tendency was to persuade the jury to render a verdict for plaintiff, because it was practically confessed by the attorney for defendant. It would be difficult to conceive of argument more objectionable, unfair, and prejudicial than was this, coming, as it did, in the closing argument, to which the defendant's counsel has

no opportunity to reply. Courts should not allow verdicts obtained by such argument to stand. If the trial court had been requested to exclude the argument from the jury, and had declined, there would, we think, be no doubt that the refusal would be reversible error on appeal, or that it would be ground for a new trial. The defendant's counsel did object to the argument, and the court sustained the objection, but the court did not ex mero motu exclude such argument, or reprimand counsel so using it; nor did counsel retract it after it was objected to and the objection sustained; nor did counsel for defendant, as he might have done, further move the court to exclude. This court, on appeal, can only review the actions and rulings of the trial courts, and not those of counsel; hence on the main appeal we cannot review the action of the trial court as to this matter, for the reason that his ruling, as far as invoked on the main trial, was in favor of appellant, and appellant cannot therefore assign it as error. *Cutcliff's Case*, 148 Ala. 108, 41 South. 873; *Stone's Case*, 105 Ala. 60, 72, 17 South. 114; *King's Case*, 100 Ala. 85, 14 South. 878.

But the defendant could and did assign, as ground for new trial, this illegitimate argument of plaintiff's counsel, which argument counsel failed to withdraw, or to attempt to correct the erroneous impression it may have produced upon the minds of the jury, and the trial court declined to set aside the verdict on this account; so, as to the new trial, it may assign such action as error.

This court has repeatedly and in strong language condemned remarks of counsel less offensive and less offending than those used in this case, and has awarded new trials where the trial court failed or refused to take prompt and decisive action to eradicate such erroneous impressions, and has done this in cases even where counsel making such argument had done all he could to cure his error; that is, by retracting the offensive remarks.

In the case of *Wolfe v. Minnis*, 74 Ala. 386, 389, this court, by Stone, C. J., said: "We think the language complained of in this case should not have been indulged, and coming, as it did, from able and eminent counsel, it was well calculated to exert an improper influence on the minds of the jurors. The court might, and probably should, have arrested it ex mero motu. It is one of the highest judicial functions to see the law impartially administered, and to prevent, as far as possible, all improper, extraneous influences from finding their way into the jury box. And when opposing counsel objected to the improper language employed, and called the attention of the court to it, it was not enough that offending counsel replied, 'Oh, well, I'll take it back.' Such remark cannot efface the im-

pression. The court should have instructed the jury, in clear terms, that such remarks were not legitimate argument, and that they should not consider anything thus said in their deliberations. Nothing short of a prompt, emphatic disapproval of such line of argument, and that from the court itself, can avert the probable mischief. *Sullivan v. State*, 68 Ala. 48; *Cross v. State*, 68 Ala. 476." This quotation is strikingly applicable to this case.

In the case of *Florence, etc., Co. v. Field*, 104 Ala. 471, 480, 16 South. 538, 540, this court, commenting on improper remarks of counsel, speaking by Justice Haralson, said: "On objection raised by defendant's counsel, the court said the objection was sustained, and stated to counsel making the remark that it was improper, whereupon the said counsel remarked, 'Well, I withdraw the remark.' There was no exception reserved by defendant to this remark of counsel, nor to the action of the court upon it. Nor is it made the basis of a motion for a new trial. It is, however, assigned as error. We have referred to it to state that the remark was calculated to seriously prejudice and injure the defendant with the jury. The action of the court in excluding it was very mild, and not a sufficient antidote to the poison that had been injected into the minds of the jury by the use of such language. Verdicts ought not to be won by such methods, and when an attorney, in the heat of debate, goes to such extraordinary lengths generally the court should promptly set aside any verdict that may be rendered for his client. The repressive powers of a court to prevent such departures from legitimate argument of a cause before a jury should be vigorously applied. No mere statement that it is out of order or improper can meet the exigencies of the case. Nothing short of such action on the part of the court, and a clear satisfaction that the prejudice naturally excited by the use of such language had been removed from the minds of the jury, ought ever to rescue a case from a new trial on motion of the party against whom rendered."

In the case of *Tannehill v. State*, 159 Ala. 52, 48 South. 662, this court, speaking through *Simpson, J.*, said: "It is the duty of the court to see that the defendant is tried according to the law and the evidence, free from any appeal to prejudice or other improper motive; and this duty is emphasized when a colored man is placed upon trial before a jury of white men. Courts in some other jurisdictions have held, on what seems to be good reason, that the injury done by such remarks cannot even be atoned by the retraction or the ruling out of the remarks; but at least it is error, as held by our own courts, for such remarks, stating facts that are not in evidence before the jury, to be allowed."

In the case of *Berry v. State*, 10 Ga. 511, 57 SO.—56

522, where the question was raised for the first time on motion for new trial, *Lumpkin, J.*, made the following pungent remarks: "That the practice complained of is highly reprehensible, no one can doubt. It ought, in every instance, to be properly repressed. For counsel to undertake by a side wind to get that in as proof which is merely conjecture, and thus to work a prejudice in the minds of the jury, cannot be tolerated. Nor ought the presiding judge to wait until he is called on to interpose. For it is usually better to trust to the discrimination of the jury as to what is, and what is not, in evidence than for the opposing counsel to move in the matter. For what practitioner has not regretted his untoward interference, when the counsel, thus interrupted, resumes: 'Yes, gentlemen, I have touched a tender spot; the galled jade will wince. You see where the shoe pinches.'"

In the case of *East Tennessee, Virginia & Georgia Railroad Co. v. Carloss*, 77 Ala. 443, 448, this court, through *Somervill, J.*, said: "As the case is sent back for a new trial on another point, we need not consider whether the exception was properly taken so as to raise this question. Circuit judges have ample power to check arguments of this character by setting aside verdicts obtained through their influence, either on motion of the adverse party or *ex mero motu*. If it were exercised more freely in such cases, this court would probably be troubled with reviewing fewer transgressions of the rule to which we have above referred."

[8] We are also of the opinion that a new trial should have been awarded because of the disqualification of the juror Taylor, who was shown to be boarding at the house of and with the plaintiff at the time of the trial. He was either the guest, the tenant, or a member of the household of the plaintiff at the time of the trial, either of which relations would disqualify him as a juror. It was not disputed, but admitted, that this fact was unknown to the defendant or its attorney at the time of or before the trial. It could not be expected, under the circumstances shown in this case, that the juror would be disinterested and unbiased as between the parties. Here was a juror whose landlady was the plaintiff, and a witness at the trial, insisting that this defendant had wrongfully killed her husband and left her a widow. It would have been inhuman and wholly unnatural that this juror could be entirely uninfluenced by these facts. The trial lasted for several days, and he was rooming at the plaintiff's house and home during this time, and had been doing so for some time before the trial. The plaintiff certainly knew this fact before and at the time of the trial, and it is admitted that the defendant did not. The juror or the plaintiff should have disclosed this fact to the jury or to the defendant, so that the juror could be chal-

lenged or excused. However honest and conscientious the juror may have been, he was not a proper juror on this trial under his existing environments. Without committing ourselves to all that Mr. Proffatt (Jury Trial, § 177, p. 231) says, we quote: "Social or business relations existing between a juror and a party to the suit render the juror incompetent. As when the juror is under the power of either party, or in his employment, or has drunk or eaten at his expense, since the commencement of the action. Hence the relation of landlord or tenant disqualifies." Mr. Thompson (Trials, vol. 1, § 67, p. 59) says: "That the venireman is the inferior or dependent in business relations of the opposite party to the suit will generally disqualify. Thus, if he is his surety, and the rendition of a judgment against him will diminish the probability of his being exonerated, or if he is his tenant, although distress for rent may have been abolished," etc.

[7] While it has been held that the fact that one of the parties is an innkeeper and that one of the jurors is stopping at his inn will not disqualify him; this is quite different from a private boarding house, such as that shown in this case. The relation shown in the case at bar is much closer than that between ordinary landlord and tenant, or between the landlord and a mere patron of a public hotel. The distinction between a public inn or hotel and a boarding house is well pointed out in the case of *Foster v. State*, 84 Ala. 452, 4 South. 833, where it is said: "An 'inn' is a house of entertainment for travelers, being synonymous in meaning with 'hotel' or 'tavern.' It was formerly defined to mean 'a house where a traveler is furnished with everything which he has occasion for while upon his way.' Thompson v. Lacy, 3 B. & Ald. 283; *People v. Jones*, 54 Barb. (N. Y.) 311. But this definition has necessarily been modified by the progress of time, and the mutations in the customs of society and modes of travel in modern times. An inn, however, was always, and may now, when unlicensed, be distinguished from a boarding house, the guest of which is under an express contract, at a certain rate, and for a specified time; the right of selecting the guest or boarder and fixing full terms being the chief characteristic of the boarding house, as distinguished from an inn," etc.

So, in the case of *City of Birmingham v. Birmingham Waterworks Company*, 152 Ala. 310, 44 South. 582, 11 L. R. A. (N. S.) 613, the distinction is drawn; it being there said: "The public house is for the entertainment of all who come lawfully and pay regularly. The boarding house is for the accommodation of those only who are accepted as guests by the proprietor. Such an establishment is as much a private house as if there were no boarders. * * *

"In a boarding house, the guest is under an express contract, at a certain rate, for a certain period of time; but in an inn there is no express engagement. The guest, being on his way, is entertained from day to day, according to his business, upon an implied contract," etc.

In the case at bar, the juror was not only a tenant of the plaintiff, but a member of her household; and it is wholly improbable that he could have been indifferent to the result of the suit. His testimony, on the motion for a new trial, while showing that he was not in favor of returning as large a verdict as some of the other jurors favored, yet shows that he resolved his doubts as to whether the case was made out in favor of the plaintiff. As to this, he says: "Yes; and my recollection is myself and two other gentlemen were the lowest gentlemen on that jury for a verdict. I took a very firm stand, as I saw the case, that I wasn't in favor of an excessive or any large verdict; in my mind, there was a question of doubt about it, and I was willing to give the plaintiff the benefit of it."

We are of the opinion that the trial court should have granted the motion for a new trial, and that it was error to refuse it.

Reversed and remanded. All the Justices concur, save DOWDELL, C. J., not sitting, and MAYFIELD, J., who dissents as to the question of wantonness being for the jury.

BRIGGS v. TENNESSEE COAL, IRON & R. CO.

(Supreme Court of Alabama. Dec. 19, 1911.
Rehearing Denied Feb. 15, 1912.)

1. JUDGMENT (§ 299*)—ENTRY OR DOCKETING—ALTERATION.

After adjournment of the term, a judgment entered upon the minutes, the minutes being signed by the judge, cannot be altered or amended, except for clerical error or omission on evidence shown by the record; parol evidence being insufficient to warrant amendment nunc pro tunc.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 583-586; Dec. Dig. § 299.*]

2. JUDGMENT (§ 315*)—ENTRY OR DOCKETING—ALTERATION—RECORD EVIDENCE.

The mere omission in the bench notes of the trial judge to mention pleadings is not record evidence warranting the alteration after the expiration of the term of a duly entered judgment which recited the existence of such pleadings, for there is no law requiring the judge to make bench notes.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 613; Dec. Dig. § 315.*]

3. JUDGMENT (§ 315*)—ENTRY OR DOCKETING—ALTERATION—RECORD EVIDENCE.

Where the original judgment entered by the clerk was stricken out and another substituted, the fact that the original judgment still appeared in the minutes of the court was not such record evidence as would warrant the court after the expiration of the term in amending the second judgment nunc pro tunc.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for without the aid of parol evidence it would be presumed that the first was erased by order of the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 613; Dec. Dig. § 315.*]

Anderson, McClellan, and Mayfield, JJ., dissenting.

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by Millage Briggs against the Tennessee Coal, Iron & Railroad Company for injuries while engaged in its employment. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

A trial was had and judgment entered under the following facts: On the 25th day of March, 1910, judgment was rendered in favor of the defendant, and the judge's bench notes showed as follows: "By leave of the court, plaintiff refiled his complaint and amendments thereto. By leave, defendant refiled its demurrers heretofore filed, and also additional demurrers, by separate paper of this date, to each count of the complaint as refiled. By leave, the defendant refiled pleas 1, 2, and 4 and plea 3 as amended, by separate paper filed after demurrer to each count of the complaint overruled. Plaintiff, by leave, refiled its demurrers heretofore filed to pleas 2 and 4, and plea 5 ~~as amended~~. Demurrers to plea 3 sustained. Verdict and judgment for the defendant." From said bench notes the clerk entered the following judgment: "On this the 25th day of March, 1910, this cause being reached on the docket and called for trial, came the parties, by their attorneys, and the plaintiff, by leave of the court first had and obtained, refiles his complaint and the amendment thereto. The defendant now, by leave of the court first had and obtained, refiles its demurrers thereto, as appears by separate paper writing this day filed. Demurrers to each count of the complaint are by the court heard and considered, whereupon it is ordered, adjudged, and decreed that said demurrers be and they are hereby overruled. Defendant now, by leave of the court first had and obtained, refiles pleas 1, 2, and 4, and plea 3 as now amended, as appears by separate paper writing this day filed. The plaintiff now, by leave of the court first had and obtained, refiles his demurrer heretofore filed to pleas 2, 4, and 5. The demurrer to plea 3 is by the court heard and considered, whereupon it is ordered, adjudged, and decreed by the court that the said demurrer is hereby sustained; and issue now being joined thereupon," etc. It appears that the clerk, or the plaintiff's attorney, with the consent of the clerk, changed the minutes by drawing a red line or lines through them, and entered in lieu of said judgment the following judgment: "On this the 25th day of May, 1910, this cause being reached upon

the docket and called for trial, came the parties by their attorneys, and plaintiff, by leave of the court first had and obtained, refiles his complaint and the amendment thereto. The defendant now, by leave of the court first had and obtained, refiles its demurrers to the complaint, and also files additional demurrers thereto, as appears by separate paper writing this day filed. The demurrers to each count of the complaint are by the court heard and considered, whereupon it is ordered and adjudged that the said demurrers be and they are hereby overruled. The defendant now, by leave of the court first had and obtained, refiles pleas 1, 2, and 4, and plea 3 as now amended, as appears by separate paper writing this day filed. Plaintiff now refiles to plea 5 all demurrers heretofore filed to pleas 2 and 4. Demurrers to plea 2 are by the court heard and considered, whereupon it is ordered and adjudged by the court that the demurrers to plea 2 be and the same are hereby overruled. Demurrers to plea 3 are by the court heard and considered and it is ordered and adjudged by the court that the demurrers to plea 3 be and the same are hereby in all things sustained. Demurrers to plea 4 are by the court heard and considered, whereupon it is ordered and adjudged that the demurrers to plea 4 be and the same are hereby in all things overruled." Then follows the same order as to plea 5, together with a joinder of issue and finding in favor of plaintiff. On the 6th day of December, petition therefor having been filed, and set for hearing on December 1, 1910, by the defendants in said cause, said last-named judgment was stricken, and the original judgment as entered by the court was restored to the minutes. In the meantime a bill of exceptions had been prepared and presented to and signed by the judge, containing the minute entry as changed and last made. The court's attention having been called to the change by this motion, the judge struck his name from the bill of exceptions. The cause was submitted on motion to establish the original bill of exceptions as signed by the judge, and from the order made by the judge, striking the changed minute entry and restoring the original minute entry.

Denson & Denson, for appellant. Percy, Benners & Burr, for appellee.

ANDERSON, J. Section 3019 of the Code of 1907 authorizes the presentation to the judge of a bill of exceptions within 90 days after judgment is entered, and further gives the judge 90 days after the presentation within which to sign same. This period of 90 days given the judge was intended as a sufficient time within which he should go over and determine the correctness of same,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and it stands to reason that he will not sign it before ascertaining its correctness. Section 3018 provides that, after he signs said bill, it thereby becomes a part of the record, and after it becomes a part of the record, if in term time, it would be in fieri until the adjournment of the court, but, like other parts of the record, cannot be altered or modified after adjournment. *Posey v. Beale*, 69 Ala. 32; *Chapman v. Holding*, 54 Ala. 61; *Branch Bank v. Kinsey*, 5 Ala. 9; *Weir v. Hoss*, 6 Ala. 881; *L. & N. R. Co. v. Malone*, 116 Ala. 600, 22 South. 897; *Bridges v. Kuykendall*, 58 Miss. 827. On the other hand, if it is not signed in term time, the statute keeps the matter as to the bill of exceptions in fieri until the same is signed, or until the expiration of the period for signing or presenting same unless it is sooner signed; but the very moment it is signed and filed it becomes a part of the record, and, if it becomes such after the term of court has adjourned, it is no longer in fieri, and it is beyond the power of the judge to change or modify same. If the bill as signed by him is not the proper one as tendered, the aggrieved party may proceed to establish same under section 3021. *Turner v. White*, 97 Ala. 549, 12 South. 601. But, until steps are taken to do so, the bill, as signed and filed by the judge, will be treated by this court as the true and correct one. The bill of exceptions is in fieri for 90 days from presentation and 90 additional days for consideration by the judge, but, if the bill is presented sooner and the judge sees fit to sign and file the same before the expiration of the 90 days given him within which to sign, the suspension is thus cut down, and, after the signing and filing of same, the matter is no longer in fieri, and is beyond the power of the judge. The cases of *Posey v. Beale*, supra, and *L. & N. R. R. Co. v. Malone*, supra, both held that the bills of exceptions there involved could not be changed or altered by the judge after being signed and after the adjournment of court, and stated that the change could not be made after the adjournment of court or beyond the time agreed upon by counsel. This last expression was mere dictum in said cases, as neither of them involved the question of changing a bill of exceptions after it was signed and filed and before the expiration of the time for signing same, for in each case the attempted correction was after the adjournment of court, and after the expiration of the time given for signing the bill. We think that what the court meant to state in the cases supra was that the question as to the bill of exceptions was in fieri only during the term of court or until the expiration of the time within which the bill could be signed, and that the court did not mean to hold that the signing and filing of same when done within the time allowed would authorize the judge to subsequently withdraw his signature or

change or alter same, even if done before the expiration of the period within which the bill could be signed. In other words, we hold that, if the bill is signed in the term time, the matter is still in fieri until the adjournment of the term, but, if not signed in term time, it is still in fieri until the bill is signed by the judge and filed with the clerk, the period, of course, not to extend beyond the time fixed by law for signing, but, when the bill is signed and delivered, the matter is no longer in fieri, and the power and control of the judge is at an end. The action of the judge in withdrawing his signature from the bill of exceptions was subsequent to the end of the term, as fixed by the practice act, being more than 30 days after the rendition of the judgment. *Weakley's Local Laws of Jefferson County*, p. 598, § 20; *Stein v. McArdle*, 25 Ala. 562. It was also subsequent to the signing and filing of same with the clerk and was unauthorized and void. *Ex parte Nelson & Kelly*, 62 Ala. 379, 380; *Dudley v. Chilton County*, 66 Ala. 597, and authorities supra. We will therefore treat and consider the bill of exceptions signed and filed on January 24th as the true and correct one.

As we understand the facts in this case, a judgment was rendered for the defendant on May 25, 1910, and a judgment was written up by the clerk on a slip or folio, which was subsequently to be bound in book form, as the minutes of the court, and which said entry conformed to the bench notes made during the trial; that within 10 days thereafter the minute entry as written by the clerk was changed either by the clerk or by plaintiff's counsel with the consent of the clerk, so as to include rulings not disclosed by or included in the bench notes. Nor does it appear that this change was brought to the attention of the judge until November 26, 1910, during another term of the court, or that the presiding judge knew of such change when signing the minutes with all of the other judges on June 30th, the end of the term. "The object of a judgment nunc pro tunc is not the rendering of a new judgment and the ascertainment and determination of new rights, but is one placing in proper form the record, the judgment that had been previously rendered, to make it speak the truth, so as to make it show what the judicial action really was, not to correct judicial errors, such as to render a judgment which the court ought to have rendered, in place of the one it did erroneously render, nor to supply nonaction by the court, however erroneous the judgment may have been." *Wilmerding v. Corbin Banking Co.*, 126 Ala. 278, 28 South. 640, and cases cited. It is also a well-established rule that judgments can be amended nunc pro tunc only upon record evidence or evidence quasi of record, and the deficiency in a judgment or decree cannot be supplied by parol. 6 May-

field's Dig. § 75, p. 504. The present motion was not to invoke any rulings that were not made, but to, in effect, eliminate from the judgment entry rulings which were not made, but which had been erroneously embodied therein by the subsequent action of the clerk and plaintiff's counsel, and the correction could be made by a judgment *nunc pro tunc*. *Ware v. Kent*, 123 Ala. 427, 26 South. 208, 82 Am. St. Rep. 132. The first judgment entry conforms to the bench notes, and is presumably the one that received the sanction and approval of the trial court. The contrary not appearing, public officers are presumed to do their duty, and section 5732 of the Code of 1907 requires that the minutes must be read each morning in open court. The obvious purpose of this wise and highly important statute was to enable the trial court to check up the minutes, and see that they were correctly entered in conformity with the bench notes, or that one or both should be corrected, if not correct, while the facts and proceedings were fresh upon the minds of the court and counsel. Indeed, this court has announced that it is a custom to comply with this statute, and said, speaking through Stone, J., in the case of *Lanier v. Russell*, 74 Ala. 367: "The system and practice in our common-law courts of general jurisdiction we think furnish a safe analogy and guide in cases like the present. The statute directs that the minutes of those courts must be read each morning in open court. Code 1876, § 546. This must mean that the minutes made by the clerk of the court's proceedings during one day must be read on the morning of the next succeeding day. Now, in practice, these proceedings are generally entered up after the adjournment of the court for the day, frequently during the night, after judicial hours, and often finished up during the next morning, before court convenes. Yet the judgment bears date, and should bear date, of the day the proceedings were had in the court. Such we think has been the universal custom since our 'judicial system was organized.' Not only does the statute and custom direct and recognize the daily keeping and reading of the minutes, but section 3714 of the Code of 1907 provides extra compensation at a per diem rate for this particular service. Here we have a judgment that was presumably the one approved by, and was in fact, the judgment of the court, and which is subsequently changed without the assent or knowledge of the court, and which said change was not brought to the attention of the judge before signing the minutes upon final adjournment, or, in fact, until November 26th of a succeeding term. The court makes the rulings and pronounces the judgments, and it is but the clerical duty of the clerk to record the minutes as directed by the court, through the bench notes or otherwise; and, when said minutes are so recorded and approved

by the court, the clerk or no one else has the right to change them, even during the term, unless directed by the judge to do so or unless the unauthorized change is subsequently ratified by the judge. It might be that, if the judge knew of the change when he signed the minutes, this would be an approval or ratification of the change, but it affirmatively appears, in the present case, that he did not know of said change when signing the minutes. Nor can we say that the mere signing of the minutes at the end of the term concludes the judge as to all things contained therein. If such was the case, there could never be a correction. It might be that such a signing would be presumptive evidence of the correctness of same, but, when it appears that a change was made between the approval of the minutes and the final signing of same and that the judge did not know of same, the presumption from signing the minutes cannot overcome the other presumption of correctness growing out of the reading of the minutes and the approval of same. We therefore think that the record or quasi record evidence supports the first minute entry, and shows that the change was not authorized, and that it was not subsequently ratified. On the other hand, if we are to consider parol evidence or evidence *de hors* the record, we cannot say that the conclusion of the trial court was wrong, as this is an appeal upon which all reasonable presumption must be indulged in favor of the finding of the trial judge, and which said finding must not be disturbed unless it is plainly erroneous. It is true the practice act of the city court requires us to review the rulings and conclusion, on the facts, of the trial judge without any presumptions in favor of the correctness of same, but whether said section applies to trials of motions of this character, as distinguished from ordinary cases, we need not decide, but may concede that it does; yet that provisions of the act and ones similar thereto have been repeatedly construed as governing us only in cases where this court has before it the same data and advantages for considering the evidence as did the trial court. *Thompson v. Collier*, 170 Ala. 469, 54 South. 493; *Simpson v. Golden*, 114 Ala. 336, 21 South. 990; *York v. State*, 154 Ala. 60, 45 South. 893, and many cases there cited. This is a case in which the trial judge was a witness to, and in a sense, a party to the transactions involved, and, while he does not testify in the case, yet we know that he was a witness to what took place on the trial, and after the motion was made, and, while considering same, he may have refreshed his memory, was aware of his custom and habit of noting the rulings in the bench notes, and may have had in his breast and mind many reasons for holding that the first minute entry was the correct one, and which said facts and circumstances

could not be, and are not, presented to this court so as to give us the same advantages and opportunities of passing on the facts as was possessed by the trial judge.

A majority of the court, however, are of a different opinion, and think that the trial court erred in granting the motion *nunc pro tunc*. As the last judgment must be considered as the proper one, we are all of the opinion that the main case must be reversed for the overruling of plaintiff's demurrers to pleas of contributory negligence to the wanton count of the complaint.

The case is therefore reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, McCLELLAN, and MAYFIELD, JJ., dissent on the question of amending judgments *nunc pro tunc*.

SIMPSON, J. [1] When the judgment in this case, as last formulated, was entered upon the minutes and the minutes were signed by the judge, it became the judgment of the court, and, after the adjournment of the term of the court, it was beyond the power of the judge to alter or amend the same, "except for a clerical error or omission on evidence shown by the record." *Chambliss et al. v. Cole*, 128 Ala. 649, 651, 30 South. 630, and cases cited. This principle, clearly recognized by a long line of decisions, is necessary in order that the records of our courts may, as the law requires, import absolute verity unless attacked by the known methods within the power of a court of chancery. Parol testimony is not admissible in a proceeding to alter, amend, or correct a record by an amendment *nunc pro tunc*, which, according to the authorities cited and many others, must rest alone on matter apparent on the record.

[2, 3] It cannot be said that the mere fact that the bench notes made by the judge do not mention the pleadings in question furnishes record evidence that no such action was taken as set out in the minutes, for the reason that there is no law requiring the judge to make bench notes, and the minutes of the court, and not the bench notes, constitute the record of the case. Nor does the fact that the previous judgment appears on the loose leaves of the minutes furnish any such record evidence, for, without the aid of parol testimony, it shows that it was erased, which is presumed to be the act of the court.

Consequently the action of the court in granting a motion to correct the judgment entry at a succeeding term of the court was erroneous and of no effect.

DOWDELL, C. J., and SAYRE and SOMERVILLE, JJ., concur.

ANDERSON, J. While Justices McCLELLAN, MAYFIELD, and the writer think that

the change in the first judgment entry was unauthorized, and that the trial court had the right to correct the record by eliminating the entry, as changed, and reinstating the original entry, we do not wish to impute any improper motives to counsel or the clerk in making said change. While the change was unauthorized and should not be binding on the trial court, the evidence was sufficient to justify them in entertaining the belief that the first entry was incomplete, and counsel naturally took the matter of correcting the same up with the clerk, when prudence should have suggested his doing so with the judge. We do not think there was any intention whatever to falsify the record, and are not disposed to further combat the conclusion of the majority in the instant case, and but for the influence and force of the opinion in the future there would be no attempt to reply to the majority opinion.

I fully agree with the majority that parol evidence cannot be resorted to in order to supply matters which do not appear of record, but I do think that parol evidence can and should be resorted to in order to explain how and by whom entries upon the record were made, obliterated, or altered; otherwise it could never be shown *nunc pro tunc* that the trial court did not make or direct entries, notwithstanding they may have been made without warrant or authority.

I also think the bench notes and first judgment entry were not only record or quasi record evidence of what judgment was really rendered by the court, but that they offered the highest and best evidence of same. They may not affirmatively contradict the second entry, but they do afford negative evidence that the rulings contained in the second entry and not disclosed by the bench notes and first entry were not in fact made, else they would have appeared therein. The first entry was presumably read in open court, the morning after the trial, was approved by the trial court, and thereby became the judgment of the court, subject to change only by or with the assent of the trial judge, and to my mind it is monstrous to reject this entry as record evidence and give absolute verity to the second one, made without the knowledge or consent of the trial judge. The holding renders trial courts absolutely helpless to make their judgments speak the truth. In other words, notwithstanding the statute is complied with and the minutes are read in open court, as the law requires, the judgment so read may be subsequently canceled without the knowledge or consent of the trial judge, and the unauthorized one so substituted by counsel and clerk, at any time before the court adjourns, becomes conclusively the judgment of the court, and the first entry cannot be looked to as record evidence. If this second

entry becomes ipso facto the judgment of the court, what would be the result if counsel on the other side convinced the clerk a few days later that the second entry was incorrect and induced him to change it, and a few days later another change was made, each entry as canceled appearing with red lines through same, what one should be regarded as the true and proper judgment of the court, the one presumably read in open court and approved by the judge, or one of the numerous changed or amended ones and as to which the trial judge was not a party?

I also think that my Brother SIMPSON attaches too little importance to the first entry, which, as he says, appeared upon "loose leaves of the minutes." It appears that in the city court all minutes are first written upon loose leaves, which are subsequently bound together in book form, and the second entry, the one to which the majority imply absolute verity, was written in the same way as the one discredited by them, and seems to be in part upon the same loose leaf which contains the first one. The copy of the minutes sent up shows the first entry on pages 623 and 624 of Book 29 A, with two red lines running through the face of same, and immediately succeeding it is the second entry, commencing on page 624. This first entry conforms to the bench notes, and the second one does not, and the proof shows, which was not objected to, that the red lines were run through the first entry, without the knowledge or authority of the trial judge, and that he did not know of the existence of the second one until long after the adjournment of the court for the term. If the action of the clerk was a mere clerical error, it could be corrected upon motion nunc pro tunc. If, on the other hand, the action of the clerk was not entirely clerical, then his act in cancelling the first judgment and creating a second one was unauthorized and void, and the trial court had the power to vacate or expunge the record and expunge the cancellation of the first one so as to make the record disclose the true and real judgment of the court. To my mind the holding of the majority will be most far-reaching and dangerous. A trial court may have the minutes read, as the statute directs, and then correct or approve same, then, after that is done, the clerk or some one else may change the entry, and, if the judge happens to sign the minutes, he is bound by the changed entry, notwithstanding he did not know of said change when signing said minutes. Such a holding subordinates the power that renders the judgment to the mercy of the clerk, unless perchance the judge discovered the change before court adjourned. It appears in this case that the trial judge did not know of the change when he signed the minutes, but,

if he did, the signing could not conclude him, as to the correctness of same, as it was more than 30 days after the date of the rendition of the judgment in the case, and, under the practice act of the city court, he was powerless to correct same and could only do so in the manner subsequently attempted, and which I think was the proper and appropriate method, and do not think that the injured party should be forced to file a bill in the chancery court for the correction or cancellation of the unauthorized judgment entry.

CHARBONIER v. ARBONA.

(Supreme Court of Florida. Feb. 14, 1912.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE (§ 49*)—CONTRACTS ENFORCEABLE—VALIDITY.

Equity will enforce the specific performance of a contract for the sale of land when the price was a fair one when the contract was made and no advantage was taken of the defendant.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140-151; Dec. Dig. § 49.*]

2. SPECIFIC PERFORMANCE (§ 119*)—PROCEEDINGS—BURDEN OF PROOF.

As against a general denial in an answer, the burden is upon the complainant to prove, by at least a preponderance of sustaining proofs, tax liens upon the property, the existence and validity whereof depend upon matters of public record.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 382, 383; Dec. Dig. § 119.*]

Appeal from Circuit Court, Escambia County; J. Emmett Wolfe, Judge.

Bill in equity by Joseph Arbona against Mary D. Charbonier. From a decree for complainant, defendant appeals. Modified and affirmed.

E. C. Maxwell, for appellant. Blount & Blount & Carter, for appellee.

COCKRELL, J. This is an appeal from a decree awarding specific performance of a contract for sale of real estate in the city of Pensacola.

On March 2, 1910, Miss Charbonier for a cash consideration of \$100 gave Arbona a six months' option on the property at a valuation of \$5,000, and before the expiration of the time limit the entire purchase price was tendered. The owner admits the execution of the contract, but seeks to defend upon the ground that she was inexperienced in business affairs and that the price was grossly inadequate.

[1] From the evidence, however, we think the circuit court was warranted in finding that the contract was in all respects a fair one when made, and it is not a case where advantage was taken of inexperience. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

property had been for years used as a bar-room, and from its location might not have been rented so profitably for other uses; at least such is the consensus of opinion of the real estate experts who testified. The contract was made pending the prohibition campaign, and over the protest of the would-be purchaser the owner cut down the option so that it would expire before the approaching election was to be held.

While the real estate agents differ as to the valuation of the property in March, 1910, there is ample evidence to warrant a finding that \$5,000 was a fair price then, though a year later it was worth considerably more.

We think the evidence shows the contract fair and equitable and one to be enforced by specific performance.

[2] The bill charged specifically that there were legal charges against the property for pavement and city taxes, and these were allowed against the purchase price. In this there was error. The answer did not admit these charges and contained the general denial, thereby casting the burden of proving these items upon the complainant, at least by a preponderance of sustaining proof. *Stackpole v. Hancock*, 40 Fla. 362, 24 South. 914, 45 L. R. A. 814.

The complainant admits here that there is no evidence to prove these items, but submits that they are facts necessarily within the defendant's knowledge. The existence and validity of these liens are, however, matters of public record and do not come within the exception recognized in some jurisdictions.

We accept the appellee's suggestion that we correct the error here, and eliminating from the decree the credits, totaling \$381.35, and adding that sum to the decree, the decree will be affirmed; one-half the costs of this appeal to be taxed against the appellee.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, and HOCKER, JJ., concur.

CAMERON v. POWERS.

(Supreme Court of Florida. Feb. 14, 1912.)

(Syllabus by the Court.)

BROKERS (§ 85*)—ACTION FOR COMMISSION—EVIDENCE.

In an action for brokerage for bringing about a sale of realty, evidence that another agency, to whom a commission was paid, was the actual procuring cause, is admissible.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 106-115; Dec. Dig. § 85.*]

Error to Circuit Court, Orange County; J. W. Perkins, Judge.

Action by Frank J. Powers against Joseph

Cameron. Judgment for plaintiff, and defendant brings error. Reversed.

W. L. Palmer, for plaintiff in error. Massey & Warlow, for defendant in error.

COCKRELL, J. Powers recovered judgment for commissions on the sale of certain lands near Sanford, Fla., owned by Cameron.

There is a sharp conflict of testimony as to whether Cameron made the contract with Powers for the commissions or knew that Powers claimed to be acting for him in the sale.

A defense was sought to be interposed based upon the theory that another agency, to whom a commission was paid, was the actual procuring cause of the sale; but evidence looking to this defense was erroneously excluded. The court seems to have proceeded upon the idea that the defense was limited to a direct contradiction of the evidence for the plaintiff, and would not admit evidence of what was done by the other agency to bring about the sale.

The broker here was not to be paid for introducing a purchaser, but for bringing about the sale, and the question who effected the sale should have been gone into fully. *Wiggins v. Wilson*, 55 Fla. 346, 45 South. 1011.

Judgment reversed.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, and HOCKER, JJ., concur.

(130 La.)

No. 19,197.

STATE v. JACKSON et al.

(Supreme Court of Louisiana. Feb. 26, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 448*)—EVIDENCE—OPINION EVIDENCE.

The question whether the accused "acted as if they were in possession of the whisky" (referring to three barrels of whisky which had been stolen from a box car and hidden in the "briars and brush," and which persons who found it, and were lying in wait to capture the thief, saw the accused, at night, roll out, for delivery to a wagon, which had been brought there to carry it and them away) was not objectionable as eliciting the opinion of the witness; the subject-matter being within common observation and experience.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 448.*]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

Sam Jackson and Bill Alexander were convicted of larceny, and appeal. Affirmed.

W. B. Kemp, for appellants. Walter Guilson, Atty. Gen., and W. H. McClendon, Dist. Atty. (G. A. Gondran, of counsel), for the State.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index.

MONROE, J. Defendants, having been convicted of stealing three barrels of whisky and duly sentenced, present their case to this court upon a single bill of exception, from which it appears that a box car reached Harahan, with the seal broken and three barrels of whisky missing; that the barrels were found, concealed in the briars and brush, within a quarter of a mile of the home of the defendants; that two railroad detectives and a deputy sheriff went to the place and stationed themselves so as to be able to see who might come to take charge of them; that defendants came with a third man, who had a wagon; that after a few minutes defendants went away; that the third man (McCray) was then arrested; that defendant Alexander was arrested "later that night at his home," and defendant Jackson at another place; that Jackson pointed out a place where, he said, he had found one barrel of whisky concealed, and Alexander told McCray that he had found two barrels, and wanted him (McCray) "to come that night with his wagon and help him" (Alexander) to move them to another place. The bill then recites that Reed, one of the detectives, was asked by a juror whether, from the actions of the accused while near the whisky, "he thought that they had charge of it;" that before counsel for defendant could object the witness, answered, "Oh, yes, sir;" that counsel then and there asked the court to instruct the jury that the opinion of the witness was not evidence; and that the court instructed the jury that "the opinion of a witness is not evidence, unless that opinion is founded on some fact within the knowledge of the witness," to which charge objection was made, and counsel asked the court to charge "that an opinion of a witness was not testimony, unless the witness has qualified as an expert," which was refused. The bill is not signed by counsel for defendant, and does not show that it was filed by the clerk; but it bears the signature of the judge, who states that the request for instructions was not made until some 10 or 15 minutes after the question had been asked, and when the witness was under cross-examination, and after counsel for defendant had several times asked him why he had answered, "Yes," to the question, if the accused acted as if they were in possession of the whisky, after which the instructions were asked and given as stated—the "witness [the statement, per curiam, continues] having testified that the accused had moved the whisky from where it had been concealed in the briars and brush, and rolled it out, preparatory to putting it in the wagon, when the deputy sheriff, Karlton, had been discovered by them; he having unintentionally walked upon the accused while looking for Mr. Uets and Mr. Reed [the detectives]. The

charge was fully proven by the evidence, beyond any doubt, and the verdict was a proper one."

We find no error in the ruling complained of. The subject-matter was entirely within common observation and experience, and, though the witness had already testified to some of the facts upon which his opinion was founded, it would hardly have been practicable for him to have placed them all before the jury. McKelvey on Ev. §§ 132, 133; Elliott on Ev. vol. 1, § 676, citing Hardy v. Merrill, 56 N. H. 227, 22 Am. Rep. 441, and other cases.

Judgment affirmed.

(130 La.)

No. 19,183.

RICHARDSON et al. v. COBB.

(Supreme Court of Louisiana. Feb. 26, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 627*)—DISMISSAL—FAILURE TO FILE TRANSCRIPT.

It is a settled rule of practice in civil cases that where the delay for the return of an appeal has been extended, and the transcript has not been filed in the Supreme Court on or before the return day, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749, 3126; Dec. Dig. § 627.*]

Appeal from Seventh Judicial District Court, Parish of Richland; John R. McIntosh, Judge.

Action by Ella O. Richardson and Edmund Richardson against R. L. Cobb. Judgment for plaintiffs, and defendant appeals. Dismissed.

Maynard & Fitz Gerald, for appellant. Dart. Kernan & Dart, for appellees.

On Motion to Dismiss.

LAND, J. Plaintiff and appellees have moved to dismiss the appeal, on the ground that the transcript was filed in this court several days after the extended return day. The record before us shows the following facts pertinent to the motion to dismiss:

Judgment in favor of the plaintiff was read and signed in open court on April 11, 1911. On June 29, 1911, the defendant was granted an order of appeal, returnable to the Supreme Court on or before August 15, 1911. On October 11, 1911, this order was set aside, and another order of appeal was granted, returnable to the Supreme Court on the 5th day of December, 1911. This appeal was perfected by giving bond, and citations of appeal were duly served on the plaintiffs. On December 4, 1910, on the application of the defendant and appellant, the return day was extended to December 20, 1910. The transcript was filed in the clerk's

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

office of the Supreme Court on December 26, 1910.

In a recent case, we held that, where the transcript on an appeal was not filed until two days after the return day, the appeal will be dismissed. *Arata v. New Orleans Ry. & Light Co.*, 128 La. 449, 54 South. 938. We note the following additional cases as holding that, where the delay for the return of an appeal has been extended, and the transcript is not filed in the Supreme Court until after the return day, the appeal will be dismissed. *Hake v. Lee*, 104 La. 123, 28 South. 1003; *Succession of Theriot*, 118 La. 649, 43 South. 265. This has become a well-settled rule of practice, which cannot be departed from in civil cases on equitable considerations. The failure of the appellant to timely file the appeal is considered as an abandonment of the appeal. *Mix v. Campbell*, 115 La. 11, 38 South. 877; *Brooks v. Smith*, 120 La. 454, 45 South. 388; *Rojas & Conner v. Seeger*, 122 La. 218, 47 South. 532.

This rule is not enforced in criminal cases, where it is the duty of the clerk of the court to send up the transcript. *State v. Clay*, 121 La. 529, 46 South. 616. It is, therefore, ordered that the appeal herein be dismissed, at the cost of the defendant.

(130 La.)

No. 19,288.

BROWN v. DUPUY.

In re BROWN.

(Supreme Court of Louisiana. Feb. 26, 1912.)

(Syllabus by the Court.)

MANDAMUS (§ 50*)—WHEN LIES—REVIEW OF PRIMARY ELECTION PROTEST.

Mandamus will not lie to compel the respondent judge to again decide a primary election protest on the merits, or to review or to reverse his judgment rendered on the merits.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 97; Dec. Dig. § 50.*]

Application of Rubin H. Brown for writs of certiorari and mandamus against Jules E. Dupuy. Dismissed.

L. T. Dulany, for relator.

LAND, J. Rubin H. Brown, Jules E. Dupuy, S. C. Sumrall, and L. A. Moresi were candidates in the recent Democratic state primary for nomination to the office of representative in the General Assembly from the parish of Iberia. All four qualified as candidates, and without protest or objection from any source their names were printed on the official ballots voted in said primary election. Returns of the election, made as required by law, showed that Jules E. Dupuy had received 952 votes, and Rubin H. Brown had received 836 votes. When the Democratic parish committee met to canvass the returns, Rubin H. Brown appeared before that

body and presented a written protest against the return of Jules E. Dupuy, on the ground that he had not been an actual resident of the parish of Iberia for two years immediately preceding said primary election. The committee ruled that it had no jurisdiction of such a contest, and rejected the protest of Rubin H. Brown.

The relator then appealed to the district court for the parish of Iberia. The appeal was allowed, and after a hearing on the merits of the protest the court affirmed the ruling of the committee and dismissed the appeal. On the trial of the appeal, the following admissions were made, to wit:

"It is admitted, as it was admitted before the committee, that Hon. Jules E. Dupuy is the chief inspector for the agricultural department of the state, and since his appointment three years ago has lived with his family in Baton Rouge, occupying a house rented by him. It is admitted that he is a duly qualified elector of the parish of Iberia, and that he has always exercised his right of suffrage and domicile in the city of New Iberia, Iberia parish, La., and that he handed in his name as a candidate for representative to the chairman of the Democratic executive committee for the parish of Iberia in due time; that no protest thereto was filed; that he voted in the Democratic primary of the 23d of January, 1912, in the city of New Iberia, which is the Sixth ward of Iberia parish, without objection and without protest; and that he is a duly qualified elector of Iberia parish. It is admitted that he has always lived and resided in Iberia parish all of his life, and that he has resided in Baton Rouge only since his appointment as chief fertilizer inspector three years ago."

The relator has filed in this court his petition for writs of certiorari and mandamus, and prays the court to decide the question of the jurisdiction of the parish committee and of the district court, and that said court be ordered to decide the merits of said cause, and that said committee be commanded to order a second primary between relator and S. C. Sumrall, or, in the event of the declination of said Sumrall to enter the said second primary, that said committee order and declare the relator the nominee.

In his return to the rule nisi, the judge, inter alia, says:

"Your respondent ruled that the committee had no jurisdiction, and then, assuming jurisdiction in the matter, your respondent took up the case on its merits and tried same, and reached the conclusion that Jules E. Dupuy was the regular nominee of the Democratic party for member of the House of Representatives from the parish of Iberia."

The record sent up shows that, besides the admissions quoted supra, all the proceedings before the parish committee and the returns of the election were offered in evidence.

The judgment of the court recites that it was rendered "after hearing the pleadings, the documentary evidence, and the admissions made by all parties," and the decree

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

orders that plaintiff's appeal and review from said decision "be and hereby is dismissed, at his cost."

It is manifest that mandamus will not lie to compel the respondent judge to *again* decide the case on its merits, or to review or reverse his judgment thereon. Relator has not invoked the extraordinary supervisory jurisdiction vested in the Supreme Court to prevent usurpation of powers or a denial of justice, or to afford relief, where there is no other adequate remedy.

It is therefore ordered that the preliminary writs issued herein be recalled, and that relator's petition be dismissed, with costs.

His Honor, the CHIEF JUSTICE, recused, being related to one of the parties to the suit.

(130 La.)

No. 18,811.

SMITH v. AMERICAN BRIDGE CO. et al.
(Supreme Court of Louisiana. Feb. 12, 1912.
Rehearing Denied March 11, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1118*)—AMENDMENT OF JUDGMENT.

A judgment cannot be amended as between coappellees.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4414; Dec. Dig. § 1118.*]

2. MASTER AND SERVANT (§ 107*)—APPEAL AND ERROR (§ 1151*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—INCREASE OF AWARD.

Where a defective hook used to fasten a chain on a timber "gig" was the cause of, or contributed to, an accident to an employé without fault on his part, the employer will be held responsible in damages. In a proper case an award of damages will be increased on appeal, but not beyond the amount claimed by plaintiff before suit, with knowledge of the extent of the injuries sustained by him.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 107;* Appeal and Error, Cent. Dig. §§ 4493-4506; Dec. Dig. § 1151.*]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Charles Smith against the American Bridge Company and others. Action dismissed as to the American Bridge Company and the Jefferson Construction Company, and judgment rendered against Harry F. Grimm, who appeals. Amended and affirmed.

T. M. & J. D. Miller, for appellant Harry F. Grimm. J. C. Hollingsworth and Carroll, Henderson & Carroll, for appellee Charles Smith.

LAND, J. This is a suit for damages for personal injuries sustained by the plaintiff while in the employment of the defendants. The action was dismissed by the court as to the Jefferson Construction Company and the

American Bridge Company and judgment was rendered in favor of the plaintiff for \$750 against the defendant Harry F. Grimm, a subcontractor, who employed the plaintiff. The defendant Grimm is the only appellant from the judgment. Plaintiff has answered the appeal, and prayed that the judgment be amended by increasing the award of damages to \$5,000 and by condemning the American Bridge Company and Grimm in solido.

[1] As a judgment cannot be amended as between coappellees, the demand against the American Bridge Company and the Jefferson Construction Company need not be further considered.

In their reply brief, counsel for defendant say:

"We will not discuss the citations set out in plaintiff's brief, because this case presents no issue of law, except the undisputed one that the burden of proof is on plaintiff to show negligence, and that before he can recover he must make his case reasonably certain."

Plaintiff, a man about 48 years of age, and a structural iron worker by vocation, was employed by defendant Grimm, who had a subcontract for the structural iron work of the City Hall Annex. On May 1, 1908, plaintiff, and other men in charge of a foreman, were sent to a certain yard for the purpose of moving to the building two pieces of timber, 10 by 12 inches wide, and 30 or 35 feet long. The work required the use of a "gig," consisting of an iron axle, two wheels, a long pole, and a hook and chain. The modus operandi was to lift the pieces of timber and adjust them so as to balance, as near as practicable, on the axle, and then to fasten them to the axle by means of a chain wrapped around the timber and fastened underneath by means of a hook. This operation was performed in the instant case; the foreman fastening the chain around the timber. The foreman steered at the back end of the timber until the gig was pushed out of the yard, and then the plaintiff took his place. After proceeding a half a block and across two car tracks on Baronne street, the accident occurred. The plaintiff, a German, testified in part as follows:

"A. The hook in that chain was caught to the link, and the whole business slipped around, and the whole timber came on my leg.

"Q. What was it that fell on your leg?

"A. Two timbers.

"Q. Those were the 30-foot timbers you spoke about?

"A. Thirty or thirty-five feet, I didn't measure them.

"Q. Were you hurt?

"A. Yes, sir.

"Q. Were you hurt badly?

"A. I was hurt pretty good.

"Q. After these timbers had fallen on you, what was done with you?

"A. I was put in a carriage and carried home."

One of the timbers struck the plaintiff on his leg about the ankle, and crushed or frac-

tured a small bone. That the hook and chain parted, and the pieces of timber fell to the ground, is shown by the nature of plaintiff's wound, and the testimony of Kelly to the effect that the defendant sent him and several other men to pick up the timber and bring it to the job, meaning the City Hall Annex then in the course of construction. Plaintiff was the only witness who was present at the accident, and, while his testimony is somewhat confused, it is clear enough that the chain became unhooked, and the timber fell and struck plaintiff on the ankle. The fact that the timber fell to the ground is also indicated by the instructions given by defendant to his men, after the accident, not to put their legs or feet under the timber on the gig.

The petition alleges that the accident was occasioned by a defective hook and chain. The plaintiff frankly admits that he did not examine the hook and chain before or after the accident. The same apparatus seems to have been used after the accident. Defendant produced during the trial a rusty chain and hook, and testified that it was the same that was used on the timber gig at the time of the accident. Rafferty, an employé of the defendant, who used the timber gig after the accident, testified in part as follows:

"Q. When you examined this hook, was it in the same condition that it is now?

"A. No, sir; not when I first saw it. That hook looked a little too heavy for me. That is not the hook we had on the column.

"Q. That is not?

"A. No, sir; that looks a little too heavy for me.

"Q. What kind of hook was it that you examined?

"A. Something similar to this. It was smaller and closer hook than that. The crack was something similar to this one. Only I would have a fine time closing this hook with a brick, and the other hook I closed with a brick."

"A. Yes, I am pretty near positive that the other hook was lighter.

"Q. I understand you to say that you did something to it, with a brick; what was that?

"A. Closed it in.

"Q. Why did you close it with a brick?

"A. Because it was opened too far, and when you grab like that they go right down tight, and when you have a little jar or shake the links would work through."

Kelly, another employé of defendant, did not examine the hook and chain on the day of the accident, but subsequently used the same timber gig, and identified the chain and hook produced by the defendant as being in the same condition it was the last time he saw it on the job. Whether Kelly saw the hook before or after it was closed by Rafferty does not appear. The hook and chain produced by the defendant has been sent up as an exhibit. It is admitted that the hook was cracked before the accident, and that by reason of the crack the opening was enlarged. To the eye of a nonexpert, the opening of the hook appears too large

for safety. The excess of the opening accounts for the separation of the chain from the hook on the occasion in question, which was the immediate cause of the accident.

[2] The trial judge seems to have decided the case on the theory of the negligence of the foreman, as appears from the following extracts from his opinion:

"I am, however, satisfied from a careful reading of the evidence that the plaintiff was injured through the neglect of the foreman employed by Grimm. * * * The chain was passed around the beams by Webb. The hook caught between the links in such a negligent way that, after the 'gig' had traveled a short distance, being guided by the plaintiff, who stood at the rear of the moving apparatus, the hook became detached, allowing the beams to fall, inflicting on plaintiff the injuries complained of."

We are satisfied that the extra large opening of the hook contributed to the accident.

Considering the physical injuries (not permanent) inflicted on plaintiff, his pain and suffering, expenses incurred, and loss of wages, we are of opinion that the award of damages is inadequate. We, however, do not feel justified in increasing the award beyond \$1,000, the amount claimed of defendant by the plaintiff, through his counsel, six months after the injuries were sustained.

It is therefore ordered that the judgment below be amended by increasing the amount thereof to \$1,000, and that as thus amended be affirmed; defendant and appellant to pay costs of appeal.

(130 La.)

No. 18,583.

McCRORY v. BRADFORD et al

(Supreme Court of Louisiana. Jan. 29, 1912.
Rehearing Denied Feb. 26, 1912.)

(Syllabus by the Court.)

1. TAXATION (§ 734*)—TAX SALE—NOTICE TO TAX DEBTOR.

Notice to the tax debtor is essential to the validity of a tax sale; and where the sheriff mails a letter to "Burnside," which is returned with the notation that the post office address of the tax debtor is "Hobard," and the sheriff fails to send him a notice at that place, there has been no notice, and the sale of the tax debtor's property is void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1470; Dec. Dig. § 734.*]

2. TAXATION (§ 631*)—TAXABLE PROPERTY—SUSPENDED HOMESTEAD ENTRY.

Where the United States suspends a homestead entry, the entryman has no positive right, and as the title is still in the government he has no taxable property in connection with the land sought to be entered. Since he owes no taxes during the suspension, the land cannot be sold for taxes by the state. To permit the state to do so would be to permit the state to control the title while it still vested in the general government.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 631.*]

Appeal from Twenty-Seventh Judicial District Court, Parish of Ascension; Paul Leche, Judge.

Action by Byrd McCrory against J. L. Bradford and C. B. McManus. Judgment for plaintiff, and defendants appeal. Amended and affirmed.

B. J. Vega and F. Rivers Richardson, for appellants. Pugh & Lemann, for appellee.

BREAUX, C. J. Plaintiff brought this suit against the defendants to have a tax sale annulled and canceled, and the first question for decision is whether the defendants acquired a valid title to the land bought by them at tax sale.

The facts are that the property was sold in the year 1898 at tax sale for the taxes of 1895. The taxes for all the other years were paid by plaintiff.

Plaintiff received no notice from the sheriff prior to the sale. He obtained his patent in the year 1908, and when he repaired to the clerk's office to have it recorded he learned that his land had been sold at tax sale, having received no prior notice. The sheriff of the parish, who was at that time deputy sheriff in charge of the collection of taxes, stated that he addressed a notice in a registered letter to Byrd McCrory at the Burnside post office; that it was not delivered to McCrory; that there was written on the envelope, "Return to writer," and it was returned, and on the envelope was written, "Moved to Hobard." The returned letter was in the possession of the sheriff's office at the time of the trial, and it was produced, opened, and read. No further attempt was made to serve the notice. The post office of plaintiff was Hobard, and had been for some time. It is in evidence that the name of Burnside appeared on the assessment roll for 1905 opposite the name of McCrory. It is also in evidence that the property sold at tax sale, as above mentioned, had been sold for taxes due in 1902 some time prior to 1905, and redeemed by plaintiff.

As relates to the other ground alleged by plaintiff, that the property was not subject to taxation to the knowledge of defendants, the facts are that plaintiff made homestead entry of the land on August 20, 1897, and commuted the entry by paying for the land in cash, as required under 2301 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1406). The usual receipt when such entries are made was issued to him, but no patent had been issued.

The record discloses that in January of the year 1900 a former agent of the Land Department of the United States reported against the entry in question, and charged that it was illegal for reasons stated. In December, 1903, another inspector made similar report against the entry, and some time thereafter a Commissioner of the General Land Office suspended the entry, and gave

orders that notice be given to Claimant McCrory and the other parties in interest. The acting commissioner, on the 12th day of August, 1908, specially revoked the charges against this entry for reasons specially stated, and issued instructions to the registrar and receiver in New Orleans accordingly. A patent was issued to the plaintiff, McCrory, on the 12th day of August, 1908.

Judgment was for the plaintiff in the district court, and defendant appealed. Plaintiff and appellant answered the appeal and asked for an amendment of the judgment by striking therefrom the sum of \$42.75, taxes paid, and in the decree it is added that all taxes paid by the defendant McManus shall be paid to him.

[1] Returning to the tax sale, it is very evident that as no notice was given it was not valid. The adjudicatee was agent of the present owner, one of the defendants, and it follows that it is null as to the two defendants. The testimony of the sheriff and the record of his office confirms plaintiff's testimony of failure to serve notice upon him.

This officer, whose duty it was to issue notices and serve them on taxpayers, was unmistakably informed that the post office of plaintiff was not Burnside, but Hobard. He knew that the notice had not been served, and on its return it should have been properly addressed and mailed. Notice is a constitutional requirement, and whenever notice is due, as in this case, the want of notice is fatal to the tax sale. There is no evidence before us that the taxpayer was at fault or in any way negligent. He was not notified, and the fact that a letter was addressed to him in the manner that this letter was addressed and returned, with an indorsement informing the officer of the post office at which to address the taxpayer, is not the notice required. Something more should have been done upon the return of the letter, and there should have been some little diligence to avoid the absolute want of notice. *Hoyle v. Southern Athletic Club*, 48 La. Ann. 879, 19 South. 937. The want of notice, it has been held, is fatal. *Cucullu v. Brakenridge Lumber Co.*, 49 La. Ann. 1449, 22 South. 409; *Hodding v. City of New Orleans*, 48 La. Ann. 982, 20 South. 199.

How can a tax debtor pay the taxes if he is not informed by proper notice? He has the right to assume that, under the Constitution, he will receive notice before his property will be sold. In *re Interstate Land Co.*, 118 La. 587, 43 South. 173. Notice is jurisdictional. *Riddell v. Rice*, 128 La. 241, 54 South. 785. *Foreman v. Hinchcliffe*, 106 La. 225, 30 South. 762; *Bartley v. Sallier*, 118 La. 93, 42 South. 657; *Villey v. Jarreau*, 33 La. Ann. 291; *McWilliams v. Michel*, 43 La. Ann. 984, 10 South. 11; *Johnson v. Martinez*, 48 La. Ann. 52, 18 South. 909; *Delta Land Co. v. Sholars*, 105 La. 360, 29 South. 908.

Some importance is attached to the fact,

on the part of the defendants, that the name and address of McCrory appeared on the assessment rolls of 1905. It does not appear by whom it was written on this roll. It was written there in compliance with the requirement of law, but by whom is not of any moment in this instance. It does not appear that the plaintiff knew that his address was thus written on the assessment roll; but, even if he had known, it would not have relieved the sheriff from the duty of remailing the letter, addressed to the proper post office, after it had been returned. If an erroneous address is written on the assessment roll, it would serve no purpose to prove that the registered letter was addressed to another than the post office of the taxpayer, particularly when it appears that the sheriff knew that it was not the proper address of the taxpayer.

[2] We might have rested our decision at this time, were it not that plaintiff asks that he be not condemned to pay the taxes. It therefore becomes necessary to decide whether or not it was legal to sell the land for taxes. We take up for decision the second question—that relating to the homestead entry. The contention is that the commissioner's order, suspending this entry, was *ultra vires* by reason of the fact that the title was in the entryman at the time; that the suspension of the entry did not relieve the entryman from the necessity of paying taxes; and that the condition, as relates to the necessity of paying the taxes, remained unchanged. It may well be said in answer that, although the land is subject to taxation, the government may refuse to issue a patent if its laws have not been complied with. If the entryman has committed a wrong, it surely can temporarily suspend the entry, in order to institute inquiry.

In *Railway Co. v. Prescott*, 16 Wall. 607, 21 L. Ed. 373 (Justice Miller was the organ of the court), it was decided that under section 21 of the amendatory statute of 1864 the grantee could not acquire title before paying the costs of survey. The court said:

"While we recognize the doctrine heretofore laid down by this court, the land sold by the United States may be taxed before they have parted with legal title by issuing a patent. It is to be understood as applicable to cases where the right to the patent is complete, and the equitable title is fully vested in the party without anything more to be paid or anything to be done, owing to the foundation of the right."

Here the right was exercised by the Land Department, for the reason that the Department was given to understand that fraud had been committed, and in order to probe these frauds a suspension followed. The United States have control of the public domain, and, until it finally passes to the grantee, the state is without authority, through the tax-collecting department, to take from

the general government any part of her control.

Although the foregoing are our views, we find no difficulty in agreeing with the proposition, advanced by defendants' learned counsel, that the certificates of registrars of the United States for the price of public lands are sufficient evidence of title to form the basis of a petitory action. This view has the support of ample authority. But the existence of the right is not to be taken as cause sufficient to divest the Land Department of its legal authority, prior to the issuance of a patent, in matter of the entry of the land. It is unquestioned now that whatever the United States has a right to do the individual states have no right to undo. Such might be the effect if lands, the entry of which is suspended, could be seized and sold by the state in satisfaction of taxes assessed while the land is under suspension. As between the entryman and the United States government, there is nothing complete, as relates to final entry, until it is shown that the entryman has bona fide carried out the requirements of the Land Department. *Burroughs on Taxation*, p. 130. Under the homestead law, possession is considered as a species of property in the hands of the citizen. It is said that the land is not taxed, but the mere possession and the entryman's improvements may be taxed. It has been decided that, until a patent issues, the courts cannot control the Land Department in the disposal of its lands. *Laramie v. Steinhoff*, 11 Wyo. 290, 71 Pac. 993, 73 Pac. 209.

Defendants have cited a number of decisions construing special statutes in regard to the period of inquiry into the question of fraud. The question of the dignity of the record and the effect of patents are discussed in the cited decision; but we found no expressions denying to the government the right to inquire in due time into charges brought against an entry. Without further decisions upon the subject and statutes, we must decline to hold that the order suspending the entry was null and void.

The defendants urged that the plaintiff deemed the first act of sale for taxes made of the property, but we have not found that in this redemption he has waived any right. Had this been intentional on his part, it would have been difficult to hold that, in view of the situation in which he was placed, he was prejudicing his rights by declining to pay any more taxes, in view of the order suspending his claim entirely and leaving him virtually without a title. But we have seen that there was nothing intentional, as he was not notified, as is amply proven by the evidence.

For reasons stated, it is ordered, adjudged, and decreed that the judgment appealed from be amended by striking from it that part which condemns the plaintiff to pay

to the defendants the sum of \$42.75 paid by the defendants, and also any other taxes paid by the defendants, if any others have been paid. With this amendment, the judgment is affirmed.

(130 La.)

No. 19,149.

STATE v. FOSTER.

(Supreme Court of Louisiana. Feb. 26, 1912.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 213*)—ILLEGAL SALE—DESCRIPTION OF PLACE—SUFFICIENCY.

Unless it is made to appear that a person charged with selling liquor without a license, at his place of business upon a named street in a named town, has more than one place of business on such street, the charge as to the place is sufficiently specific.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 255-257; Dec. Dig. § 213.*]

2. INTOXICATING LIQUORS (§ 217*)—ILLEGAL SALE—SPECIFICATION OF QUANTITY.

The charge of selling liquor in prohibition territory need not specify the quantity, as the quantity in no manner affects either the offense or the defense.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 234, 235; Dec. Dig. § 217.*]

Breaux, C. J., dissenting, and Provosty, J., dissenting in part.

Appeal from First Judicial District Court, Parish of Caddo; Thomas F. Bell, Judge.

Jim Foster was convicted for an illegal sale of liquors, and appeals. Affirmed.

Cal D. Hicks, for appellant. Walter Guion, Atty. Gen., and J. M. Foster, Dist. Atty. (G. A. Gondran, of counsel), for the State.

Statement of the Case.

MONROE, J. The information under which defendant is prosecuted charges that, upon the 11th day of August, 1911, he "did unlawfully keep a grog or tipping shop and did retail spirituous and intoxicating liquor, to wit, beer and whisky, without previously obtaining a license," etc. He called for a bill of particulars, alleging that he was entitled to be informed of the nature of the liquor he was alleged to have retailed, whether it was whisky, beer, wine, or other intoxicating or spirituous liquors, or near beer; and "of the time, place, and date of the alleged sale or retailing"; and of the quantity of liquor, or liquors, he was alleged to have sold or retailed. The district attorney furnished the bill, reading as follows:

"Kind of liquor; beer which will produce intoxication. Time; date alleged in the information. Place; defendant's place of business in the city of Shreveport, on Texas avenue.

"That he elects to make this prosecution for retailing spirituous and intoxicating liquor.

"That all other information asked for, and to which defendant is entitled, is contained in the bill of information.

"The sale was made by the person named in the bill of information."

Defendant objected to the bill so furnished, on the grounds that it fails to give the number, on Texas avenue, of his place of business, and fails to inform him of the quantity of liquor he is charged with selling; and he comes before this court, appealing from a conviction and sentence, on bills of exception to the overruling of his objection.

Opinion.

[1] There being no suggestion that defendant had more than one place of business on Texas avenue, in Shreveport, we are of opinion that the charge, as to the place, was sufficiently specific.

[2] As to the other objection, as it does not appear that the quantity of liquor sold in "prohibition" territory in any manner affects either the offense or the defense, upon a charge of selling liquor without a license, we are of opinion that the charge was, also, sufficiently explicit upon that point.

Judgment affirmed.

BREAUX, C. J., dissents to the extent that it is held that the charge of selling liquor in prohibition territory need not specify the quantity.

Mr. Justice PROVOSTY, dissents, for the reasons assigned in the case of State v. Pomerranky (No. 19,145) 57 South. 994.

(130 La.)

Nos. 18,761, 18,769.

CENTRAL GLASS CO., Limited, v. NIAGARA FIRE INS. CO. OF CITY OF NEW YORK.

(Supreme Court of Louisiana. Jan. 2, 1912. On Rehearing, March 11, 1912.)

(Syllabus by the Court.)

On Rehearing.

COURTS (§ 224*)—SUPREME COURT—JURISDICTION OF AMOUNT.

Where the defendant, after issue joined, admits owing a certain sum, leaving a sum less than \$2,000 in dispute at the time the judgment is rendered, this court is without jurisdiction of the cause.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 224.*]

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by the Central Glass Company, Limited, against the Niagara Fire Insurance Company of the City of New York. Judgment for plaintiff, and defendant appeals. Dismissed.

Caffery, Quintero, Gidliere & Brumby, for appellant. Lazarus, Michel & Lazarus and David Sessler, for appellee.

PROVOSTY, J. This is a suit upon a fire insurance policy, the policy in the standard form. In addition to the amount of the insurance, plaintiff claims damages and attorney's fees; the latter claims being founded upon Act 168, p. 226, of 1908. We give this act in the margin.¹

It requires insurance companies to make payment within 60 days from notice of loss, instead of as stipulated in the policy after 60 days from the adjustment of the loss, under penalty of 12 per cent. damages on the amount of the loss, and reasonable attorney's fees; and it imposes upon the insurance company the duty of furnishing the assured a blank form for use in making the proof of loss.

Defendant is now willing to pay the insurance, and contests only the claim for damages and attorney's fees. Defendant's refusal to pay was based on the fact that the officers of the plaintiff company had been indicted on the charge of having procured the building to be burned. After the criminal case had been tried and the accused acquitted, the defendant tendered the amount of the policy; but plaintiff refused to accept the tender, unless the damages and attorney's fees were added.

Defendant contends that said act has no application to policies which, like the one in suit, were in existence before the passage of the act; and contends, further, that attorney's fees are not required by said act to be paid in all cases, but only in cases where the delay in paying was unjustifiable; and contends, finally, that said act, if applied to policies already in existence at the time of its passage, would impair the obligations of contracts, in that it would require the insurance company to furnish a blank form for making the statement of the loss, which, by the terms of the policy, it is not required to do, and would change the point of departure of the delay of 60 days, within which, under the terms of the policy, the insured must render a statement of the loss, from the date of the fire to that on which the blank form for making the proof of loss is furnished, and, finally, would make the 60 days allowed for payment of the insurance run from the receipt of the proof of loss, instead of from the adjustment of the loss, as stipulated in the policy.

All these points were passed on by this court in the case of *Monteleone v. Insurance Co.*, 126 La. 807, 52 South. 1032. The court held that the act did apply to antecedent contracts, and did not impair their obligation, as the changes made by it were merely in the remedy for the enforcement of the contract and not in the contract itself; and, finally, that the allowance of attorney's fees was discretionary. Upon further consideration, we have concluded that the act does impair the obligation of the contract, and

as this point disposes of the case we spare ourselves the trouble of considering the others.

There can be no denying that the act makes changes; the sole question must be as to whether the changes are in the contract itself, or merely in the remedy.

By the remedy, as distinguished from the obligation of the contract, we understand the means of judicially enforcing the contract. And by the Legislature having complete control over the remedy we understand that the parties cannot by their contract deprive the Legislature of its power to regulate the manner in which the power of the courts shall be exercised for the enforcement of contracts. For instance, cannot, by agreeing that their contract of lease shall be enforceable by distress for rent, deprive the Legislature of its power to abolish distress for rent. *Cooley, Const. Lim.* 349, 350. In other words, that parties cannot by their contract deprive the Legislature of its power to change the laws of the state.

But we do not understand that the Legislature has control over stipulations or conditions inserted in a contract as integral parts thereof, and not needing recourse to the judicial tribunals for being efficient. To allow the Legislature to change the contract in such features as these, existing solely by the will of the parties, and operating without need of any recourse to the judicial tribunals, would be to allow the Legislature to change or impair the contract of the parties. Even when such conditions and stipulations have come into the contract, not by express agreement, but merely as an effect of the existing law being read into the contract, they are beyond legislative control, if they have become integral parts of the contract. Thus, as to a note already in existence, the Legislature cannot dispense with demand, protest, and notice for holding the indorser. *Farmers' Bank v. Gunnell*, 67 Va. 131. For other examples, see, also, *Rose's Notes to Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Rubric, Limitations upon the General Rule*.

In the case at bar, the stipulations and conditions in question exist solely by the will of the parties, and need no recourse to the judicial tribunals for their efficiency, and are integral parts of the contract, and important at that. The delay within which payment becomes due under a contract of insurance is as much an integral, vital part of the contract as the delay within which payment becomes due on a promissory note; and the conditions under which such payment becomes exigible are as much an integral, vital part of the contract as conditions in general are in contracts in general. If the Legislature could compel the insurance company to furnish a blank form for use in making out the statement of loss, it could compel the company to furnish an expert

¹ See note at end of case.

for filling out the blank; in fact, if it be true that the proof of loss is a matter pertaining to the remedy over which the Legislature has complete control, the Legislature might dispense the insured altogether from making proof of loss; and, in like manner, if the 60 days delay for making payment is a matter pertaining to the remedy, the Legislature might dispense with the delay altogether, and require payment to be made at once, so that the payment would be due at once, without any proof of loss having been made.

We conclude that the said act, if applied to policies already extant at the time of its enactment, would be unconstitutional.

The judgment appealed from is affirmed, in so far as it condemns the defendant company to pay the amount of the insurance, with interest from judicial demand, and costs up to the time the tender was made of the said amount, and is set aside, in so far as it condemns the defendant to pay damages and attorney's fees. Plaintiff to pay costs of appeal and all costs incurred subsequent to the tender.

On Rehearing.

BREAUX, C. J. The defendant in the lower court admitted liability to the amount of \$2,000, and counsel for plaintiff and counsel for defendant agree in the statement that on November 17, 1900, after issue had been joined in the case, a tender of the amount above stated was made to plaintiff company and by it declined.

The district court rendered judgment for \$2,000, admitted, as just stated, as due, together with 12 per cent. damages and 15 per cent. fee of attorney; total, \$540 over the \$2,000 above mentioned.

This court has repeatedly decided that it would not assume jurisdiction of an amount less than \$2,000, balance due after an admission that all other sums are due, and after a tender of the amount admitted during the pendency of the suit.

The following are excerpted from decisions upon the subject:

The test is the amount in dispute at the date of the judgment in the district court.

By a reduction before judgment to an amount less than \$2,000, the appellate court is without jurisdiction.

Appellate jurisdiction is always excluded when the only amount in dispute is reduced to less than the minimum limit of the court's appellate jurisdiction. *State ex rel. Beauvais v. Judge*, 48 La. Ann. 676, 19 South. 617; *State ex rel. Western Union Tel. Co. v. Judge*, 21 La. Ann. 728, and other decisions cited in *Borde v. Lazarus, Michel & Lazarus*, 127 La. 122, 53 South. 465, on the point here at issue.

The amount involved being over \$500, but not over \$2,000, there is no reason not to transfer the cause, if the parties in interest desire, to the Court of Appeal.

It is therefore, ordered, adjudged, and decreed that the appeal is dismissed, at appellant's costs.

It is further ordered, adjudged, and decreed, if within 10 days the appellant files the required affidavit for the transfer of this case to be heard by the Court of Appeal, and usual showing is made that the case be transferred to that court, it be transferred. If no application be made for the transfer at the end of the delay stated, this judgment shall be final.

NOTE.

An act relative to fire insurance; directing fire insurance companies to furnish blanks for proof of loss; providing the effect of failure to furnish same; requiring fire insurance companies to promptly adjust losses and to pay the amount due under their policies and specifying a penalty for failure to pay the amount due under their policies within sixty days after the receipt of proofs of loss from the insured; requiring copies of this act be furnished the assured which is to be considered a part of the policy contract; and declaring conditions in policies in violation of this act to be void and of no effect.

Section 1. Be it enacted by the General Assembly of the state of Louisiana, that whenever any loss or damage shall be suffered from this state from fire, by any person, firm or corporation, upon property insured under a policy of insurance of any fire insurance company doing business in this state, and notice of the fact that such loss or damage has occurred shall be given by the person, firm or corporation incurring the same, or the agent thereof, to the insurance company issuing such policy, or to the agent thereof nearest the place of loss, immediately after the date of such loss or damage—the limit to which reasonable time shall be mentioned in said policy and made a part thereof at the time of issuing the same, but the time fixed in the policy shall not be taken or construed to be a condition precedent to the right of recovery—then it shall thereupon become the duty of such insurance company to furnish to the person, firm or corporation incurring such loss or damage, such reasonable blank forms of statements and proofs of loss as such insurance company may desire to be filled out, in regard to the time, origin and circumstances of the fire causing such loss or damage, and the knowledge and belief of the insured touching the same, the lists and description and quantity of property destroyed or damaged, and of property saved, and the original cost of such property, and the cash value thereof at the time of the fire, the details as to possession, ownership, title, and incumbances, and changes of title, use, occupation, location and exposure since the time of issuing such policy, if any, and other insurance, if any, and description and schedules in such policy.

Sec. 2. Be it further enacted, etc., that if any such fire insurance company shall fail, neglect or refuse to furnish blank forms of statements and proofs of loss to the insured, in case of loss or damage by fire, as provided in the preceding section, then such company shall be deemed to have waived the requiring of any statement or proofs of loss at the hands of such insured a person, firm or corporation, and upon suit brought upon such policy, such insurance company shall not be heard to complain of the failure of the insured to furnish any such statement or proofs of loss, any provision in any such policy of insurance to the contrary notwithstanding.

Sec. 3. Be it further enacted, etc., that when-

ever any loss or damage shall be suffered in this state from fire by any person, firm or corporation upon property insured under a policy of insurance of any fire insurance company doing business in this state, it shall be the duty of the fire insurance company that has issued the policy or policies upon receipt of proofs of loss from the assured, to pay the amount due under its policy or policies, within sixty days thereafter, or if the said proofs of loss are not satisfactory to the company, it shall be the duty of the company to proceed under the terms of the policy or policies to ascertain and adjust the amount of the loss and its liability under its policy or policies and to make payment of the amount due under the policy or policies to the insured within sixty days from the date upon which it received the proofs of loss offered by the assured, and should the company fail to pay, within said time the amount due the insured under the policy after demand made therefor, such company shall be liable to pay the holder or holders of such policy in addition to the amount of the loss, 12 per cent. damages on the total amount of the loss as may be determined by a court of competent jurisdiction together with all reasonable attorney's fees for the prosecution and collection of such loss; provided that whenever the insurance company shall pay to the insured within sixty days from the date upon which it received the proofs of loss offered by the assured the amount which its adjuster or agent has determined or admitted to be due, then in that case the insured shall only recover from the said insurance company the difference between the amount thus paid him and the amount judicially ascertained to be actually due under the policy together with 12 per cent. damages on said difference and all reasonable attorney's fees for the prosecution and collection of such loss.

Sec. 4. Be it further enacted, etc., that all fire insurance companies doing business in this state shall deliver to the insured with each policy issued a copy of this act which shall be considered as a part of the policy contract as full as if it were incorporated therein, and any condition in the policy contract in contravention with the provisions of this act will be void and of no effect.

(130 La.)

No. 19,162.

STATE v. FARRELL.

(Supreme Court of Louisiana. Feb. 26, 1912.)

(Syllabus by the Court.)

FALSE PRETENSES (§ 18*)—PAYMENT FOR SERVICES—SERVICES "ACTUALLY RENDERED."

Where one appears on the pay rolls of the city of New Orleans and receives pay for services rendered the city by another, acting on his behalf, he does not violate Act 155 of 1888, which provides "that any person who shall knowingly permit his name to be carried on the pay rolls of any state, parish, municipal or other political corporation, as employee, and receive salary, or pay for the services not actually rendered" shall be guilty of a crime, as the services have been "actually rendered," and the act is violated only when the services are "not actually rendered."

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 18.*]

Land, J., dissenting.

Appeal from Criminal District Court, Parish of Orleans; Frank D. Chretien, Judge.

William J. Farrell was indicted for receiving pay for services not actually rendered to

a city, and appeals. From a judgment sustaining a demurrer to the indictment, the state appeals. Affirmed.

St. Clair Adams, Dist. Atty., and Warren Doyle, Asst. Dist. Atty., for the State. James O'Connor and Chandler C. Luzenberg, for appellee.

BREAUX, C. J. The defendant was indicted on the charge of having had his name entered on the city pay roll as one of its employees and with having received \$30 for services, although no services were performed by him.

In other words, the indictment charged defendant with having obtained money without personally having rendered service therefor.

While the able and learned district attorney did only that which was his duty in drawing the indictment, we, as interpreters of the law, have to ascertain whether the act can be given sufficient effect to sustain the indictment.

The defendant was indicted under Act 155 of 1888, which sets forth that a person who knowingly permits his name to be carried on a pay roll of a public corporation as an employee and receives pay for services not actually rendered shall be guilty of obtaining money under false pretenses and subject to punishment at hard labor, or, without hard labor, for a period not exceeding 12 months.

A demurrer was filed by defendant and sustained by the district court. The grounds of the demurrer were that the indictment charged, in effect, that he in person had not actually rendered any services as elevator tender in the criminal district court.

There is no question but that nothing can be added in law to the words of the act. Although there is no necessity to use the words of the act, it is not legal to go further than expressed in the act.

The difficulty is that the language used in the act does not admit of the use of the additional words of the indictment. They are not within the intentment of the act. There is a difference between receiving salary for services "not actually rendered," and receiving pay for services "not actually performed" by the one by whom the salary is collected. The former is within the intentment of the act; the latter is not.

If the indictment be law, every time an officer or an employee does not himself do the work for which he collects the salary, under any circumstance, he violates the law, and should be punished. That was not the intention of the act.

If the indictment were sustained, it would have to be considered as law.

A defendant cannot be prosecuted under an illegal indictment. The demurrer puts the question directly before the court; it must be overruled or maintained. If the case were

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

remanded and evidence admitted, whatever would be proven would not justify the court in condemning the defendant, if the indictment is not sustained by the act.

The learned and energetic prosecuting officer states in the brief that he does not think that it requires argument to sustain the proposition that "the elimination of control of public officers over the employes subject to their supervision will preclude efficient service."

Of this, we entertain no doubt and entirely agree with the statement. We must add, however, that it does not follow because of the difference in the indictment and the act in question that supervision must necessarily be affected and diminished.

The following will serve to illustrate: The average private employé who employs an unskilled workman to do certain work, and lets him have a free hand in doing the work in his absence, on his return, if the work is properly done, has to accept and pay for it, although others have assisted or have done all the work. But if the employé deemed, for good reason, that his workman must himself perform the work, and so directs, he must comply with the direction.

A civil corporation has greater authority and supervision, and its supervision has or should have complete control. Nothing less.

For reasons assigned, it is therefore ordered, adjudged, and decreed that the judgment appealed from is hereby affirmed.

LAND, J. (dissenting). The accused was indicted for receiving salary and pay as an employé of the city of New Orleans for services falsely pretended to have been rendered as elevator tender in the criminal district court building in said city; whereas, in truth and in fact, as he, the accused, then and there well knew, he had not actually rendered any services as elevator tender in said building for the salary and pay so knowingly received by him, contrary to the form of the statute, etc. The accused was arraigned and pleaded not guilty, but subsequently withdrew the plea and filed a demurrer to the indictment. On hearing, the demurrer was maintained. The state has appealed.

The defendant was indicted under Act No. 155 of 1888, which reads as follows:

"That any person who shall knowingly permit his name to be carried on the lists or pay rolls of any state, parish, municipal or other political corporation, as employee, and receive salary or pay for services not actually rendered, shall be deemed guilty of obtaining money under false pretenses, and on conviction by a court of competent jurisdiction, shall be punished at hard labor or otherwise, not exceeding twelve months."

Our learned Brother, in his reasons for judgment, says:

"In this case, it is not charged that the duties assigned to the elevator tender have not

been performed as required by Act 155 of 1888; but they have not been performed by him. It is not contended by the state that these services have not been rendered; but only that they were not rendered by him, the elevator tender."

This admission is not of record, and the sole question before us is whether or not the indictment on its face shows a violation of Act No. 155 of 1888. I think it does. It is distinctly charged that the accused received pay "for services falsely pretended to have been rendered"; whereas, in truth and fact, the accused well knew that he had not actually rendered any services as elevator tender. The indictment does not admit that the services were rendered by any other person, and its terms are broad enough to negative the rendition of services by the accused in person, or by deputy or substitute. It is a familiar maxim of law that "he who acts through another acts by himself." "Qui facit per alium facit per se." Hence the charge that the accused had not actually rendered any services is comprehensive enough to negative the rendition of services by himself, or by deputy or substitute.

In the argument at bar, it was assumed by counsel for the accused that he had performed the services of elevator tender through another, without additional cost to the city of New Orleans. This is a matter that appertains to the merits of the case. The only question before us for decision relates to the technical sufficiency of the indictment.

I therefore respectfully dissent from the majority opinion:

(130 La.)

No. 18,877.

COX et al. v. HOPE SHINGLE & LUMBER CO.

(Supreme Court of Louisiana. Feb. 26, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 805*) — FAILURE TO FILE TRANSCRIPT—ABANDONMENT OF APPEAL.

Where an order for a devolutive appeal fixes the return day, and the appellant files the proper bond, but thereafter fails to file the transcript within the required time, his failure to do so will constitute an abandonment of the appeal, and thereafter no other appeal will be allowed.

[Ed. Note.—For other cases, see Appeal and Error, Cent.Dig. §§ 3174, 3175; Dec.Dig. § 805.*]

Appeal from Second Judicial District Court, Parish of Webster; R. O. Drew, Judge.

Action by Thomas L. and Mary A. Cox against the Hope Shingle & Lumber Company. Judgment for defendant, and plaintiffs appeal. Dismissed.

Thomas W. Robertson, for appellants. Thigpen & Herold, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On Motion to Dismiss.

BREAUX, C. J. The motion filed by appellee to dismiss this appeal was presented on the ground stated, in substance, as follows:

A devolutive appeal was taken from the judgment on May 6, 1910, returnable on June 20th of the same year, and a devolutive appeal bond for the sum of \$150, as fixed in the order of appeal, was filed in the lower court, under the order, on the 6th day of May, 1910, thereby divesting the district court of further jurisdiction.

Plaintiffs and appellants failed and neglected to file the transcript in this court as provided in the order of appeal, and appellee's contention is that such a failure constituted an abandonment of the appeal.

Thereafter, on the 11th day of April, 1911, the plaintiffs and appellants secured an order for a devolutive appeal to this court, under which the transcript was filed in this court on May 15, 1911.

Unquestionably the first appeal was abandoned. Nothing else can be inferred as to this appeal than that the appellants failed to avail themselves of the order granted. They are given sufficient time to take this appeal and to furnish bond. In case of necessity, they can easily obtain further time within which to bring up the transcript. Failing in this, it can well be considered as an abandonment of the appeal. There seems to be distinction made when an appeal is brought here and filed. If it is one actually and completely brought within the jurisdiction of this court, although there may be some defect in the manner of taking the appeal, or in the transcript, it will not be deemed necessary cause to dismiss the appeal, but, if an appellant chooses not to complete his appeal at all, if he does not see to the making of a transcript after having furnished the appeal bond, his failure in this respect has been considered cause sufficient to dismiss. One cannot treat the courts with absolute indifference and neglect, and at the same time he heard to urge that he is still in time to take a second devolutive appeal.

In *Exposition Co. v. Crescent City R. R. Co.*, 39 La. Ann. 355, 1 South. 791, a similar question was decided. The appellant failed to bring up a transcript, and have it filed. On motion of appellee, the second appeal was dismissed because of appellant's failure to file a transcript.

This is the language of the court on the subject:

"There is a motion to dismiss the appeal substantially on the ground that, the first appeal having been dismissed because not filed in time, the appeal must be considered as abandoned, and the second appeal was not entertained."

This case presents no distinguishing features from those in *Pierce v. Cushing*, 33 La. Ann. 810, and *Sterling v. Sterling*, 35 La.

Ann. 840. After a thorough review of this point, the court held substantially as before stated by us.

In the *Case of Hymel*, 116 La. 43, 40 South. 525, the recited grounds were similar on the point involved. The court did not decide it, but dismissed the appeal on another issue equally as fatal to an appeal.

In *Pierce v. Cushing et al.*, 33 La. Ann. 810, and *Sterling v. Sterling*, 35 La. Ann. 840, which are cited in *State v. Treasurer of Debenture Co.*, 52 La. Ann. 553, 27 South. 87, it was decided that an appeal should be dismissed if not filed in time. While not entirely similar to the present case, the text and the decisions cited throw light upon the subject here.

So far as research extends (and we have endeavored to make it thorough), failure to file is abandonment of the appeal. Code of Practice, art. 587.

There remains the one alternative—dismissal.

We have, none the less, dwelt upon some of the issues of the merits, and have no objection to state that an error on the merits would have to be unusually manifest in order to sustain an appellate court in reversing an appeal, when, as in this case, the judgment of the court a qua in personal injury suit is against plaintiff, and the appellant does not appear in the appeal either personally or by counsel.

Returning to the grounds stated on the motion to dismiss, the appeal is dismissed, at appellant's costs.

(130 La.)

No. 18,757.

KNIGHT v. BERWICK LUMBER CO.

McHUGH v. SAME.

(Supreme Court of Louisiana. Jan. 15, 1912.
Rehearing Denied March 11, 1912.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION (§ 84*)—PRESCRIPTION OF TEN YEARS—GOOD FAITH.

Good faith, to support the prescription of 10 years *acquirendi causa*, is based on the honest and positive belief of the possessor, founded on just reasons, that he is purchasing from the real owner. Doubt as to the title of the vendor or as to his right to alienate is fatal to a claim of good faith. A doubt sufficient to induce the possessor to make an investigation of the title of his vendor is presumed to have continued down to the sale, in the absence of evidence tending to show its removal by adequate information derived from the records or other trustworthy sources.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 488-500; Dec. Dig. § 84.*]

2. REAL ACTIONS (§ 8*)—PETITORY ACTION—ISSUES.

In a petitory action, or action to establish title, issues cannot be raised as to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ownership of lands not sued for by the plaintiff.

[Ed. Note.—For other cases, see Real Actions, Cent. Dig. §§ 28-35; Dec. Dig. § 8.*]

Appeal from Nineteenth Judicial District Court, Parish of Iberia; James Simon, Judge.

Actions by George Knight against the Berwick Lumber Company, and by Michael W. McHugh against the same defendant. Actions consolidated. Judgment for defendant, and plaintiffs appeal. Reversed and rendered, and rights as to certain lands reserved, and suit of George Knight remanded for further proceedings.

Martin & Martin, for appellant George Knight. Weeks & Weeks, for appellant M. W. McHugh. Burke & Burke and Borah & Himel, for appellee.

LAND, J. George Knight instituted a partition suit against the Berwick Lumber Company, in which he alleged ownership of the undivided one-third or more of section 15, less the N. W. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of section 14, township 12 S., range 11 E., situated in the parish of Iberia, and that the Berwick Lumber Company owned the other two-thirds of said lands, less the N. W. $\frac{1}{4}$ of section 15. Defendant answered, denying title in the plaintiff, and asserting title in itself to all the property described in the petition, except the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 15. Defendant averred that it acquired title from Wm. N. Bradley, by duly recorded act of sale, of date March 25, 1889; that Bradley acquired title from Frank A. Tompkins, sole heir of Sara M. Hartman, on February 20, 1889, by deed duly recorded; that in the said last sale there were some clerical errors in the description of some of the property; that the land in section 14 was described as being the N. E. $\frac{1}{2}$ of section 14, the intent being to sell the N. $\frac{1}{2}$ of section 14, and the notary described the N. E. $\frac{1}{4}$ of section 13, when the intent was to sell the N. E. $\frac{1}{4}$ of section 15; that these were mere clerical errors, the intent being, as expressed in the deed, to sell such lands as Frank A. Tompkins inherited from his grandmother, Sara M. Hartman, who never owned the N. E. $\frac{1}{4}$ of section 13, but did own the N. E. $\frac{1}{4}$ of section 15, and the N. $\frac{1}{2}$ of section 14; that Mrs. Hartman acquired said lands from the widow and heirs of Richard Lynch in 1872 by deed duly recorded; that Lynch acquired the S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 15 from Jno. Wilson Moseley, who acquired from the United States; and that Lynch acquired the other lands from the same source. Defendant for further answer pleaded the prescription of 10 years *acquiriti causa*.

Michael M. McHugh instituted suit against the Berwick Lumber Company and George Knight to establish his title to the N. E. $\frac{1}{4}$

of section 15, alleged to have been acquired from Frank H. Tompkins in May, 1900, by act of sale duly recorded in the parish of Iberia, and to have been inherited by said Tompkins from his grandmother, Mrs. Sara Hartman.

The Berwick Lumber Company for answer pleaded possession since 1889 of the particular land described in the petition, and denied plaintiff's right of action, under Act No. 38 of 1908, and prayed that the action be dismissed, or that plaintiff be forced to assume the position of plaintiff in a petitory action. In the alternative, the Berwick Lumber Company for answer set up, in substance, the same defenses urged in the suit of Knight. George Knight answered, alleging title to the undivided $\frac{1}{2}$ or more of section 15 and the N. $\frac{1}{2}$ of section 14, acquired by purchase from the widow and heirs of E. A. Pharr, who acquired from Lila Lynch, sole issue of the marriage between Richard Lynch and his second wife.

The two suits were consolidated, tried, and judgment was rendered in favor of the defendant decreeing it to be the owner of the N. $\frac{1}{2}$ of section 14, and of the E. $\frac{1}{2}$ and S. W. $\frac{1}{4}$ and S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, section 15, township 12 S., range 11 E.

The judge *a quo*, in his written reasons for judgment, after reviewing the facts of the case, reached the conclusion that the defendant not only had the better title to the lands in controversy, but had acquired a perfect title to them by the prescription of 10 years.

We cannot find in the record any sale from Tompkins to Bradley as alleged by defendant, and as stated in the reasoning of the judge. We find in the transcript a paper purporting to be a copy of a power of attorney from Frank A. Tompkins to B. F. Winchester, authorizing the sale of certain lands to Wm. N. Bradley; but this document was ruled out on objection of the defendant, and comes up attached to one of plaintiff's bill of exceptions. We assume that the able counsel for the defendant elected to rely on defendant's plea of prescription, and did not overlook a procuration and deed forming essential links in the chain of title set up in the answer.

On March 25, 1889, Wm. N. Bradley by notarial act sold to the Berwick Lumber Company, Ltd., for the price of \$1,350 in cash, the following described property:

"The north half of section fourteen (14), the east half, also southwest quarter and south half of northwest quarter of section fifteen (15). All in township twelve (12) south, range eleven (11) east, containing in all nine hundred and eighty-six (986) acres of land. Also the east half of southeast quarter of section twenty-three, eighty-one (81) acres. The east half of northwest quarter of section thirty-five, 79.51 acres. Also the west half of northeast quarter and the east half of northwest quarter,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

147.64 acres, all in township twelve (12) south, range ten (10) east."

The lands in dispute are underscored.

The power of attorney from Tompkins to Winchester authorized the sale to Bradley of 476.52 acres, "being the N. E. $\frac{1}{2}$ section 14; N. E. $\frac{1}{4}$ section 13, township 12 S., range 11 E."; the S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ section 15, township 12 S., range 11 E.; S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, same section; N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, township 12 S., range 11 E. The certificate annexed to the copy of the procuracy recites that the original was filed with a certain act of sale passed before Septime Lan- aux, notary public, from Winchester, agent to Tompkins, to Wm. N. Bradley, of record in Conveyance Book No. 18, at folio 87 of the records of Iberia parish. The alleged misdescription in the act of sale was never corrected, so far as the record shows, and the Berwick Lumber Company took title from Bradley by a *new* description, substituting the N. E. $\frac{1}{4}$ of section 15, for the N. E. $\frac{1}{4}$ of section 13, and the N. $\frac{1}{2}$ for the N. E. $\frac{1}{2}$ of section 14.

Section 15 (except the N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$), and the N. $\frac{1}{2}$ of section 14, were assessed to the estate of Richard Lynch on the assessment rolls of Iberia parish for the year 1888, and there were written across said assessment in the handwriting of the deputy tax collector the following words:

"This property has been transferred from Lynch to Mrs. Sara Hartman. See folio 123."

Mr. Brownell, the president of the Berwick Lumber Company, examined this assessment on the day the deed from Bradley to said company was executed, and the description of the lands conveyed was evidently taken from the assessment rolls. Mr. Brownell was educated for the bar in another state, and admits that he took the trouble to travel from Berwick, in St. Mary parish, to New Iberia, a distance of 45 miles, for the purpose of passing the deed from Bradley to the Berwick Lumber Company, but denies that he ever examined the deed from Tompkins to Bradley. Mr. Brownell gives no reasonable explanation for his failure to examine the records to see that Bradley had a recorded title to the lands conveyed to the Berwick Lumber Company. Mr. Brownell testified, in substance, that he took it for granted that Bradley had acquired title in some way through his aunt, Mrs. Hartman, and visited New Iberia for the purpose of ascertaining to whom the lands were assessed. We make the following extracts from the testimony of Mr. Brownell:

"A. He told me that they came to him through Mrs. Hartman. I believe he told me that was his aunt."

"A. He told me through Mrs. Hartman."

"A. Yes, sir; I asked him what was his title to the land."

"A. He said they came through Mrs. Hartman, and the sale was made at the time."

"Q. Why did you come up to New Iberia?"

"A. Well, we came up here to pass the sale."

"Q. Why didn't you pass it in Berwick or Morgan City?"

"A. I don't know any special reason anything more than I believe I came here to see in regard to the assessment."

"Q. Why did you wish to see the assessment?"

"A. Well, the lands are usually assessed to the parties they belong to for any considerable time."

"Q. And you wanted to see the assessment roll to see whether the lands belonged to Bradley or not?"

"A. I wanted to see the assessment roll in regard to the ownership of the lands."

"Q. Your statement was that you wanted to see assessment rolls to find whether the lands were assessed to Bradley as the ownership?"

"A. Not necessarily to Bradley, but to see that the lands were assessed * * * already. He claimed he owned the land. I believe he had not owned the lands long enough to have them assessed."

Mr. Brownell admits that he found that the lands were assessed to Richard Lynch for the year 1888, and was told by the tax collector that they would be assessed to Mrs. Hartman for the year 1889.

"A. I wanted general knowledge from the assessment rolls to verify the statements of Bradley; that is, I wanted a little corroborative evidence, not that I doubted his word if that was corroborated, but there was no question that he was all right, I thought."

"Q. Now, he told you he got the land from Mrs. Hartman, and you came to New Iberia to examine the assessments, and you found this land assessed to Richard Lynch?"

"A. Yes, sir."

"Q. How did this verify his statement that he had bought it from Mrs. Hartman?"

"A. It verifies it for this reason, in my mind, that upon the map which Bradley gave to me the particular lands in question were designated as Richard B. Lynch; in other words, Richard Lynch was written over them. Now, Bradley had told me that he had procured these lands through Mrs. Hartman, and Mr. Hartman from Lynch. I compared the map with the assessment and found them to compare, and being assessed by the assessor or his representative in the office, that these lands were assessed to Mr. Hartman for the year 1889, I came to the conclusion that all Bradley told me was true."

The witness testified that his statement that he did not look at the deed to Bradley, "foolish as it may seem," was true. The information obtained by Brownell from the assessment for 1888, and the prospective assessment for 1889, warned him that the Lynch title had passed to Mrs. Hartman, and that she was regarded as the owner of the property for the purposes of the assessment for 1889. It is hardly credible that Mr. Brownell, with his knowledge of the laws regulating the conveyance of real estate, was so "foolish" as not to examine the records before him to ascertain what title, if any, his vendor, Bradley, had to the lands assessed in the name of Richard Lynch, and about to be assessed to Mrs. Hartman for the year 1889. Mr. Brownell had sufficient doubt about the titles to make an investigation, and if he did

not look for the title of Bradley on the records before him, he must be considered as willfully blind to the facts that an examination would have disclosed. In the answer of the defendant it is averred that Bradley acquired his title on February 20, 1889, from Frank A. Tompkins, sole heir of Mrs. Sara M. Hartman, as shown by deed recorded in Book 18 of Conveyances, p. 87, and that defendant's deed, of date March 25, 1889, was recorded in the same book on page 188. We think that any reasonable man, under the circumstances, would have examined the deed to Bradley, to verify his very indefinite and loose declarations of title, and to compare the description of the lands in the deed with the description of the lands assessed to Richard Lynch. It is customary in conveying to take the description of real estate from the immediate vendor's title deed. The departure from this custom in the instant case seems to have been occasioned by the material difference between the description in the deed and the description in the assessment. This difference was necessarily known to Bradley, and the president of the Berwick Lumber Company surely had some reason for not inspecting the title deed to Bradley. The only reason that we can imagine is that he had notice from some source of the defects in Bradley's title.

[1] The prescription of 10 years *acquiescendi causa* is based on good faith and just title. C. C. art. 3478.

"The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact; as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which in fact belongs to another." C. C. art. 3451.

"By the term *just title*, in cases of prescription, we do not understand that which the possessor has derived from the true owner, for then no true prescription would be necessary, but a title which the possessor may have received from any person who he honestly believed to be the real owner, provided the title were such as to transfer the ownership of the property." C. C. art. 3484.

To be in good faith, the possessor must have the positive belief that he is the true owner of the property he holds. If he doubts the validity of his title, his possession cannot be the basis of the prescription of 10 years. *Gaines v. Hennen*, 24 How. 553, 16 L. Ed. 770. Doubt as to ownership, or the right to alienate, is inconsistent with good faith, because doubt is the mean between good and bad faith. Good faith demands a firm and positive belief. *Carpentier-Du Saint, Répertoire du Droit Français*, vol. 31, p. 294, No. 1,534. While the president of the Berwick Lumber Company was not bound, as a matter of law, to inquire into the title of Bradley, he voluntarily undertook an investigation that disclosed to him the facts that the property was assessed to the estate of Richard Lynch and would be assessed to Mrs. Hartman, from or through whom Brad-

ley said he had acquired his title. If the president of the lumber company had *honestly believed* that Bradley was the real owner of the property, it is fair to presume that he would not have undertaken such an investigation, and would not have sought "corroborative" evidence of Bradley's statements as to the title. We therefore conclude that the Berwick Lumber Company was a possessor in bad faith, and that its plea of prescription should have been overruled. As already stated, no deed from Tompkins to Bradley appears in the record before us, and therefore there is no evidence that Bradley, the vendor of the Berwick Lumber Company, ever acquired the legal title to the N. E. $\frac{1}{4}$ of section 15. The plaintiff, McHugh, purchased said property from Tompkins in the year 1909, and the Berwick Lumber Company cannot dispute the title of Tompkins, from whom it claims to have derived its title. Counsel for McHugh requests the court to pass on the title to all the lands claimed by the Berwick Lumber Company and George Knight in their respective answers. But we cannot in a petitory action, or in an action to establish title, give plaintiff judgment for land not sued for by him. Such a judgment would be *ultra petitem*.

[2] Nor can a defendant in such an action assert title to lands not sued for by the plaintiff.

George Knight admits the co-ownership of the Berwick Lumber Company in the lands described in his petition for a partition. Knight claims to have acquired the interest of Lila Lynch, a daughter of Richard Lynch, the common author of the three litigants before the court. The reasons for judgment concede the claim of Lila Lynch to an interest in the property, but the judge was unable to fix the extent of such interest with any degree of certainty. Richard Lynch was married three times. The evidence does not establish the date of the first marriage, or the date of the death of the first wife, or the date of the second marriage, with the mother of Lila Lynch, who died in 1853. The third marriage was in 1855. Lila Lynch was born February 26, 1846, and Richard, her brother, in 1849. Richard died without issue and unmarried. John Lynch had five children, John, Lila, Richard, Minnie, and Hugh. John was of the first, Lila and Richard of the second, and Minnie and Hugh of the third, marriage. Minnie died without issue, and unmarried. It may be assumed that the second marriage took place not later than May, 1845, nine months preceding the birth of Lila Lynch. Now, what lands in dispute were acquired by Richard Lynch between May, 1845, and the year 1853, the date of the death of the second wife? In December, 1848, a United States patent issued to Richard Lynch for the N. $\frac{1}{4}$ of section 14, and N. E. $\frac{1}{4}$ of section 15, in township 12 S., range 11 E. in the

Opelousas district, containing 476.52 acres. In the same month and year another United States patent issued to Richard Lynch, for the S. E. $\frac{1}{4}$ of the same section 15, containing 160.18 acres. These lands belonged to the second community, and on the death of the wife in 1853, her half interest passed to Lila and Richard, the children of the marriage. On the death of Richard, about 1870, his interest passed one-fourth to the surviving father and three-fourths to his sister. Lila thus became the owner of the undivided seven-sixteenths of said lands, and an undivided nine-sixteenths became the separate property of her father, Richard Lynch. On his death, Lila inherited one-third of said interest, or three-sixteenths of the whole, making her total interest, five-eighths. In 1893 Lila Lynch sold to E. A. Pharr the N. $\frac{1}{2}$ section 14, and section 15, except the N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ previously sold by her to said Pharr.

In July, 1909, Mrs. Amelia Pharr, universal legatee of E. A. Pharr, sold to George Knight all her undivided one-third right, title, and interest in and to the above-described tracts of land, including the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 15, and all her rights against persons who may have removed timber from the premises. It is evident that Mrs. Pharr intended to sell all and singular her right, title and interest in the property.

Our conclusion is that the N. E. $\frac{1}{4}$ of section 15 belongs to McHugh and Knight in the proportions of three-eighths to the former and five-eighths to the latter, and that the titles of all parties to other lands should be reserved.

It is therefore ordered that the judgment below be reversed, and it is now ordered that the plea of prescription be overruled, and that the N. E. $\frac{1}{4}$ of section 15, township 12 S., range 11 E., in the parish of Iberia, be decreed to be the property of the plaintiffs, Michael W. McHugh and George Knight, in indivision, in the proportions of three-eighths to the former and five-eighths to the latter; and it is further ordered that the defendant, the Berwick Lumber Company, Limited, pay costs in both courts. It is further ordered that the rights of the three litigants as to all other lands be reserved, and that the partition suit of George Knight be remanded for further proceedings according to law.

(130 La.)

No. 18,885.

RYALS v. RYALS.

(Supreme Court of Louisiana. Feb. 26, 1912.)

(Syllabus by the Court.)

MARRIAGE (§ 58*) — ANNULMENT — INTERDICTION FOR INSANITY.

The grounds upon which marriages may be annulled are specified in the Civil Code, and

do not include the interdiction for insanity, and incarceration in the state asylum, of one of the spouses.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 115-123; Dec. Dig. § 58.*]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Action by Belle Ryals against George Ryals. Judgment for defendant, and plaintiff appeals. Affirmed.

R. L. Belden, for appellant. Wm. F. Schwing, curator ad hoc, for appellee.

MONROE, J. Plaintiff alleges that "over eight years ago" she married George Ryals, and that "for a short time afterwards they lived together agreeably, up to about six or seven years ago," when he became insane, and was arrested, and in due course decreed to be insane, and, by reason thereof, committed to the State Asylum, "where he is now undergoing said sentence for insanity, which is infamous"; that said proceedings were conducted by the state—

"according to her laws upon the matter of interdiction, and without the consent or sanction of petitioner, and, by reason thereof, your petitioner is deprived of the company of her said husband, owing to the acts of the state of Louisiana, acting in her sovereign capacity and by virtue of her laws, enacted to govern and dispose of the insane, by decreeing them insane and civilly dead and removed from society."

She further alleges that her husband's malady is incurable, and that he will remain where he is until relieved by death, and that she is a young woman, in the prime of life, and is not compelled—

"to remain in a state of abject slavery and servitude and to satisfy the law of marriage which was never intended to exist and continue under the foregoing circumstances herein assigned, and therefore the said marriage, which has been annulled and avoided by the said judgment of interdiction, terminates the contract of marriage that once existed between petitioner and her once husband, George Ryals, and for the further reason that petitioner's once husband is civilly dead to all intents and purposes of the law, and therefore the marriage that was performed between your petitioner and said George Ryals perished when the judgment of interdiction was pronounced, and therefore the said marriage which has been annulled by the acts of the sovereign through her constituted judicial tribunals should be so decreed by this honorable court."

Petitioner—

"prays for judgment decreeing the marriage heretofore existing between petitioner and her said husband, George Ryals, terminated and no longer in force, null and void," etc.

In a supplemental petition plaintiff intimates, as an afterthought, without alleging, that her husband was or may have been insane when she married him.

The curator ad hoc appointed to represent defendant filed an exception of "no cause of action." The judge a quo sustained it.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and dismissed the suit, and plaintiff has appealed. The case has been submitted without argument, oral or written.

The grounds upon which marriages may be annulled are specified in the Civil Code, and do not include that upon which plaintiff relies. The judgment appealed from is therefore affirmed.

(180 La.)

No. 19,158.

STATE v. JACOBS.

(Supreme Court of Louisiana. Feb. 26, 1912.)

(Syllabus by Editorial Staff.)

INFANTS (§ 18*)—JUVENILE COURT—JURISDICTION—"PROTECTION OF CHILDREN."

Act No. 83 of 1908, as amended by Act No. 48 of 1910, § 8, created the juvenile court, and provided that it should have jurisdiction of the trial of all children under 17 charged as neglected or delinquent children, except for capital crimes, and of all persons charged with contributing to the neglect or delinquency of children under 17, or with a violation of any law then in existence or thereunder enacted for the protection of the physical, moral, or mental well-being of children, not punishable by death or hard labor, together with all cases of desertion or nonsupport of children by their parents. *Held*, that such courts had no jurisdiction to try accused for an assault committed on a delinquent minor child; the expression "law enacted for the protection of children" being limited to those laws relating to their physical, moral, and mental well-being, not including general laws prohibiting assault and battery, affecting both adults and children.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 18; Dec. Dig. § 18; * *Reformatories*, Cent. Dig. § 7.

For other definitions, see *Words and Phrases*, vol. 6, pp. 5741, 5742.]

Breaux, C. J., dissenting.

Appeal from Juvenile Court, Parish of Orleans; Andrew H. Wilson, Judge.

Mose Jacobs was convicted of assault on a delinquent child by the juvenile court of the parish of Orleans, and he appeals. Reversed.

Chandler C. Luzenberg and Chas. F. Engle, (Jno. S. Boatner, of counsel), for appellant. St. Clair Adams, Dist. Atty., Warren Doyle, Asst. Dist. Atty., and A. D. Henriques, Jr., Asst. Dist. Atty., for the State.

PROVOSTY, J. The accused was found guilty and sentenced in the juvenile court of the parish of Orleans upon the following affidavit:

"That on the 23d day of September, 1911, being in the parish of Orleans aforesaid, and within the jurisdiction of the juvenile court of said parish, one Mose Jacobs did then and there, in 827 Carondelet street, willfully and maliciously, and without cause or provocation, assault and beat one Esther Sharples, a minor child, aged 16 years, residing at 1933 Bordeaux street. The said Esther Sharples being a delinquent child."

The accused has appealed, and urges, among other reasons why the judgment

against him should be set aside, that the juvenile court was without jurisdiction to try the case.

The juvenile court, as its name implies, is a court of special jurisdiction, designed to deal with juvenile humanity. It was created by Act No. 83, p. 96, of 1908, as amended by section 3 of Act No. 48, p. 72, of 1910, which reads:

"Be it further enacted, etc. The juvenile court in the parish of Orleans, and the district courts outside of said parish, sitting as juvenile courts, shall have jurisdiction of the trial of all children under seventeen years of age who may be charged in said courts as neglected or delinquent children, except for capital crimes, and of all persons charged with contributing to the neglect or delinquency of children under seventeen years of age, or with a violation of any law now in existence or hereafter enacted for the protection of the physical, moral or mental well-being of children not punishable by death or hard labor.

"Said courts shall have jurisdiction of all cases of desertion or nonsupport of children by either parent."

Jurisdiction is here given in four categories of cases:

(1) Those of neglected or delinquent children.

(2) Those of persons contributing to the neglect or delinquency of neglected or delinquent children.

(3) Those of persons charged with the violation of any law now in existence or hereafter enacted for the protection of the physical, moral, or mental well-being of children.

(4) Those of desertion or nonsupport of children.

Clearly the case of the accused does not fall within either the first, second, or fourth of these categories, as he is not charged, either with being a delinquent child, or having contributed to the neglect or delinquency of any neglected or delinquent child, or of having deserted or failed to support a child. Does it fall within the third of these categories?

We have no hesitation whatever in saying that the laws which are meant to be referred to by the expression of "any law now in existence or hereafter enacted for the protection of the physical, moral or mental well-being of children" are not the laws enacted for the good of society in general, such, for instance, as the law which makes assault and battery a crime, but only those laws having special reference to the protection of children, such as statutes regulating the custody and care of children, their employment and admission to places of amusement and other places supposed to be subversive of the morals of children, the sale of prohibited articles to them, etc. There is in our statute books quite a body of these laws, and the prevailing tendency is to the enactment of a great many more.

The expression "laws enacted for the pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

tection of children," in the connection in which we here find it, is the equivalent of the expression "laws enacted with a view specially to the protection of children."

In fact, the expression is even less general than we have here given it. It does not say, in general terms, the protection of children, but "the protection of the physical, moral or mental well-being of children." By this qualification, the intention to designate those laws enacted specially with reference to children is, we think, unmistakably indicated. Assault and battery is not such a law, but is a general law, having reference to adults as much as to children; and therefore the juvenile court had no jurisdiction of the present case.

Judgment set aside, and the accused ordered to be discharged without day.

His honor, the CHIEF JUSTICE, dissents.

(130 La.)

No. 19,248.

STATE v. PULLEN.

(Supreme Court of Louisiana. Feb. 26, 1912.)

(Syllabus by the Court.)

1. HOMICIDE (§ 264*) — EVIDENCE — DANGEROUS CHARACTER OF DECEASED.

The question of whether a sufficient foundation has been laid to introduce evidence to show an overt act on the part of the deceased, and to show the dangerous character of the deceased, is one largely in the discretion of the trial judge; and his decision will not be interfered with, except when there is a clear showing of error on his part.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 558; Dec. Dig. § 264.*]

2. HOMICIDE (§ 332*) — EVIDENCE—DANGEROUS CHARACTER OF DECEASED—REVIEW.

The trial judge who hears the witnesses and notes their appearance and manner of testifying is competent to pass upon the weight to be given their testimony, and is not necessarily controlled by the number of witnesses on each side; and this court will not say that his appreciation of the weight of evidence was false, unless made to clearly appear so from the record, and only when such a showing amounts to manifest error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 699-704; Dec. Dig. § 332.*]

3. INDICTMENT AND INFORMATION (§ 169*)—ISSUES—EVIDENCE—FUGITIVE FROM JUSTICE.

It is not necessary to negative prescription in the indictment by alleging a state of facts to show that the accused was a fugitive from justice; and this latter fact may be shown on the trial without alleging it in the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 320, 535; Dec. Dig. § 169.*]

4. WITNESSES (§ 361*) — IMPEACHMENT — REBUTTAL.

A witness whose evidence is sought to be impeached may meet such an attempt by proof of his reputation for truth and veracity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1165, 1167-1175; Dec. Dig. § 361.*]

5. INDICTMENT AND INFORMATION (§ 11*)—RETURN—AMENDMENT—PAROL EVIDENCE.

It was competent for the court to permit the clerk to amend his minutes, so as to show the date on which the indictment had been returned. Parol evidence is always admissible to cure the omission of a ministerial act in criminal proceedings.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 62-75; Dec. Dig. § 11.*]

6. CRIMINAL LAW (§ 1090*) — APPEAL—BILL OF EXCEPTIONS.

This court will not pass on a ruling of the lower court in a criminal proceeding, unless a formal bill of exceptions has been reserved and filed; as the defendant failed to reserve a bill to the refusal of the trial judge to grant a new trial, this court cannot review his ruling.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.*]

Appeal from Eleventh Judicial District Court, Parish of Natchitoches; Sam J. Henry, Judge.

Jeff Pullen was convicted of manslaughter, and appeals. Affirmed.

Scarborough & Carver, for appellant. Walter Gulon, Atty. Gen., and W. A. Wilkinson, Dist. Atty. (G. A. Gondran, of counsel), for the State.

BREAUX, C. J. The defendant, Jeff Pullen, was indicted by the grand jury of Natchitoches parish, on the 7th day of December, 1911, for the alleged murder of Henderson Jones in that parish on the 1st day of November, 1904. He was put on his trial on the 7th day of December, 1911, and on that day he was convicted of manslaughter, and his punishment was assessed at 10 years in the penitentiary.

He reserved a number of bills of exceptions. In the first, it is stated that the accused sought to prove by two witnesses, to wit, the accused himself and a Frank Morris, that, at the time of the shooting, the deceased had drawn a pistol and was advancing on the accused.

The state examined Kennedy Wade to prove that this was not true, and that, at the time of the shooting, the deceased was not armed.

[1] The accused, assuming that sufficient foundation had been laid to admit testimony of an overt act by the deceased, then tendered a number of witnesses who were willing to testify that the deceased was a bad and a dangerous man. Whereupon the district attorney objected to the admissibility of this testimony.

The trial court was not of opinion that an assault had been made, as witnesses had testified that no assault had been made; but, on the contrary, the accused made search for the deceased and when he met him provoked the trouble; and, furthermore, that, when the defendant, Pullen, was testifying he was asked if he knew Henderson Jones' character

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and reputation, to which he replied that he did not.

The court's ruling at the time was that, before the dangerous character of the deceased can be proven, it must be made to appear that an overt act was made, and that the prisoner knew of the dangerous character of the deceased.

We are of opinion that the court's ruling was correct. It was for the trial judge to pass upon the issue and to decide whether proper foundation had been laid, in order that the deceased might offer testimony of an overt act.

The following are pertinent decisions on the subject: *State v. Ford*, 37 La. Ann. 443; *State v. Perlen*, 107 La. 606, 31 South. 1016; *State v. Golden*, 113 La. 801, 37 South. 757; *State v. Feazell*, 116 La. 264, 40 South. 698; *State v. Davis*, 123 La. 133, 48 South. 771; *State v. Miller*, 125 La. 254, 51 South. 189; *State v. Davis*, 127 La. 263, 53 South. 558; *State v. Tasby*, 110 La. 122, 34 South. 800.

It has been decided in two or three of the decisions above cited, in which the question was at issue, that the judge's ruling will not be disturbed on appeal, in the absence of positive and convincing evidence of error.

We have reviewed the testimony at the time, our attention was attracted by the statement of the trial judge, before noted, that witnesses had been heard in the case who said that former witnesses had testified positively that no assault had been made by the deceased, thereby directly contradicting plaintiff as a witness and his witness Morris. The testimony of these other witnesses is not before us. They were not recalled in order to have their testimony taken, as might have been done if defendant had asked for their return to the witness stand, in order to have their testimony down to be reviewed on appeal. This was not done. In *State v. Dan Benjamin*, 127 La. 518, 53 South. 847, witnesses were recalled to be cross-examined.

In the present case, it does not appear that the defense sought to have witnesses recalled, or to have anything said by witnesses taken down, other than the evidence which is before us, and which does not prove that the trial judge erred.

The present case is more conclusive for the state, for the reason that, considering the issues without reference to the witnesses that had already testified, the foundation does not appear to have been laid.

[2] The trial judge can be trusted in deciding that the testimony of one witness was of more weight, in his opinion, than the testimony of the accused and a witness who testified for the accused. The court did not believe the accused, and stated, in substance, that the defense's witness, Morris, is unworthy of belief. He and the accused, as witnesses, did not impress the court evidently.

The number of witnesses is not always

controlling, but the appearance of witnesses, their manner of testifying, their apparent sincerity, and other traits of character which are considered in forming an opinion of witnesses' testimony.

Not having found error in the ruling, we take up the next point stated. It was, in effect, that the state proved that the accused became a fugitive from justice in order to interrupt prescription. The defense urges that the indictment contained no allegation of defendant having become a fugitive from justice, and objected to the evidence offered to prove the asserted fact.

[3] The court correctly overruled the objection. Evidence of flight is admissible, although prescription is not negated in the indictment. It may come up on the merits as going to show guilty apprehension. *State v. Beatty*, 30 La. Ann. 1266; *State v. Dufour*, 31 La. Ann. 804; *State v. Harris*, 48 La. Ann. 1189, 20 South. 729; *State v. Middleton*, 104 La. 233, 28 South. 914; *State v. Austin*, 104 La. 410, 29 South. 23; *State v. Nash*, 115 La. 719, 39 South. 854.

The next bill of exceptions relates to the alleged attempt made, as set forth in the bill of exceptions, to impeach the testimony of an important witness. The contention on the part of the defense was that there was no attempt made on the part of the defense to impeach the witness, and that it was not in accordance with the rules of evidence to introduce testimony with the view of giving some force to the testimony of the witness.

The statement of the court that there was such an attempt made by defendant to impeach the witness for the state is positive and direct.

The following is the statement of the trial court forming part of the bill of exceptions: The objection was overruled by the court for the following reason: Said Wade was contradicted by the defense's witness, Frank Morris, and the accused himself, and the attorney for the accused proclaimed loudly that he had many witnesses to impeach Wade, and when objected to by the district attorney the court forced the district attorney to put Wade back upon the stand, so that proper foundation for an impeachment could be made, and, in the presence of the jury, several witnesses were sent for and called to impeach.

One of the bills of exceptions shows that if the witness for the state swore to the truth the witness Wade swore to a falsehood.

[4] A witness whose evidence is sought to be impeached may meet such an attempt, as in this case, by proof of his reputation for truth and veracity. *State v. Boyd*, 38 La. Ann. 374; *State v. Fruge*, 44 La. Ann. 165, 10 South. 621; *State v. Desforges*, 48 La. Ann. 73, 18 South. 912.

We pass the next bill of exceptions, numbered 4; it has no force according to the statement of the trial judge. It was founded in error on the part of the defense; that

which the defense thought was denied to it was permitted by the trial judge, who adds:

"This is an error as the objection was overruled, and the witness was allowed to testify fully upon the subject."

The objection was made by the state, which the trial judge states he did not sustain, as the defense thought, but the court overruled it.

The next point urged on the part of the defense was that the court permitted the clerk to amend the minutes in accordance with the motion of the district attorney, so as to show that which did not before appear in the minutes that the indictment was returned by the court on the 1st day of December, 1904.

[5] The objection was properly overruled, as parol evidence is admissible to cure errors of a ministerial act in criminal proceedings. *State v. Gates*, 9 La. Ann. 94; *State v. Major*, 88 La. Ann. 642; *State v. Lewis*, 39 La. Ann. 1110, 3 South. 343; *State v. Monceaux*, 48 La. Ann. 101, 18 South. 896; *State v. Grandison*, 49 La. Ann. 1012, 22 South. 308; *State v. Perry*, 51 La. Ann. 1074, 25 South. 944.

The motion for a new trial is not before us. No bill of exceptions was taken as to that motion.

[6] The court will not review or pass on the ruling of the lower court in a criminal case, except where the objection and ruling are set forth in a formal bill of exceptions. *State v. Given*, 32 La. Ann. 782; *State v. Nelson*, 32 La. Ann. 842; *State v. Williams*, 35 La. Ann. 742; *State v. Constock*, 36 La. Ann. 309; *State v. Jackson*, 37 La. Ann. 467; *State v. Rodrigues*, 45 La. Ann. 1041, 13 South. 802.

There is not sufficient ground to reverse the verdict.

For reasons stated, the verdict and judgment are affirmed.

(130 La.)

Nos. 18,846, 18,444.

ROBERSON v. GOLDSMITH et al.

(Supreme Court of Louisiana. Jan. 29, 1912.

On Application for Rehearing,
Feb. 26, 1912.)

(Syllabus by the Court.)

1. JUDGMENT (§ 650*)—CONCLUSIVENESS—FINALITY OF DETERMINATION.

In order to constitute a basis for the plea of *res judicata*, the judgment relied on must be one "from which there can be no appeal, either because the appeal did not lie, or because the time fixed by law has elapsed, or because it has been confirmed on appeal." C. 3556, No. 31.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1162; Dec. Dig. § 650.*]

2. JUDGMENT (§ 707*)—CONSENT JUDGMENT—EFFECT.

The effect of a consent decree as to third persons is merely that of a transaction in authentic form.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1230; Dec. Dig. § 707.*]

3. GUARDIAN AND WARD (§ 134*)—POWERS OF UNDERTUTOR—EFFECT OF JUDGMENT.

An undertutor has no authority to cause execution to issue on a judgment rendered in favor of his ward against the tutor, so long as the latter remains in office, and whatever may be done under such unlawfully issued execution is null.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 457; Dec. Dig. § 134.*]

4. HUSBAND AND WIFE (§ 62*)—DISABILITIES—ESTOPPEL TO ASSESS.

Where a woman upon the representation that she is divorced obtains a decree of emancipation, and joins in the execution of various instruments, all with the purpose and effect of inducing another to part with money, she cannot afterwards, in order to escape liability, and without alleging and proving error on her part and fraud on the part of the other, be heard to say that she was a married woman, unauthorized by her husband, when the money was so parted with.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 282-284; Dec. Dig. § 62.*]

5. ESTOPPEL (§ 14*)—EQUITABLE ESTOPPEL—GROUNDS.

Where a widow in community and her children, emancipated minors, unite in executing a note and securing it by mortgage on the property held in common, and the minors unite in a notarial act declaring that their mother has settled with them in full, and that they have no claim against her or her property, all with the purpose and effect of obtaining from a third person money which is used, with their knowledge and consent, in clearing such property of prior incumbrances, they cannot afterwards, in order to escape liability on such note and with respect to such mortgage, be heard to say that there was no settlement by the mother and tutrix, and that the minors have a legal mortgage priming that so given by them.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 18; Dec. Dig. § 14.*]

6. GUARDIAN AND WARD (§ 74*)—GENERAL MORTGAGE ON TUTOR'S PROPERTY.

The general mortgage of a minor for an unliquidated amount constitutes no legal impediment to the seizure and sale of the property affected at the instance of a judgment creditor of the owner.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 206-218; Dec. Dig. § 74.*]

7. GUARDIAN AND WARD (§ 133*)—ACTION AGAINST TUTOR—JUDGMENT BY CONFESSION—INTEREST.

Whilst a judgment by confession obtained by a minor represented by her undertutor against her tutrix may be conclusive as between the parties thereto, a creditor having a mortgage which is brought in conflict with the general mortgage in favor of the minor is not thereby affected, and may contest the correctness of the minor's claim; and, where it appears that the minor is claiming interest, but that the cost of her maintenance borne by the tutrix would have exceeded any interest which might have been earned by the money due her, such claim will not be allowed at the expense of the creditor.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 453-456; Dec. Dig. § 133.*]

8. MORTGAGES (§ 431*)—ACTION—TRANSFER—RIGHTS OF HOLDER.

Where foreclosure proceedings are brought on a negotiable mortgage note, and no rights

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

are asserted or denied that could not be asserted or denied by or against the owner, the fact that the proceeding is brought by one who is merely the holder of the note is immaterial.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1268; Dec. Dig. § 431.*]

Appeal from the Civil District Court, Parish of Orleans; King, Judge.

Action by William E. Roberson against Mrs. Mary E. Goldsmith and others. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 125 La. 571, 51 South. 646; 128 La. 1019, 55 South. 660.

Benjamin R. Forman, for appellants. Benjamin Ory and James C. Henriques, for appellee.

Statement of the Case.

MONROE, J. Plaintiff obtained an order for executory process on a note for \$1,200 of date October 12, 1908, secured by mortgage; both note and act of mortgage having been executed by Mrs. Mary E. Goldsmith and three of her children by a previous marriage, to wit, Sue Virginia Tilton, appearing as the divorced wife of James R. Bass, Alloys Mary (known as Alice) and Newell, Tilton, emancipated minors, and the property purporting to have been mortgaged being two lots of ground in this city. Thereupon Mrs. Goldsmith, appearing as the tutrix of the minor, Pearl Tilton, and Sue Virginia Tilton, appearing as the wife of Dr. W. W. Coulter, intervened and obtained an injunction, alleging, in substance, (1) that plaintiff is not the owner of the note sued on; that the mortgage named in the act knew that the minor, Pearl, owned a one-eighth interest in the mortgaged property, and that she and her brother and sisters had a legal mortgage on their mother's half interest therein, inscribed April 20, 1906, to secure \$9,598.50; (2) that Mrs. Coulter was a married woman, unauthorized by her husband, when she signed said note and act of mortgage, and that, as to her, they were without consideration, and that her mother had never accounted to her as tutrix; (3) that on October 7, 1909, the undertutor of the minor, Pearl, having obtained judgment in her behalf against her tutrix, caused the half interest of the tutrix in said lots to be sold under *fi. fa.*, and adjudicated to him. An exception of no cause of action to the intervention was sustained by the district court, but the judgment was reversed on appeal. 125 La. 571, 51 South. 646. And, the case having been remanded, there was a trial on the merits, resulting in a judgment in favor of the plaintiff (in executory process), from which Mrs. Goldsmith, tutrix, and Mrs. Coulter, have again appealed. The lots in question were acquired by A. G. Tilton (of whom Mrs. Goldsmith was then the wife) as community property. A. G. Tilton died in April, 1896, leaving his widow and four children, the minors whose

names have been mentioned. The widow was confirmed as natural tutrix. An abstract of inventory was filed, showing that, according to the inventory, "the property belonging to the minors or in which they have any interest is appraised at the sum of \$9,598.50." Newell Tilton was shortly afterwards (August 22, 1906) emancipated by judgment of court. Mrs. Coulter, appearing as the divorced wife of Bass, was emancipated by judgment of court on September 30, 1908, though, as a matter of fact, she had been married to Dr. Coulter on May 7, 1908, and Miss Alice Tilton was emancipated by judgment of court, September 30, 1908. On October 12, 1908, Mrs. Goldsmith (formerly Mrs. Tilton), who had married again and had been appointed dative tutrix, with the three emancipated minors, executed the note here sued on and the act of mortgage (Mrs. Coulter again appearing as the divorced wife of Bass, and giving the notary to understand that she was a *feme sole*), in consideration of which they received \$1,200 cash, which was used in paying off recorded mortgages and privileges resting upon the property in question, and in defraying the expense incidental thereto; and the three emancipated minors upon the same day executed another notarial act, whereby they declared that their mother and tutrix had settled with them, after having 10 days before furnished them with her account and all papers and vouchers connected therewith, and that they were satisfied and granted her a full release and discharge from all claims and demands and all liens, privileges and mortgages. The note here sued on matured on October 12, 1909, but on August 24, 1909, Stanley D. Graham, as undertutor of Pearl Tilton, Mrs. Coulter, Alice Tilton, and Newell Tilton filed a petition in the succession of A. G. Tilton, alleging that Mrs. Goldsmith was indebted to them on account of her tutorship, and on the same day obtained judgment against her, by confession, each for \$1,375, with interest from April 20, 1897, "and with recognition of her legal mortgage to date from April 20, 1897." On the following day execution was issued at the instance of Pearl Tilton, and the half interest of Mrs. Goldsmith in the lots here in question was seized, and on October 7, 1909, adjudicated to said undertutor for \$2,300, which amount, save certain costs, he retained. On October 12th plaintiff herein obtained his order of seizure and sale, and the writ, as issued, directed the sheriff to seize the whole of the two lots, and thereupon the injunction issued.

On December 7th following Mrs. Goldsmith, as tutrix of Pearl Tilton, Stanley D. Graham, as undertutor, Mrs. Coulter, Miss Alice Tilton, and Newell Tilton, proceeded, by rule, in the succession of A. G. Tilton, to have canceled certain mortgages which rest-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes.

ed upon the half interest of the tutrix (adjudicated to the undertutor, as heretofore stated) in the lots in question, to wit, the general mortgage in favor of Pearl Tilton and against her tutrix, the mortgage of \$1,200 in favor of plaintiff herein, and a judicial mortgage resulting from the inscription of a judgment for \$390 obtained by Dr. Bruning against Mrs. Goldsmith, the allegations being that the property had been sold in satisfaction of the general mortgage against the tutrix, and that said mortgage primed the others.

Defendant in rule (plaintiff herein) answered, alleging that his mortgage was valid; that the judgment against Mrs. Goldsmith had been obtained by confession and collusion for the purpose of defrauding him; and that the execution and sale thereunder were void, for the reason that no final judgment could be rendered and no execution could run against the tutrix, at the instance of the undertutor, until the termination and settlement of the tutorship, and, assuming the character of plaintiff in reconvention, he prayed that said rule be dismissed, that his mortgage be recognized as in full force, and that the sale of the interest of his debtor in the mortgaged property as under a superior privilege and the judgment purporting to authorize such sale be decreed void. Upon the pleadings so presented and after hearing evidence and argument, the judge a quo gave judgment dismissing the rule, and, further, as follows:

"And decreeing in favor of said respective defendants that their several mortgage rights, witnessed by the inscriptions in the mortgage office, sought herein by this rule to be canceled, were and are in no wise affected by the judgment of August 24, 1909, in the succession of A. G. Tilton * * * in the suit of Stanley D. Graham, Undertutor, et al. v. Mrs. Mary Goldsmith, Tutrix, or by the seizure and adjudication made by the civil sheriff under the writ issued on said judgment, and that, as to all the defendants in this rule, said judgment, writ, and adjudication are null and of no effect. In all other respects the demands of the several parties to this rule are dismissed with (out) prejudice to the rights of any party having interest to proceed for the nullity of said judgment of August 24, 1909, hereafter."

The judgment so rendered (on January 12, 1910) was signed March 3, 1910; and, as no appeal therefrom was taken until March 1, 1911, plaintiff herein has made it the basis of a plea of *res judicata* against the insistence of the interveners in the instant case upon the validity of the judgment and sale thereunder, which, as to him (plaintiff herein), were thus decreed to be "null and of no effect." In the meanwhile—that is to say, on January 19, 1910—whilst the matter of the rule thus referred to was pending upon an application for new trial, the minor, Pearl Tilton, was emancipated by notarial act. On January 26th, however, her tutrix, or former tutrix, asked the district court to convene a family meeting in her

behalf to approve and ratify the act of her undertutor in purchasing her (the tutrix's) interest in the two lots, and the family meeting was convened and approved and ratified accordingly; and thereafter the minor, so emancipated, intervened in this proceeding, and, declaring that she ratified said act, asked that judgment be rendered herein as originally prayed for by the tutrix. The judgment as rendered, however, rejects the demands of the interveners and opponents, sustains plaintiff's plea of *res judicata*, recognizes the note and mortgage sued on as valid and as enforceable and executory "upon the seven undivided eighths interest" of Mrs. Goldsmith, Mrs. Coulter, Miss Alice Tilton, and Newell Tilton, in the lots in question, dissolves the injunction, decrees the nullity of the sale to Pearl Tilton of Mrs. Goldsmith's half interest in said lots, recognizes the claim of Pearl Tilton against her tutrix to the extent of \$1,375, without interest, and limits said claim to that amount, condemns the interveners and opponents to pay all costs, and reserves the right of the plaintiff herein hereafter to claim damages. And from the judgment so rendered interveners and opponents prosecute this appeal.

Opinion.

Counsel for the appellee have filed briefs under the numbers and titles in this court of the transcripts of both appeals (i. e., the appeal in the Succession of Tilton from the judgment on the rule to cancel mortgages, and the appeal, in the case, the title and number of which appear at the head of the opinion), and they style the two "consolidated cases," but counsel for appellant says in the last brief filed by him:

"The learned counsel of William E. Roberson, otherwise E. A. Carrere, falls into the error of supposing that the proceedings in the succession of Albert G. Tilton, on appeal here, No. 18,844, were consolidated with the case of William E. Roberson v. Mrs. Mary Goldsmith, on the third opposition of Mrs. Mary Goldsmith, tutrix, and others, on appeal here, No. 18,846. The matter of the succession of Albert G. Tilton has never been fixed for trial, and no brief has been prepared in that case for that reason. The judgment in the succession of Tilton was rendered nearly a year before the judgment appealed from in the case of Roberson v. Goldsmith."

The transcript, No. 18,844, was filed in this court on April 22, 1911, and transcript No. 18,846 was filed on May 8, 1911. We find in the transcript last mentioned written instructions from the counsel on either side to the clerk as to its preparation, and we observe that counsel for the appellants gave the following, among other, instructions:

"In a former appeal in this case, a transcript was made and filed, No. 18,019 [125 La. 571, 51 South. 646] Supreme Court. Therefore omit in the transcript of appeal all papers and documents copied in that transcript. Also omit all the papers and documents copied in the transcript in Succession of Albert G. Tilton."

In this court counsel filed a motion, suggesting that the two transcripts above mentioned contain much that is pertinent to the present appeal, and concluding in the form of an order that:

"Said two transcripts may be annexed to and considered, so far as the same are pertinent, on the argument and hearing of this case."

We, however, find no motion for the consolidation of the cases, and, whilst it appears to us that such a course, which was entirely open to the parties, would have tended to facilitate matters, we cannot at this time order the consolidation. And, as appellants seem to prefer that the cases shall be considered separately, we shall confine ourselves for the present to the case of *Roberson v. Goldsmith*, contained in the transcript No. 18,846.

[1] 1. When this case was tried in the district court, the year within which the parties thereto were entitled to appeal from the judgment on the rule to cancel mortgages, which judgment is here made the basis of the plea of *res judicata*, had not expired, and before its expiration the appeal was taken. The plea of *res judicata* was therefore improperly sustained. C. C. 3556, No. 31; *Escurix v. Daboval*, 7 La. 578.

[2] 2. It is an elementary proposition that no one can be bound by transactions or proceedings to which he is not made a party, and it is clear that when Mrs. Goldsmith's three children, Mrs. Coulter, calling herself the divorced wife of Bass, Miss Alice Tilton, Newell Tilton (who had but recently joined with her in obtaining \$1,200 upon their representation that she owed them nothing and upon their notarial release of all demands, liens, privileges, etc., against her and her property), and the undertutor of the minor, Pearl Tilton, upon the one side, and Mrs. Goldsmith, upon the other, went off to themselves and agreed that Mrs. Goldsmith owed each of the others \$1,375, and that the aggregate amount was secured by their original minor's mortgage against her property, priming that of the plaintiff, for the \$1,200 which had been advanced, the rights of the plaintiff were in no wise affected. Nor does it alter the case that the parties thereto had the agreement put in the form of a judgment, since plaintiff was no more a party to the one than to the other, and did not become interested in either until it was attempted to make use of the agreement in the form of a confessed judgment, to the prejudice of his rights, and then only to the extent necessary to prevent such attempt from succeeding.

"Consent decrees decide nothing. They merely authenticate private agreements, rendering them executory between the parties. Their effect as to third persons is that of a transaction in authentic form." 1 Hennen's Dig. p. 742, No. 9.

Leaving to the consent judgment in this case, therefore, such effect between the parties as it may be entitled to, we are of opinion that, as to the plaintiff and his rights, it was utterly void of effect. Beyond that, the attempt, by the undertutor, to execute such judgment against the tutrix was unauthorized and barren of legal results as to any one.

[3] In a case decided by our predecessors, it appeared that a judgment having been rendered against a tutrix and her second husband as cotutor, in favor of her children by the first marriage, the undertutor of the minor caused execution to issue under which two slaves were adjudicated to him, whereupon he proposed to pay the price by crediting the same upon the judgment, but the sheriff demanded cash, and, on the refusal of the undertutor to pay, readvertised the slaves under executions which had been issued by another creditor of the cotutor. The undertutor then, acting by the advice of a family meeting, enjoined the proceedings, praying that the sheriff be ordered to make title under the original adjudication; and he appealed from a judgment dissolving his injunction. In deciding the question presented on the appeal, this court said:

"The judge below properly dissolved the injunction. The undertutor, whose duty it is to act for the minor when the latter's interest is adverse to that of the tutor, is the proper person, contradictorily with whom the accounts of the tutor must be settled. The judgment which is rendered thereupon fixes the amount due to the minor, and which, in the hands of the tutor, is to be administered upon; but the undertutor is without any authority to execute such a judgment against the tutor, as long as the latter remains in office. The undertutor has no right to receive any part of the property or funds belonging to the minor. If they are considered unsafe in the hands of the tutor, or if there exists against the latter any sufficient cause, the undertutor is authorized to sue for his removal and for the appointment of another tutor, who upon giving security would be competent to enforce the minor's rights and claims against the former tutor. The execution in this case directs the sheriff to seize and sell the property of the tutrix and cotutor, and to pay the funds thus obtained to the undertutor. The latter, being clearly unauthorized to receive and administer those funds, would have had to hand them over to the tutrix and cotutor, who were alone competent to receive them. Thus the money made on the minor's execution would return into the hands of the very persons out of whose property it was levied. If the whole amount of the judgment was obtained in the same way, the result would be to convert into specie, in the hands of the tutor, all the property on which the minor had a legal mortgage, and thus deprive him of the security provided by law. A proceeding which would lead to such preposterous consequences cannot receive our sanction. The tacit mortgage of the minor can be enforced against a tutor only at the termination of his functions in one of the modes provided by law. If the minor or his legal representative does not then find, in the possession of his tutor, sufficient property to satisfy his claim in consequence of sales made by the tutor or of executions levied on his property, his tacit mortgage may be enforced against the pur-

chasers in the order pointed out by article 715 of the Code of Practice. * * * If the execution was unlawfully issued, everything under it is null." *Holmes, Undertutor, v. Hemkin et al.*, 6 Rob. 58.

See, also, *Gibbs v. Lum*, 29 La. Ann. 526; *Cochran v. Violet*, 37 La. Ann. 223; *Schnieder v. Burns*, 45 La. Ann. 875, 13 South. 175.

We therefore conclude that the adjudication by the sheriff to the undertutor of the half interest of the tutrix in the property in question operated no change in the title.

[4] 3. Mrs. Coulter, having represented herself as a divorced woman, for the purposes of her emancipation and of the note and mortgage here sued on, cannot be heard to say that she was a married woman when said note and mortgage were executed. *Henry v. Gauthreaux*, 32 La. Ann. 1107; *Kohlman v. Cochrane*, 123 La. 219, 43 South. 914.

[5] 4. Mrs. Goldsmith and her children (other than the minor, Pearl Tilton), having united in the representation to the prospective holder, or holders, of the note and mortgage sued on that, as to them, all incumbrances on the property mortgaged were released and all claims discharged, and having obtained the money which plaintiff is here seeking to recover and authorized its use in discharging obligations already resting on said property, cannot now be heard to assert claims which they thus declared had no existence.

[6] 5. It is well settled that the general mortgage of a minor for an unliquidated amount constitutes no legal impediment to the seizure and sale of property affected at the instance of a judgment creditor of the owner. *C. P. 710*; *Eagan v. Bell*, 13 La. Ann. 508; *Laplace v. Haydel*, 19 La. Ann. 363; *Tessier v. Bourgeois*, 38 La. Ann. 256.

[7] 6. It having been alleged in the suit of the undertutor against the tutrix that the amount due the minor, Pearl Tilton, was \$1,375, and judgment having been rendered for that amount, with interest, we are of opinion that, whether the minor is thereby concluded or not, the evidence offered to show that she is entitled to a larger amount is insufficient for that purpose. The plain-

tiff, however, contests the claim for interest, and his position is sustained by the facts and the law. The minor is shown to have lived with, and to have been provided for by, her mother during the period for which the interest is claimed, and it is evident that the amount of interest accruing from \$1,375 would not have been sufficient to defray the expense of her maintenance. Her claim cannot, therefore, be allowed. *Succession of Guillemin*, 2 La. Ann. 638; *Timberlake v. Braud*, 5 La. Ann. 715.

[8] 7. We notice the contention that the plaintiff is not the owner of the note sued on merely to say that we find nothing in it. The note is negotiable, but plaintiff, as holder, is asserting no right that the owner could not assert, and the makers have been deprived of no advantage which they would have enjoyed if the owner had sued in person.

We find no error in the judgment appealed from, save in the matter of the maintenance of the plea of *res judicata*, and, as that is not material to the result, the judgment is affirmed.

On Application for Rehearing.

The judgment of the district court having recognized the claim of the minor, Pearl Tilton, to the extent of \$1,375, and that judgment having been affirmed by this court, she should have been allowed her costs in both courts.

It is therefore ordered, adjudged, and decreed that the decree heretofore handed down in this case be recast so as to read as follows, to wit:

It is ordered, adjudged, and decreed that the judgment appealed from be amended in so far as that the plaintiff in the seizure, William E. Roberson, and the plaintiff in the intervention and injunction, Mrs. Sue Virginia Tilton, wife of Dr. W. W. Coulter, be condemned, in equal proportions, for the costs of the district court. It is further decreed that, as thus amended, said judgment be affirmed. It is further decreed that the costs of this appeal be paid by said named parties in the same proportions. The rehearing is refused.

SMITH v. STATE. (No. 15,455.)

(Supreme Court of Mississippi. March 25, 1912.)

CRIMINAL LAW (§ 784*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

An instruction that a person can be convicted of being a common prostitute on circumstantial evidence is error, where it omits the qualification that such circumstantial evidence must be sufficient to exclude every other reasonable hypothesis than that of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883–1888, 1922, 1960; Dec. Dig. § 784.*]

On suggestion of error. Suggestion sustained, former decision and judgment below reversed, and case remanded.

For former decision, see 57 South. 368.

SMITH, J. One of the instructions granted in the court below, at the request of the state, is as follows: "The court instructs the jury, for the state, that a person may be proved to be a common prostitute by circumstances, and if the jury believe from the evidence in this case, beyond every reasonable doubt, that the defendant is a common prostitute, then it is their duty to find the defendant guilty as charged, although there may be no direct evidence of sexual intercourse." The granting of this instruction was fatal error, for the reason that "it omits the necessary qualification that circumstantial evidence, in order to prove guilt beyond a reasonable doubt, must exclude every other reasonable hypothesis than that of guilt." *Williams v. State*, 95 Miss. 671, 49 South. 519; *Permenter v. State*, 54 South. 949; *Irving v. State*, 56 South. 377.

The judgment heretofore entered, therefore, is set aside, the judgment of the court below reversed, and the cause remanded.

CANADA v. YAZOO & M. V. R. CO.

(No. 15,484.)

(Supreme Court of Mississippi. March 25, 1912.)

1. CONTRACTS (§ 187*)—CONTRACT FOR BENEFIT OF THIRD PERSON.

Where the wife of a person paid the money for his transportation to the agent of a railroad company, who agreed to notify the husband that a ticket was awaiting him, the contract was made for the benefit of the husband, and suit for a breach was properly brought in his own name.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798–807; Dec. Dig. § 187.*]

2. PLEADING (§ 7*)—MATTERS OF IMPLICATION.

A complaint seeking to charge a carrier for a breach of a contract for the carriage of the plaintiff, who was sick, which alleges that the contract was made with an agent of the defendant, is sufficient as against demurrer, as the allegation carries with it the inference that the agent acted within the scope of his authority.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 11; Dec. Dig. § 7.*]

Appeal from Circuit Court, Warren County; H. C. Mounger, Judge.

Action by Meredith Canada against the Yazoo & Mississippi Valley Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The appellant, who was plaintiff in the court below, filed his declaration, alleging in substance that the defendant had agreed with plaintiff's wife at Rosedale, upon the payment of the fare from Vicksburg to Rosedale, to transport plaintiff, who was then sick in the hospital at Vicksburg, from Vicksburg to his home in Rosedale; that plaintiff's wife had paid the money for his transportation to the defendant's agent at Rosedale, and had an agreement with the agent that plaintiff, whose address was given, would be notified as soon as possible that the ticket was waiting for him at the office at Vicksburg, and to furnish him with said ticket in accordance with the contract; that because of plaintiff's physical condition it was important that he be promptly notified, but that the defendant did not notify plaintiff until three days after the ticket was bought by plaintiff's wife for him, and then only after plaintiff had telegraphed his wife to find out the cause of the delay in procuring his transportation. Plaintiff brought an action for breach of the contract, claiming punitive damages in the sum of \$5,000.

To this declaration the railroad company filed the following demurrer, which was sustained by the court: "(1) The said count does not set forth facts sufficient in law to constitute a cause of action against this defendant. (2) The said count in said declaration does not show that the alleged sale of a ticket from Vicksburg to Rosedale, under the alleged circumstances set forth in said second count, was made for any consideration other than the payment of the regular lawful rate for the transportation of a passenger from Vicksburg to Rosedale. (3) Because said count does not show that the agent therein referred to had authority to make the contract alleged in said count of said declaration to have been made. (4) Because the contract and agreement alleged in said count in said declaration, if there was one, was with the wife of the plaintiff, and not with the plaintiff; and, if there is any cause of action thereunder, it is in favor of the wife of the plaintiff, and not in favor of the plaintiff. (5) Because said second count in said declaration does not show any right of action in the plaintiff."

Albert M. Bonelli, for appellant. Mayes & Longstreet, for appellee.

SMITH, J. [1] The contract sued on having been made by plaintiff's wife with appellee for his (plaintiff's) benefit, he has the right to maintain a suit for the breach thereof in his own name. *Sweatman v. Parker*,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

49 Miss. 19; 30 Cyc. 65; 15 Ency. Plead. & Prac. 509.

[2] The allegation that the contract sued on was made with an agent of the defendant carries with it the inference that in making it the agent acted within the scope of his authority. 31 Cyc. 1627; 16 Ency. Plead. & Prac. 900. Whether or not this agent in fact acted within the scope of his authority can therefore be determined only when the proof comes in.

The demurrer should have been overruled, and consequently the judgment of the court below is reversed, and the cause remanded.

YAZOO & M. V. R. CO. v. WOODRUFF. (Supreme Court of Mississippi. March, 1910.)

Dissenting opinion.

For majority opinion, see 53 South. 687.

MAYES, C. J. My conviction that this case should be affirmed is so strong that I feel compelled to dissent. The whole court agrees that the case made by appellee was one in which no peremptory instruction was proper, unless section 193 of the Constitution of 1890 (section 4056 of the Code of 1906; chapter 194, p. 204, Laws 1908), has application. In my opinion section 193 of the Constitution is in no way involved in this case, since it clearly appears that the defective appliance rendered the engine neither dangerous nor unsafe. By section 193 of the Constitution, every employé of any railroad corporation—the engineer, conductor, brakeman, flagman—all are given the same rights and remedies for injuries sustained by them from the act or omission of the corporation, or its employés, as is allowed by law to other persons not employés, etc., save in the single exception made as against engineers and conductors, which I shall now notice.

Equality of right as against the railroad corporation is established as to all employés, except as to conductors and engineers voluntarily operating dangerous or unsafe cars or engines with knowledge; and this was not the case here. It is stated that Woodruff operated this engine, knowing of the defect which caused his injury, and is therefore precluded from recovery under section 193, which provides that "knowledge by an employé injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall not be a defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them." The particular defect in the engine which caused his injury was a lubricator. The engine which he was operating at the time was complete in all its parts, save this one defect. The testimony shows that it was quite common for these lubricators to explode, so much so that engi-

neers carry a surplus in the cab in order to replace them when they break. The testimony utterly fails to show that this defective lubricator made the engine dangerous or unsafe for operation.

Before an engineer or conductor can be denied the right under this section to recover for an injury so sustained by him, it must be shown that the defect made the cars or engine unsafe or dangerous. This is what section 193 plainly says. We must suppose that every word in the Constitution has some meaning, and that the words employed to express the will of the convention were used advisedly. The section says that "knowledge by an employé injured of the defective or unsafe character or condition of any machinery," etc., "shall be no defense," etc., "except as to conductors or engineers in charge of dangerous or unsafe cars," etc. Note that in the exception it does not say that an engineer or conductor shall not recover if they operate merely defective cars, but dangerous or unsafe cars; and this engine was neither, in so far as it stood as a menace to human life or limb.

It is my judgment that, under section 193 of the Constitution, every employé stands in the same attitude towards the railroad company, as to his rights and remedies, when injured by the act or omission of the company, as all other persons not employés; the single exception being that neither the conductor nor engineer shall recover for an injury, where he knowingly operates a car or engine that is dangerous or unsafe, but that such persons are not precluded from recovery when they knowingly operate a defective car or engine in no sense dangerous or unsafe for use.

TOWN OF DURANT v. ATTALA COUNTY. (No. 15,882.)

(Supreme Court of Mississippi. March 25, 1912.)

TAXATION (§ 913*)—REFUND OR RECOVERY OF TAX—STATUTORY PROVISIONS—REPEAL.

Laws 1886, c. 90, which provided by section 1 that, when certain bridges and turnpikes should be made free, the county supervisors should set apart all bridge taxes collected in a town opposite the bridge, and turn over a list of the bridge tax collected to the county treasurer, who, on demand, should pay such taxes to the town treasurer, to be appropriated to the repair of such bridges, and by section 2 authorized the county supervisors to direct such payment, was amended by Laws 1888, c. 185, so as to make such payment by the supervisors mandatory, and subsequently, and before any money had been paid to such town, the laws of 1886 and 1888 were repealed by Laws 1892, c. 49, without any saving clause. *Held*, in the town's mandamus proceeding, brought after the repealing act, to compel the county supervisors to require the county treasurer to pay over to the town treasurer a certain sum as a refund of such taxes, that the repeal of the earlier laws carried with it all rights and remedies given thereby, and that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

there was no authority left for any legal demand on the county.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1746-1750; Dec. Dig. § 913.*]

Appeal from Circuit Court, Attala County; G. A. McLean, Judge.

Mandamus by the Town of Durant against Attala County. Petition dismissed, and plaintiff appeals. Affirmed.

Boothe & Pepper, for appellant. Luckett & Guyton, H. T. Leonard, S. L. Dodd, and R. H. Thompson, for appellee.

MAYES, C. J. By chapter 90, p. 165, of the Laws of 1886, it was provided:

"Section 1. Whenever the turnpikes and bridges over Big Black river and swamp opposite the towns of Pickens, Goodman, Durant and West, in the county of Holmes, be made free turnpikes and bridges to all parties crossing the same, the board of supervisors of said county are hereby authorized and required to set apart all bridge taxes levied and collected on the property of the town opposite the bridge and turnpike thus made free, and the tax collector of said county shall keep a list of the bridge tax collected on the property of the incorporated town opposite the turnpike and bridge thus made free, and turn over the list of said bridge tax to the county treasurer who upon demand made by a written order of the board of aldermen of any of the said towns whose turnpike and bridge has been made free shall pay over all bridge tax collected from said town to the treasurer of said town, which shall be appropriated to the keeping in good repair said bridge and turnpike.

"Sec. 2. Whenever any of the above bridges and turnpikes are made free as provided for in the first section of this act, the board of supervisors of the county or counties lying immediately east and contiguous to said bridge and turnpike, or bridges and turnpikes, *are hereby authorized* to direct the treasurer of their county to pay over to the treasurer of the town opposite the pike and bridge thus made free, a sum of money taken from the bridge tax collected from the citizens of said town, which sum shall be appropriated to the keeping in good repair said bridge and turnpike."

Chapter 185, p. 252, of the Laws of 1888, amended the above act so as to make the second section *require* the board of supervisors "to direct the treasurer of their county to pay over to the treasurer of the town opposite the pike and bridges thus made free, a sum of money," etc. In other words, the amendment to the act of 1888 made it mandatory upon the board of supervisors to require "the treasurer of their county to pay over to the treasurer of the town a sum of money taken from the bridge tax fund of said county equal to the amount of bridge

taxes collected from the citizens of said town," etc.

Subsequently, and before any money had been paid to the town under the laws of 1886 and 1888, as authorized, chapter 49, p. 40, Laws of 1892, was enacted, which provided:

"That all acts or parts of acts requiring board of supervisors of any counties to appropriate or pay money to the municipal authorities of any city, town or village in another county for the purpose of building, repairing or keeping up any roads, turnpikes or bridges, be and the same are hereby repealed; provided, that said turnpikes and bridges shall remain free public highways and each county maintain them as such to county line.

"This act shall be in force from and after its passage."

It will be noticed that the act of 1892 contains no saving clause, but it is a general repeal of all acts or parts of acts requiring boards of supervisors to pay money to municipal authorities of any city, town, or village in another county for the purpose of building, repairing, or keeping up roads, turnpikes, bridges, etc.

In this condition of the law, and in 1910, the town of Durant, in Holmes county, undertook to collect this money for the first time, and, looking to this end, filed a petition for mandamus against the board of supervisors of Attala county, and eight years after the repealing act of 1892. The petition recites the act of 1886 and 1888, without reference to the act of 1892, and sets out that after the passage of the act the turnpike and bridges over Big Black river opposite the town of Durant, in the county of Holmes, were made free to all parties crossing the same, and after the passage of the act the board of supervisors of the county of Holmes set apart to the town of Durant the bridge tax levied and collected on the property of the town on and after the year 1886, the tax being evidence by the list of bridge tax collected from the property of the town from the year 1886 to 1908. It is alleged in the petition that the tax collector paid the treasurer of the town the sum so collected, which was appropriated to the repair of the turnpike and bridges opposite the town of Durant and located in Holmes and Attala counties. The bridge tax collected and paid to the treasurer aggregated the sum of \$12,891.30. The petition then alleges that under the act of 1886, when the bridges and pikes were made free as required by the act, a liability accrued to the town against the county of Attala, and it became the duty of the board of supervisors of Attala county to require the treasurer of that county to pay to the town of Durant a sum of money, taken from the bridge tax fund of the county of Attala, equal to the amount of property tax collected from the citizens of the town

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of Durant, the money to be appropriated to keeping in repair the bridge and turnpike. The petition then alleges that the board of supervisors of Attala county has refused to perform its duty, as required under the acts of 1886 and 1888, and has not paid to the treasurer of the town the amount which the county of Attala is liable for; that the town of Durant presented to the board of supervisors of Attala county its claim, and requested that same be allowed, but the board of supervisors disallowed the claim and dismissed the petition seeking to have same allowed. The petition concludes with a prayer that the board of supervisors of Attala county be required, by mandamus, to issue their warrant on the treasurer of Attala county for the sum above specified. The board of supervisors of Attala county demurred to this petition for mandamus, and upon a hearing the court dismissed the petition for mandamus, and from this action an appeal is prosecuted.

At the time of the institution of this suit the acts of 1886 and 1888, giving the cause of action to the town against the county were both repealed, so that at the time of the filing of this suit there was no foundation in law for it. The cause of action was conferred by statute, and by statute it was taken away. On page 1223, vol. 36, Cyc., the rule on this subject is stated to be that "the repeal of a statute without any reservation takes away all remedies given by the repealed statute and defeats all actions pending under it at the time of its repeal. The rule is especially applicable to the repeal of a statute creating a cause of action, providing a remedy not known to the common law or conferring jurisdiction where it did not exist before, and is carried to such an extent as to abate proceedings pending upon appeal after verdict in favor of plaintiff."

The rule stated above is followed by this court in the cases of *Bradstreet Co. v. Jackson*, 81 Miss. 233, 32 South. 999, *French v. State*, 53 Miss. 651, *Musgrove v. Railway Co.*, 50 Miss. 677, and *Anding v. Levy*, 57 Miss. 58, 34 Am. Rep. 435. In 81 Miss. 233, 32 South. 999, supra, Justice Calhoun for the court, after citing many authorities, states "that everything falls with the abrogated law not fully executed under it, except where contract rights have vested. Especially is this true in matters of taxation." No contract rights are involved in this litigation. As long as the law existed it was within the power of the town of Durant to collect what the act specified should be paid by Attala county; but the whole right depended for its existence upon the statute which created the right, and when the law was repealed there was no authority left for any legal demand on the county. If the claim is lost, it is lost through the inaction of the town of Durant in not pursuing the law at the time there was a subsisting statute. In the case

of *Musgrove v. Vicksburg & Nashville R. R. Co.*, 50 Miss. 677, it is said that "each legislative body has the same measure of lawmaking power as its predecessor. Each judges for itself as to the measures and policies that will conduce to the public good. Each may undo what its predecessor has done." It is simple justice to state that the act of 1892, repealing the acts of 1886 and 1888, was not referred to by counsel on either side in the court below, or in this court, until long after the case had been finally submitted.

Affirmed.

FINKBINE LUMBER CO. v. CUNNINGHAM. (No. 15,053.)

(Supreme Court of Mississippi. March 25, 1912.)

1. MASTER AND SERVANT (§ 277*)—INDEPENDENT CONTRACTOR—EVIDENCE—SUFFICIENCY.

In an action by a servant for injuries, evidence held to show that he was a servant of the defendant, and was not employed by an independent contractor.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 953; Dec. Dig. § 277.*]

2. MASTER AND SERVANT (§ 268*)—ACTIONS—EVIDENCE.

In an action by a servant for injuries, where the defendant claimed that he was employed by an independent contractor, and was not its servant, evidence that the defendant carried accident insurance on the servants of the alleged independent contractor was admissible to show that defendant was the real master, and that the contractor was only one of its employés.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 910; Dec. Dig. § 263.*]

3. MASTER AND SERVANT (§ 289*)—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

In an action by a servant for injuries, evidence held to raise a question for the jury as to plaintiff's contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 107*)—INJURIES TO SERVANT—SAFE PLACE TO WORK—DUTY OF MASTER.

The duty of the master to furnish his servant a safe place to work, not only requires him to furnish a reasonably safe place when the servant begins to work, but requires him to keep that place in a reasonably safe condition; and so, where the proprietor of a lumber mill allowed accumulations to gather around the saws, causing an injury to a servant, he was liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 178, 179, 199-202, 212, 254, 255; Dec. Dig. § 107.*]

5. MASTER AND SERVANT (§ 185*)—INJURIES TO SERVANT—SAFE PLACE TO WORK—DELEGATION OF DUTY.

Where a servant of a lumber company was injured through the failure of the company to remove accumulations of trash from around the saws, the company cannot escape liability because the accumulation was due to the negligence of another servant; the duty of the master to furnish the servant with a safe place to work being nondelegable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Circuit Court, Harrison County; T. H. Barnett, Judge.

Action by J. B. Cunningham, by his next friend, against the Finkbine Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Miller & Dodds, for appellant. J. H. Mize, for appellee.

MAYES, C. J. In January, 1909, the Finkbine Lumber Company was engaged in the general sawmill business in Harrison county, and in connection therewith operated certain machines for the purpose of manufacturing staves, laths, and shingles. Some time in January of that year the company made a proposition to one W. H. Guy, whereby it was proposed that Guy should assume the control and operation of that part of the machinery of the company used for the manufacture of laths, shingles, and staves. The contract specified the price they were to pay Guy for the manufacture of the products named, and that Guy should use the material for the manufacture of laths, shingles, and staves and the machinery, of the Finkbine Lumber Company. Guy was to receive a certain price for the finished product. Settlement was to be made with Guy at the end of each week, and the contract required that Guy should turn in the names of all employes he might employ, so the Finkbine Lumber Company might charge them with accident insurance, rent, etc., should any of them live in the houses belonging to the Finkbine Lumber Company. The contract with Guy further stipulated that Guy should not employ boys younger than 15 years of age. It seems that the reason for this stipulation was because the insurance company prohibited the working of boys under that age. The contract also contained a stipulation to the effect that, in case there should be any necessity for repairs that would fall upon the Finkbine Lumber Company to furnish, Guy should make a written requisition on the superintendent, Mr. Finlay. Guy commenced work for the Finkbine Lumber Company under this contract, the Finkbine Lumber Company furnishing all saws, belts, oil, and power, and Guy employed the laborers, including appellee, who was a boy at that time about 19 years of age.

The work in which appellee was engaged was in making staves in the mill. It appears that at the place where appellee was at work there were two saws. The material was first put in the cradle and shoved against the saws; the ends being chopped off to make it the proper length. After this was done the material was passed over to the appellee, Cunningham, and he attended to the manufacture of it on an edger into staves. In this way, and on account of neglecting to have it moved away properly, when the ends were cut off, there was an accumulation of sawdust and ends around the place

where appellee was working; and, it being his duty to oil the saws, he reached up over the saws in order to get the oil can, and stepped on some blocks or sawdust, and slipped, and fell across the saw, and was hurt. There was a "clean-up" man, whose duty it was to remove this accumulation; but this had been neglected for some while before the injury, and, according to the testimony of Cunningham, an accumulation of about a half bushel or more of little blocks and sawdust had been allowed to accumulate. Appellee states that Guy was the foreman of the Finkbine Lumber Company; but this is denied by the company, which asserts that Guy was an independent contractor. Appellee also testified that Mr. Finlay was the general superintendent of the mill, and was over Guy, and that Mr. Finlay would come through the mill, examine the staves, laths, or shingles, and direct Mr. Guy about them. Appellee could not hear what they were talking about. Finlay would then come to where appellee was and hurry him up. Appellee states that Finlay gave no orders other than to occasionally come by and hurry him up with his work. While appellee was so employed the Lumber Company collected from him certain amounts to be paid as premiums on accident insurance. This money was paid to the company, and by them applied to premiums for accident insurance, and the company required that this insurance be kept up on all employes working for Guy. Mr. F. G. Dickman, the assistant general superintendent of the mill, denied that appellee was ever employed by the Finkbine Lumber Company, or so appeared on their books.

At the time of the trial of this case Guy was gone and in no way connected with the mill plant. Mr. Dickman denied that the company had anything to do with the operation of that part of the machinery used by Guy in the manufacture of laths, staves, and shingles, except to furnish the power. He states that the company did not employ the laborers for Guy, and did not employ anybody to clean out that part of the mill used by Guy; that Guy employed and paid all employes working for him, and the company had nothing to do with it. Finlay was the mill superintendent and master mechanic, and looked after the other parts of the machinery owned and operated by the Finkbine Lumber Company.

After appellee was injured, Dickman urged him to go to New Orleans for the purpose of having his arm examined, which appellee's father declined to let him do. It seems that the father refused to let his son go unless the Lumber Company would pay his expenses to go with the son. The company offered to send Dr. Rowan with appellee, but would not pay the expenses of the father to New Orleans. The company did offer to pay both the father's and the son's expenses to Hattiesburg, so as to enable the son to consult Dr.

Ross. The father declined to do this, and wanted the son to go to New Orleans, but was not willing for the company to send the boy alone.

It appears that the company paid the boy after this accident about \$50 on account of the insurance. The testimony in reference to the Lumber Company requiring this insurance was all objected to, and the court overruled the objection; and this is urged as a cause for reversal, among other causes assigned. Mr. Finlay testified that he was superintendent of the mill, and had been with the Finkbine Lumber Company in this capacity for something like five years. His duty was to oversee the operation in a general way, but he never gave any orders to Guy's men. Finlay states that he had called Guy's attention to the fact that the premises were not properly cleaned up, and Guy promised to have it attended to. Cunningham instituted a suit against the Finkbine Lumber Company, and recovered a judgment in the sum of \$2,000, from which judgment an appeal is prosecuted.

[1] It is first contended that there is no liability on the part of the Finkbine Lumber Company, because the facts show that Guy was an independent contractor. Secondly, it is contended that the injury was caused by the negligence of appellee himself. A peremptory instruction was asked and refused. It is quite clear to us that the case made was one for the jury on both propositions. Under the testimony it was for the jury to say whether or not Guy was only a foreman for the Finkbine Lumber Company. Appellee had testified to this. The so-called contract introduced by the Finkbine Lumber Company, which was merely a copy of a letter written to Guy, and rehearsing what had been orally agreed to between them, does not make it clear that Guy was an independent contractor. The fact that the Finkbine Lumber Company saw fit to insure Guy's employes against accident and to collect from them the premium; the fact that they took such interest in this young man after he was hurt, offering to send him to New Orleans and Hattiesburg; the fact that they collected from this accident policy and paid to appellee half time for some little while after the accident; the fact that Finlay was the general superintendent of the mill, looking after the premises, machinery, etc., and had called Guy's attention to the condition of the mill; the fact that this superintendent would hurry appellee at his work—tended to show, at least, that they had some sort of control over Guy and his men, as well as his finished output. Under the testimony the jury were fully warranted in finding that Guy was not an independent contractor.

[2] The testimony allowed to prove that the company carried accident insurance on Guy's employes was properly admitted. It

was strong proof of the fact that appellant was in real control and that Guy was only a servant of the company.

[3] Whether or not appellee was guilty of contributory negligence, under the facts of this case, was a question for the jury, and they have settled it adversely to the contention of appellant. The facts in this case on the question of contributory negligence are very similar to the facts in the case of *Kneale v. Dukate*, 93 Miss. 201, 46 South. 715, and the court there held that it was a question for the jury.

[4] It was not only the duty of the appellant to furnish the appellee with a reasonably safe place in which to work when he started at his work, but this was a continuing duty. The appellee was engaged in the manufacture of staves after the timber had been cut and handed to him. It was no part of his duty to keep the place where he was working in a reasonably safe condition, free from the accumulation of trash; but it was the ever-present duty of the master to see that this was done. Appellee testifies that because the master neglected this duty, and allowed this trash to accumulate there, he was injured while attempting to reach the oil for the purpose of oiling the saws; and if this testimony is true, which the jury have said by their verdict is the fact, there is no question as to the liability of the master.

On the question as to whether or not Guy was an independent contractor, the case of *Brower v. Timreck*, 66 Kan. 770, 71 Pac. 581, is directly in point. The facts in the above case are very similar to the facts in this case, and the court held that the question was one for the jury. See, also, *Laffery v. U. S. Gypsum Co.*, 83 Kan. 349, 111 Pac. 498. In both of the above cases it is held that evidence that the owner held insurance indemnifying it against loss and damage from accident to laborers is competent, as tending to show the real relations between the person superintending the operation of the machinery and the owner.

Only one instruction was asked for the appellee, to which there can be no objection. Counsel for the appellant complain that the court erred in refusing instructions Nos. 3 and 5 asked for by appellant. We shall not set out these instructions in full, but in criticism of same will say that both instructions are in direct conflict with the law announced in this opinion. If the court had given instruction No. 3, it would have been virtually a peremptory instruction. Instruction No. 3 undertook to tell the jury that while it is true that it is the duty of the employer to furnish a reasonably safe place for an employe to work, still this rule does not apply to accumulation of blocks or pieces of wood in the course of work being done which are only temporarily and infrequently removed. The instruction entirely loses sight of the

fact that the duty of the master to furnish a reasonably safe place is a continuing duty. This duty is not satisfied by putting the place in a reasonably safe condition once, and then allowing it to become dangerous while the servant is at his work; but it must be reasonably safe at all times. Of course, what is stated here with reference to this instruction applies to the character of case which the court has under consideration. There may be some cases in which the very work which the servant is required to do as it progresses requires him to protect himself; but the case presented by this record is not such a case. If this instruction had been given, it would have destroyed the very basis of appellee's suit.

[5] The fifth instruction refused is bad for practically the same reason as the third instruction. The only practical difference between the third and fifth instructions is that the fifth instruction tells the jury that if they "believe from the evidence that the plaintiff reached above the saw for the oil can, and in so doing slipped upon a small block or piece of wood, and fell upon the saw, and that the fact that such piece of wood was on the floor was due to the negligent failure of some other employé to sweep it away, then there is no liability on the part of the defendant, and the jury will say so by their verdict." This instruction seeks to eliminate the nondelegable duty of the master to keep this place in a reasonably safe condition. The failure of an employé charged with this duty to keep it in that condition was the failure of the master. It was one of the master's nondelegable duties—one that he could not shift to any other employé.

Affirmed.

COMPTON v. STATE. (No. 15,694.)

(Supreme Court of Mississippi. March 25, 1912.)

INTOXICATING LIQUORS (§ 239*)—WRONGFUL SALE—INSTRUCTIONS.

Where a prosecuting witness testified that he and defendant agreed that defendant should order whisky for them both from a place in Louisiana, and that in accordance with such agreement the witness gave defendant a dollar, and defendant ordered two quarts of whisky, one of which he gave witness in accordance with the agreement, an instruction that if the jury believed that the witness gave defendant a dollar, and about three weeks later defendant delivered to witness a quart of whisky, he was guilty, was erroneous, since, if the witness' testimony was true, defendant did not sell the whisky, but simply acted as the witness' agent or assistant in effecting a purchase thereof.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 975; Dec. Dig. § 239.*]

Appeal from Circuit Court, Pike County; D. M. Miller, Judge.

Bright Compton was convicted of illegal-

ly selling intoxicating liquor, and he appeals. Reversed.

The indictment against appellant charged that he did "then and there unlawfully and willfully sell and retail intoxicating liquors, contrary to statute." On the trial a witness named Paris testified that he and appellant had agreed that appellant should order whisky for them both from Slidell, La., and that in accordance with this agreement he gave appellant \$1, and appellant ordered two quarts of whisky, one of which he gave to witness Paris, in accordance with their agreement. On the trial the court gave the following instruction, at the request of the state: "No. 1. The court instructs the jury, for the state, that if you believe from the evidence in this case beyond a reasonable doubt that J. H. Paris gave defendant one dollar at Lexie, Pike county, Miss., during the month of June, 1910, and about three days later the defendant delivered to the said Paris one quart of whisky for said dollar near Tylertown, Pike county, Miss., then he is guilty, and you should so find."

E. J. Simmons, for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

SMITH, J. The granting of the first instruction requested by the state was fatal error. It omits a material portion of the testimony of the witness Paris, upon whose testimony it was predicated, which omitted portion discloses that appellant did not sell the whisky to the witness, but simply acted as his agent or assistant in effecting the purchase thereof (Powell v. State, 96 Miss. 608, 51 South. 465), for the commission of which crime appellant was not on trial. The testimony of Paris, in effect, was that appellant ordered from Slidell, La., for himself and Paris, one-half gallon of whisky, one quart for each; Paris giving to appellant the money with which to pay for his portion thereof. Upon receipt of the whisky by appellant, he delivered to Paris the quart ordered for him.

The judgment of the court below is reversed, and the cause remanded.

HAWKINS v. DUBERRY. (No. 14,985.)

(Supreme Court of Mississippi. March 25, 1912.)

1. WILLS (§ 184*)—REVOCATION—CODICIL—RE-EXECUTION.

Code 1906, § 5079, provides that a devise shall not be revocable by the testator or testatrix, except by destroying, canceling, or obliterating the same, or causing it to be done in his presence, or by a subsequent codicil, will, or declaration in writing made and executed, etc. Held, that the execution of a codicil to a will, without the same being subscribed and attested as required, rendered the codicil invalid, but did not affect the validity of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 462-467; Dec. Dig. § 184.*]

2. INSURANCE (§ 775*)—BENEFICIARIES—BENEFITS—WILLS.

A person insured in a beneficial association cannot make a valid bequest of the benefits to a person who does not belong to the class of persons authorized to become beneficiaries under the constitution and by-laws of the order.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1941; Dec. Dig. § 775.*]

Appeal from Chancery Court, Yalobusha County; I. T. Blount, Chancellor.

Bill by Eliza Duberry against A. Seymour, administrator with the will annexed of the estate of John W. Duberry, and Alice Hawkins. Judgment for plaintiff, and defendants appeal. Reversed.

Creekmore & Stone, for appellants. W. C. Blount, for appellee.

McLEAN, J. The appellee, Eliza Duberry, filed her bill in the chancery court of Yalobusha county against A. Seymour, administrator cum testamento annexo, and Mrs. Alice Hawkins, wherein she alleges that she is a resident citizen of Tennessee; that her husband, John W. Duberry, died in Memphis, Tenn., on February 12, 1908, leaving complainant as his wife and sole heir at law; that said deceased left an insurance policy in the Masonic Benefit Association of the value of \$685, which amount had been paid to Seymour, administrator, etc.; that this money belongs to complainant, but that Seymour declines to pay it to her, because Mrs. Alice Hawkins claims to be the owner of the money by virtue of an alleged will executed by said decedent, which alleged will complainant charges is void and of no effect in form and substance. One of the grounds of the invalidity of the will is that there was no such person in existence as Mrs. Alice Hawkins at the date of the death of the said John W. Duberry. The allegations of the bill are denied by the answer, except that it admits that the money has been paid by the lodge and collected by Seymour as administrator, etc.

[1] On the 18th of January, 1905, the Masonic Benefit Association issued its benefit certificate to John W. Duberry, of Water Valley, Miss., wherein it agreed to pay to said Duberry, upon his death, \$500 upon certain conditions. Said John W. Duberry on the bottom of this certificate made and executed his last will and testament, wherein he gave and bequeathed the money due him by virtue of the certificate unto Mrs. Alice Hawkins. This will was properly attested by three subscribing witnesses. The will is in the following language: "I, Jno. W. Duberry, of Water Valley, Mississippi, age 59 years, being of sound and disposing mind, give and bequeath the money due me by virtue of the certificate upon which this my last will is indorsed: Mrs. Alice Hawkins, \$699.00; Eliza Duberry, \$1.00. And this is my last will. December 31, 1907. [Signed]

J. W. Duberry." Beneath this will is the following: "In witness whereof I, this the 18th day of November, 1905, sign, publish and declare this instrument as my last will so far as the money is concerned which is due me after my death from the Masonic Benefit Association. I appoint Mr. N. Cox executor. [Signed] Jno. W. Duberry." The execution of this will was attested in due form by three witnesses; said attestation being as follows: "State of Mississippi, Yalobusha County. The said John W. Duberry on the 18th day of November, 1905, signed the foregoing instrument, and published and declared in our presence and in the presence of each other as his last will; and we at his request and in his presence, and in the presence of each other, on said date, have hereunto written our names as subscribing witnesses thereof." And then follows the names of the three witnesses.

It appears from the testimony of one Noah Cox that he was in Memphis on December 31, 1907, at the house of Mrs. Alice Hawkins, and that the testator said that he had consulted a lawyer, who informed him that, if he did not give his wife, Eliza, something, she might give trouble by breaking the will, and that in order to avoid this the said John W. Duberry added to the will, in his own handwriting, the following after the word Eliza Hawkins: "\$699.00; Eliza Duberry, \$1.00." There were no subscribing witnesses to this addition. In answer to the question, "It was not his intention, then, to give Alice Hawkins the total and Eliza Duberry nothing?" the witness said, "In the original first signed, he willed it all to Alice Hawkins, and when I called on him in December, 1907, he called my attention to it, and said he had consulted some lawyer, who said, if he did not give Eliza something, she might give trouble by breaking the will." It does not appear from the record whether this will was probated, but the witnesses refer to the will as having been probated, and the bill of complaint filed in this case attaches as an exhibit to it, a copy of what is called the alleged will. There is nothing in the record to show that the widow, who is complainant in this cause, ever renounced this will. There is some evidence in the record to the effect that John W. Duberry, for some two years prior to his death, resided in Memphis, Tenn.; but we cannot say from this record whether he was a resident and citizen of Tennessee or Mississippi at the date of his death. The record further shows that there is an agreement between counsel for both complainant and defendant that all questions involved in the settlement of this case include the construction of the paper presented, and the rights of the parties thereunder are submitted to the court for its decision, waiving the jury on an issue of devisavit vel non; but this is not

signed by any one. The record shows that the Masonic order paid the money to Seymour, who is described as administrator cum testamento annexo. The caption of the constitution of the Masonic Benefit Association is in the record; but there is nothing in the record to show the purpose of the organization, nor the persons who can become beneficiaries under the constitution, except there purports to be a copy of an amendment to one of the articles of association, which proposes "to provide a fund to be paid to the widow, orphans, or legal representatives of deceased Master Masons within the jurisdiction of the M. W. Stringer Grand Lodge of Mississippi." The court below held that the paper purporting to be the last will and testament of J. W. Duberry is not a will, and does not entitle defendant to the moneys in controversy, and finds in favor of Elizabeth Duberry, as being the rightful heir at law of John W. Duberry, deceased, and entitled to the money in controversy.

We are not at all satisfied with the result in the lower court. It is manifest from the evidence that this was a valid will. It was properly executed and attested, and if it be true that on December 31, 1907, he added to the then valid will the words and letters, to wit, "\$699.00; Eliza Duberry, \$1.00," without having it properly attested, the failure to have this addition attested would not destroy the otherwise valid instrument. The rule is that if the will is valid, and properly attested, and if thereafter the testator should undertake to make a codicil, and the codicil is invalid for the want of the proper attestation, the invalid codicil will not destroy the otherwise valid will. The law is that an instrument propounded as a revocation, if it be in form a will, must be perfect as such, and be subscribed and attested as required by the statute; hence an instrument intended to be a will, but failing of its effect as such on account of some imperfection in its structure, or for want of due execution, cannot be set up for the purpose of revoking a former will. This principle is well settled by the decisions, not only in the English courts, but by those in America. *Hairston et al. v. Hairston et al.*, 30 Miss. 308. Again, this court in *Wilbourn v. Shell*, 59 Miss. 205, 42 Am. Rep. 363, in discussing when and under what circumstances there is a revocation of the will, speaking through that eminent jurist, Judge Cooper, says: "But the material inquiry in all cases is whether the destruction of the will was *animo revocandi*, and to determine this it is necessary to consider the circumstances under which and the purposes and reasons for which it was destroyed; and where, from all the circumstances in evidence, it appears that the destruction or revocation was connected with, or cause of, the execution of another will, and that the

testator meant the revocation of the one to depend upon the validity of the other, then if the latter will is inoperative, from defect of attestation or other cause, the revocation fails also, and the original will remains in force." Our statute (section 5079 of the Code of 1906), which is a rescript of section 4489 of the Code of 1892, provides for revocations as follows: "A devise so made, or any clause thereof, shall not be revocable but by the testator or testatrix destroying, canceling or obliterating the same, or causing it to be done in his or her presence, or by subsequent will, codicil, or declaration, in writing made and executed."

[2] It is proper for us to say that if the legatee or beneficiary under the will, Alice Hawkins, did not belong to that class of persons who were authorized to become beneficiaries under the laws, constitution, and charter of the Masonic Benefit Society, then she is not entitled to the money, as held by this court in *Rose v. Wilkins*, 78 Miss. 401, 29 South. 397. We are not called upon to decide, upon this record, what rights the widow had in this money under the laws of the state of Tennessee, in the event it should develop that John W. Duberry was a resident and citizen of Tennessee at the date of his death.

Not being able, from this imperfect record, to reach any satisfactory conclusion as to the rights of the parties, and as the lower court erred in holding, as it did, that "the paper purporting to be the last will and testament of John W. Duberry is not the will, and does not entitle the defendant to the moneys in controversy," we reverse the case.

FULLER v. STATE. (No. 15,797.)

(Supreme Court of Mississippi. March 18, 1912.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.

Nancy Fuller was convicted of crime, and appeals. Dismissed.

PER CURIAM. Appeal dismissed.

WILSON v. STATE. (No. 15,799.)

(Supreme Court of Mississippi. March 18, 1912.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.

Sol Wilson was convicted of crime, and appeals. Dismissed.

PER CURIAM. Appeal dismissed.

HAMNER v. STATE. (No. 15,796.)

(Supreme Court of Mississippi. March 18, 1912.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.

George Hamner was convicted of crime, and appeals. Dismissed.

PER CURIAM. Appeal dismissed.

HERMAN v. STATE. (No. 15,670.)
(Supreme Court of Mississippi. March 18, 1912.)

Appeal from Circuit Court, Harrison County; Geo. S. Dodds, Special Judge.
Sam Herman was convicted of crime, and appeals. Dismissed.

PER CURIAM. Appeal dismissed.

WILSON v. STATE. (No. 15,693.)
(Supreme Court of Mississippi. March 18, 1912.)

Appeal from Circuit Court, Jones County; Paul B. Johnson, Judge.
Mary Wilson was convicted of crime, and appeals. Dismissed.

PER CURIAM. Appeal dismissed.

CONN v. STATE. (No. 15,738.)
(Supreme Court of Mississippi. March 18, 1912.)

Appeal from Circuit Court, Copiah County; D. M. Miller, Judge.
Ram Conn was convicted of crime, and appeals. Dismissed.

PER CURIAM. Appeal dismissed.

BRITTON v. STATE. (No. 15,774.)
(Supreme Court of Mississippi. March 18, 1912.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.
Edgar Britton was convicted of crime, and appeals. Dismissed.

PER CURIAM. Appeal dismissed.

GILCHRIST FOUNDRY CO. v. DENSON.
(No. 15,802.)
(Supreme Court of Mississippi. March 11, 1912.)

Appeal from Chancery Court, Jasper County; Sam Whitman, Jr., Chancellor.
Action between the Gilchrist Foundry Company and L. L. Denson. From the judgment, the Foundry Company appeals. Dismissed.
T. H. Oden, for appellee.

PER CURIAM. Motion to dismiss sustained.

RODGERS v. STATE. (No. 15,641.)
(Supreme Court of Mississippi. March 18, 1912.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.
Jack Rodgers was convicted of crime, and appeals. Dismissed.

PER CURIAM. Appeal dismissed.

HOUSE v. STATE. (No. 15,692.)
(Supreme Court of Mississippi. March 18, 1912.)

Appeal from Circuit Court, Jones County; Paul B. Johnson, Judge.
Roland House was convicted of crime, and appeals. Dismissed.

PER CURIAM. Appeal dismissed.

RHODES v. STATE. (No. 15,777.)
(Supreme Court of Mississippi. March 18, 1912.)

Appeal from Circuit Court, Bolivar County; Sam C. Cook, Judge.
Andrew Rhodes was convicted of grand larceny, and appeals. Dismissed.

PER CURIAM. Appeal dismissed.

ANDERSON v. STATE. (No. 15,798.)
(Supreme Court of Mississippi. March 18, 1912.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.
Delatta Anderson was convicted of crime, and appeals. Dismissed.

PER CURIAM. Appeal dismissed.

YAZOO & M. V. R. CO. v. LANDRY.
(No. 15,472.)
(Supreme Court of Mississippi. March 13, 1912.)

Appeal from Circuit Court, Coahoma County; Sam C. Cook, Judge.
Action by L. S. Landry against Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Dismissed.

Mayes & Longstreet, for appellant. Tim E. Cooper, for appellee.

PER CURIAM. Appeal dismissed.

YAZOO & M. V. R. CO. v. RHODES.
(No. 15,257.)
(Supreme Court of Mississippi. March 28, 1912.)

Appeal from Circuit Court, Coahoma County; Sam C. Cook, Judge.
Action by William Rhodes against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Dismissed.

PER CURIAM. Appeal dismissed.

KING v. STATE. (No. 15,562.)
(Supreme Court of Mississippi. March 25, 1912.)

Appeal from Circuit Court, Sunflower County; J. C. Ward, Special Judge.
Mose King was convicted of murder, and appeals. Affirmed.

PER CURIAM. Affirmed.

FAIRLEY v. STATE. (No. 15,539.)
(Supreme Court of Mississippi. March 25, 1912.)

Appeal from Circuit Court, Harrison County; Geo. S. Dodds, Special Judge. Lorenzo Fairley was convicted of murder, and appeals. Affirmed.

N. C. & C. E. Hill, J. C. Ross, and O. J. De-deaux, for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

PER CURIAM. The judgment of the court below is affirmed, and Friday, May 17, 1912, fixed as the date of the execution of the sentence.

SANDERS v. G. W. STRICKLAND & BRO.
(No. 15,591.)

(Supreme Court of Mississippi. March 25, 1912.)

Appeal from Circuit Court, Alcorn County; J. H. Mitchell, Judge.

Action between J. B. Sanders and G. W. Strickland & Bro. From the judgment, Sanders appeals. Affirmed.

Sharpe & McIntyre, for appellant. J. M. Boone, B. F. Worsham, and W. J. Lamb, for appellees.

PER CURIAM. Affirmed.

MISSISSIPPI CENT. R. CO. v. STEWART.
(No. 15,345.)

(Supreme Court of Mississippi. March 25, 1912.)

Appeal from Circuit Court, Lincoln County; D. M. Miller, Judge.

Action by Charles Stewart against the Mississippi Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Cassedy, Cassedy & Butler, for appellant. Jeff Truly, for appellee.

PER CURIAM. Affirmed.

(130 La.)

No. 19,163.

Succession of PLEASANTS.

(Supreme Court of Louisiana. Feb. 26, 1912.)

(Syllabus by the Court.)

PERPETUITIES (§ 4*) — CREATION OF FUTURE ESTATE—FIDEI COMMISSUM.

By her last will, the testatrix bequeathed the rents of certain houses to her brother, who is her sole heir at law, "for life, to be sold after his death," and the rents of other houses to her aunt, "for life, to be sold after her death," and, after making certain particular bequests of money, declared: "I want my houses sold after the death of my aunt and brother and the legacies named above paid, and any balance to the Home for Incurables." She then named her executors, after which, she declared: "Any property I die possessed of, not herein disposed of, I desire my brother to have." *Held*, that the dispositions thus attempted to be made are void, as creating a fidei commissum, or tenure of property, prohibited by or unknown to our system of law, and as extending the authority of an execu-

tor and the term of his administration beyond the limits prescribed by our law.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4; Trusts, Cent. Dig. §§ 3, 4.]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

In the matter of the succession of Miss Elizabeth A. Pleasants. From a judgment annulling a portion of a will, Percy S. Benedict appeals. Affirmed.

Bernard McCloskey, for appellant. Walter L. Gleason, for appellee.

MONROE, J. The decedent left an olographic will, reading as follows (omitting the date and signature), to wit:

"I leave the rents of my houses, 3529 and 2531 Prytania street, to my brother George, for life, to be sold after his death. I leave the rents of my houses, 3441 and 3443 Prytania street, to my aunt Elizabeth, for life, to be sold after her death.

"I leave \$500 to Father Lambert; \$500 to the Home for Incurables; \$1,000 to New Orleans Orphan Female Asylum; \$1,000 to St. Vincent Orphan Asylum; \$500 to the Lepers' Home, at White Castle; \$500 to the Little Sisters of the Poor of the Sixth District; \$300 for repairs to the family tomb in Metairie Cemetery. I leave my gold watch to Corinne Young. I leave my furniture in 3443 Prytania street to the Home for Incurables. I want my houses sold after the death of my aunt and brother and the legacies named above paid, and any balance to the Home for Incurables. I appoint Percy S. Benedict my executor, without bond. I nominate and appoint Geo. J. Pleasants, my brother, and Mrs. E. A. Pleasants, my aunt, joint testamentary (?) with seizin and without bond. Any property I die possessed of, not herein disposed of, I desire my brother to have. Thus entirely written, dated and signed by me," etc.

The brother referred to in the will is the sole heir at law of the decedent, and he has opposed the execution of the will, alleging:

"That the said last will of the deceased directs that the rents and revenues of certain of the real property left by her should be paid to your petitioner and to Mrs. Elizabeth A. Pleasants, petitioner's aunt, during their respective lifetimes, and further directs that at the death of either of them said rents shall go to the survivor, and that upon the death of said survivor the executor shall cause said properties to be sold, and from the proceeds thereof that various pecuniary legacies shall be delivered to various charitable institutions therein named. Now, your petitioner represents that the aforesaid clause in said will * * * is null, void, and of no effect; that the same creates a trust or fidei commissum, and attempts to introduce a tenure of property unknown to and unauthorized by our law; that thereunder the naked ownership, or fee, in said property is vested in no one after the death of the deceased; and that such disposition of property is reprobated by our law, is against the public policy of the state, and is in contravention of its codal provisions. * * *

He prays that the executor, Mr. Benedict, be cited, and for judgment annulling the will, "in so far as it attempts to divest and take away" from him "the full and entire ownership of the said properties, * * *

together with the rents and revenues," and that he "be decreed the only brother and sole surviving heir at law of the said deceased, and, as such, entitled, in full ownership, to all the real property left by the said deceased and the balance of the proceeds of such real estate as has been sold," etc.

There was judgment in the district court as follows:

"It is * * * decreed that there be judgment * * * annulling, avoiding, and setting aside, as not written, the clause in the said will reading as follows, to wit: 'I want my houses sold after the death of my aunt and brother and the legacies named above paid, and any balance to the Home for Incurables.' It is further * * * decreed that, except as above stated, said will be upheld as legal and valid, the probate thereof * * * be maintained and perpetuated," etc.

Mr. Benedict, who alone qualified as executor, has alone appealed; and he admits that the case is similar to that of Succession of Herber, 128 La. 111, 54 South. 579, suggesting only that "the last clause of the will here presented might save the case" from the application of the doctrine of the case thus mentioned.

The codal provisions invoked by opponent read as follows:

"Art. 1520. Substitutions and fidei commissum are and remain prohibited. Every disposition by which the donee, the heir, or legatee is charged to preserve for, or return a thing to, a third person is null, even with regard to the donee, the instituted heir, or the legatee."

By the first clause of the will presented in the succession of Herber, the testatrix directed that certain real estate be sold by the executor and the proceeds deposited in a bank (which had gone out of existence), the interest to be derived therefrom to be used, under the supervision of the executor, in keeping the tomb of the testatrix in proper condition.

By the second clause, it was directed that the executor should rent other real estate during the life of one Lienhard, and pay him therefrom \$75 per month, and, at his death, that the property should be sold, and from the proceeds that the executor should pay a special legacy in money, and should build a memorial to the memory of the deceased brother of the testatrix. The will contained a provision, in the nature of a universal bequest, reading as follows:

"All the residue of my estate, both real and personal, after complying with all requests herein, I bequeath unto [a person named]."

The person so named was found to be incapable of accepting the bequest; but, apart from that, it was held that the first clause of the will contemplated a perpetual trust and a perpetual executor, would eventually leave the property without owner or administrator, and was therefore null.

"The next clause [the opinion goes on to say] is open to the same criticism as the first, in that the title to the property there

referred to is left in nubibus, and the property itself is to be held by the executor, as trustee, during the life of Lienhard (though no disposition whatever is made of the revenue, in excess of \$75 per month), after which, and only then, it is to be sold, and the proceeds (less \$1,000, to be paid to the Charity Hospital, and \$1,000, to be expended on a memorial) paid to the universal legatee. These dispositions would introduce a tenure of property obnoxious to the spirit and policy, if not the text, of our law. * * *"

And this court then quotes from the opinions of Slidell, J., and Eustis, C. J., in the matter of the Heirs of Henderson v. Rost, 5 La. Ann. 461, and cites other cases, among which is Succession of Ward, 110 La. 75, 34 South. 135, in which it was held (quoting the syllabus):

"Where a testament appoints an executor, with bond, and directs that a certain amount shall be paid monthly to a person named, and that, during the life of that person, the estate shall be kept intact, and at the death of that person shall go to two other persons, share and share alike, and that to the two latter persons, one of whom is the executor, shall go all monthly surplus after the 'usufruct' to the first, *held*, that the instrument evidences an intention that the executor shall hold the estate in trust during the life of the so-called usufructuary, and that this is to create a fidei commissum, forbidden by our law under pain of the nullity of the will. * * * A person to whom, out of the revenues of an estate, a certain amount is to be paid monthly is not a usufructuary."

In the instant case, it will be observed that the title to the property in question is vested in no one; and, although it is not so specified in the will, it would devolve upon the executor to hold and administer it until the deaths of the aunt and brother of the testatrix, to whom the revenues are bequeathed, and then sell it and, after paying certain particular legacies, turn over the balance of the proceeds to the Home for Incurables. The clauses attacked are therefore obnoxious to the objections that were urged in the cases cited, the doctrine of which finds support in other decisions, both earlier and later, some of which are collated in the opinion in the matter of Succession of Le Blanc, 128 La. 1055, 55 South. 672.

The judgment appealed from is accordingly affirmed.

(130 La.)

No. 18,856.

STATE ex rel. CAREY et al. v. SANDERS,
Governor (GRAY et al., Interveners).
(Supreme Court of Louisiana. Feb. 26, 1912.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 65*)—DISTRIBUTION OF GOVERNMENTAL POWERS—LEGISLATIVE POWER—SUBMISSION OF QUESTION TO POPULAR VOTE.

Act No. 77 of 1910, creating the parish of Jefferson Davis, in the event the act was ratified by the voters of the parish of Calcasieu, was a constitutional exercise of legislative power. The inherent power of the General

Assembly to enact referendum laws in matters of local concern is too well settled by legislative and judicial construction for further controversy.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 116; Dec. Dig. § 65.*]

2. COUNTIES (§ 14*)—ORGANIZATION—STATUTORY PROVISION—SUBMISSION TO POPULAR VOTE.

The people of the parish of Calcasieu, having voted against the ratification of Act No. 77 of 1910, that statute never became operative as a law of this state.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 10; Dec. Dig. § 14.*]

3. STATUTES (§ 64*)—EFFECT OF PARTIAL INVALIDITY.

If, as contended by relators, the referendum provisions of Act No. 77 of 1910 are unconstitutional, they are so essentially and inseparably connected with all the preceding provisions that the whole statute is stricken with nullity.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66, 165; Dec. Dig. § 64.*]

4. STATUTES (§ 64*)—EFFECT OF PARTIAL INVALIDITY.

The doctrine that a statute may be constitutional in part has no application to an act, wherein the Legislature has expressly provided that the operation and legal effect of the first five sections of the act shall depend upon the result of a referendum election provided in the sixth and last section.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58, 66, 195; Dec. Dig. § 64.*]

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunet, Judge.

Mandamus proceeding by the State, on the relation of S. L. Carey and others, against J. Y. Sanders, Governor, in which J. G. Gray and others intervened. From a judgment for respondent, relators appeal. Affirmed.

Heinen & Modisette, Wallace H. Adams, Amos L. Ponder, and R. H. Odom, for appellants. Walter Gulon, Atty. Gen., and R. G. Pleasant, Asst. Atty. Gen., for appellee. McCoy, Moss & Knox, and T. A. Edwards, for interveners.

LAND, J. The relators, as residents, taxpayers, and property owners of the parish of Calcasieu and other parishes, instituted a mandamus proceeding against Jared Y. Sanders, Governor of the state of Louisiana, to compel him to proceed without unnecessary delay to issue the commissions and to make the appointments necessary according to law for the organization of Jefferson Davis parish, alleged to have been created by Act No. 77 of 1910.

The Governor, through his counsel, the Attorney General, answered that said statute was inoperative and without legal effect, because it was conditioned on its ratification by a majority of the qualified electors of the parish of Calcasieu, voting for or against the creation of said parish of Jefferson Davis, and because a majority of said electors had voted against the creation of said parish.

J. G. Gray and other taxpayers of the par-

ish of Calcasieu intervened in the suit, and opposed the granting of the mandamus prayed for by the relators.

The case was tried, and there was judgment in favor of respondent. Relators have appealed.

Act No. 77 of 1910, to create, establish, and organize, etc., the parish of Jefferson Davis, after providing for the creation of said parish out of a certain described portion of the parish of Calcasieu, with one representative in the General Assembly, and after assigning the new parish to certain election and judicial districts, and fixing a temporary parish seat, and after providing for a division of the assets and liabilities of the old and new parishes, further provides as follows, in section 6, to wit:

"That this act shall be inoperative and of no effect unless a majority of the duly qualified electors of the parish of Calcasieu as now constituted, who participate in the congressional election to be held on the 8th day of November, 1910, and voting for or against the creation of the parish of Jefferson Davis, shall vote in favor of the creation of said parish."

The same section, after providing for the election to take the sense of said electors on said proposition, etc., continues as follows:

"This act shall become effective and said parish shall be created subject to the foregoing provisions, thirty days after the promulgation of the returns of said election as herein provided showing a majority of voters of the parish of Calcasieu as now constituted who vote upon said question, shall have voted in favor of the creation of the parish of Jefferson Davis."

It is admitted that at the referendum election held pursuant to the statute in question a majority of the votes cast was against the creation of the parish of Jefferson Davis.

[1, 2] Relators contend that the referendum provisions of Act No. 77 of 1910 are unconstitutional, because the Legislature alone has the authority to create a new parish, and cannot delegate this power of legislation to the people. Article 277 of the Constitution of 1898 reads:

"The General Assembly may establish and organize new parishes, which shall be bodies corporate, with such powers as may be prescribed by law, but no new parish shall contain less than six hundred and twenty-five square miles, nor less than seven thousand inhabitants; nor shall any parish be reduced below that area, or number of inhabitants."

Article 21 of the same instrument reads:

"The legislative power of the state shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives."

Article 48 of the Constitution of 1898 reads in part:

"The General Assembly shall not pass any local or special law on the following specified subjects: * * * For the opening and conducting of elections, or fixing or changing the place of voting."

Article 31 reads:

"Every law enacted by the General Assembly shall embrace but one object, and that shall be expressed in the title."

These four articles form the text of the contentions of the relators. But in the discussion of the issues raised in this case, it must be premised that the General Assembly of Louisiana does not derive its power of legislation from the Constitution of 1898, but from the people of the state, and that the true question before the court is whether the referendum provisions of the statute are prohibited by the organic law. There is no direct constitutional prohibition of such legislation; but it is argued that article 21 prohibits by inference the delegation of legislative power to the people. It may be conceded that the people cannot directly legislate; but it does not follow that the Legislature is without power to enact laws, subject to ratification by the voters of a *particular* district. The Supreme Court of this state, in 1853, decided that such referendum legislation was constitutional. See *Police Jury v. McDonough*, 8 La. Ann. 341. In 1852, the Legislature enacted a statute empowering police juries and municipal corporations to subscribe to the stock of corporations undertaking works of internal improvements, but providing that no ordinance passed under the provisions of the act should be valid, or take effect, until approved and ratified by a majority of the voters on whose property the tax was proposed to be levied. The court held that such conditional legislation was constitutional. Sildell, C. J., after citing numerous authorities and the act of Congress of July 9, 1846, submitting the question of the retrocession to the state of Virginia, of the county of Alexandria, in the district of Columbia, to a vote of the qualified electors of that country, said:

"In conclusion upon this point, we have to say that we find nothing in the statute of 1852 repugnant to the Constitution or the spirit of representative government; and it seems to us a matter of surprise that the caution of the Legislature, in its grant of the taxing power, should be made a subject of reproach. We think, on the contrary, that there was praiseworthy discretion in thus allowing the voice of the people of the respective parishes to be expressed, instead of allowing the local authorities to conclude definitively the imposition of a burden for a novel and untried purpose."

The learned Chief Judge also cited several previous acts of the General Assembly of Louisiana, submitting questions of the removal of parish seats and the consolidation of the municipalities of New Orleans to the vote of the people specially interested.

In *City of New Orleans v. Graille*, 9 La. Ann. 561, the same court again held—

"that the provision in the act of the Legislature of 1852, referring it to the voters on whose property the tax was to be levied to decide whether the ordinance imposing the tax should take effect, did not conflict with the letter or the spirit of the Constitution."

The cases above cited are in accord with the general jurisprudence, as stated by Judge Cooley, as follows:

"For like reasons, the question whether a county or township shall be divided and a new one formed, or two townships or school districts formerly one be reunited, or a city charter be revised, or a county seat be located at a particular place, or after its location removed elsewhere, or the municipality contract particular debts, or engage in a particular improvement, is always a question which may with propriety be referred to the voters of the municipality." Const. Lim. (7th Ed.) 167, 168. *Aliter*, as to general laws. *Id.*

The inherent power of the General Assembly of this state to enact referendum laws in matter of local concern is too well settled by legislative and judicial construction for further controversy. The Constitutions of 1879 and 1898 contain identical provisions relative to the creation of new parishes. In 1886, the Legislature created the parish of Acadia, subject to the approval of the voters of the parish of St. Landry. See Act No. 39 of 1886. In 1908, the Legislature created the parish of La Salle, subject to the approval of the voters of the parish of Catahoula. See Act No. 177 of 1908. Both of these acts were duly ratified by the people. In 1908, the Legislature created the parish of Evangeline, subject to the approval of the voters of the parish of St. Landry. This act was also ratified by the people, but was declared unconstitutional, on the ground that a parish cannot be created without at least one representative. See *Sandoz v. Sanders*, 125 La. 396, 51 South. 436. While eminent counsel assailed the constitutionality of that act on numerous grounds, it never occurred to them that the statute was unconstitutional because of its referendum provisions. By Act No. 302 of 1910, the Legislature applied the principles of the initiative, referendum, and recall to the government by commission of cities of a certain class. The city of Shreveport is now under that form of government.

To paraphrase the language of Chief Justice Eustis, *supra*, we find nothing in the referendum section of Act No. 77 of 1910 repugnant to the Constitution or the spirit of representative government. We think that Act No. 77 of 1910 has but one object, i. e., the creation of the parish of Jefferson Davis; and that section 6 merely provides a method of effecting the object. We do not think that section 6 provides for the opening and conducting of elections in the sense of article 48, because it expressly provides that the election shall be held under the general election laws of the state.

[3, 4] Conceding, for the sake of the argument, that section 6 of the statute in question is unconstitutional, it by no means follows that the other sections can stand alone as independent legislation. The lawmaker in plain words provided that the act should

be inoperative and of no effect, unless ratified by a vote of the people. Therefore the operation of the act was suspended to await the happening of the condition, and, the condition having failed, the act never acquired the force and effect of law. The intent of the Legislature that the creation of the new parish should depend on the ratification of the act by the voters of the parish of Calcasieu is manifest on the face of the statute. In the nature of things, conditional legislation, like a conditional contract, is a unity, and the condition cannot be eliminated without destroying the law or the contract in its entirety. The Legislature having declared in express terms that the operation of the first five sections of the act should depend upon the result of the election provided for in the sixth section, all the provisions "are essentially and inseparably connected in substance." Cooley, Const. Lim. (7th Ed.) 247. In *Watson v. McGrath*, 111 La. 1098, 36 South. 204, this court said:

"A statute may be constitutional only in part, or with regard to certain persons or things, or with regard to a certain point of its operation, and in other respects unconstitutional. The rule is to let it have operation within the scope of its constitutionality, if the legislative intent to that effect is clear and unmistakable. *Moore v. City of New Orleans*, 32 La. Ann. 726."

The act now under consideration has but one object, i. e., the creation of a new parish, and the legislative intent is clear that the operation of the law should depend on its ratification by the people.

We do not deem it necessary to discuss the question of the constitutionality of the constitutional amendment of 1910, ratifying and approving the provision of Act No. 77 of 1910. The subordinate issues involved were correctly decided by our learned Brother below.

It is therefore ordered that the judgment appealed from be affirmed; appellants to pay costs of appeal.

(130 La.)

No. 18,857.

STATE ex rel. MOORE et al. v. SANDERS,
Governor (GRAY et al., Interveners).

(Supreme Court of Louisiana. Feb. 26, 1912.)

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Action by the State, on the relation of P. E. Moore and others, against J. Y. Sanders, Governor, in which J. G. Gray and others intervene. Judgment for defendants, and relators appeal. Affirmed.

Heinen & Modisette, W. H. Adams, A. L. Ponder, and R. H. Odom, for appellants. Walter Guion, Atty. Gen., and R. G. Pleasant, Asst. Atty. Gen., for appellee. McCoy, Moss & Knox and T. Arthur Edwards, for interveners.

LAND, J. This case is on all fours with the case of *State ex rel. Carey et al. v. J. Y. Sanders*, Governor, 57 South. 924, this day decided, and, for the reasons set forth in the opinion handed down in that case, the judgment below is affirmed; appellants to pay costs of appeal.

(130 La.)

No. 18,908.

STATE ex rel. McMAHON et al. v. SANDERS,
Governor (GRAY et al., Interveners).

(Supreme Court of Louisiana. Feb. 26, 1912.)

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Action by the State, on the relation of J. E. McMahon and others, against J. Y. Sanders, Governor, in which J. G. Gray and others, intervene. Judgment for respondents, and relators appeal. Affirmed.

Amos L. Ponder, Heinen & Modisette, W. H. Adams, and R. H. Odom, for appellants. Walter Guion, Atty. Gen., and R. G. Pleasant, Asst. Atty. Gen., for appellee. McCoy, Moss & Knox and T. Arthur Edwards, for interveners.

LAND, J. This case is on all fours with the case of *State ex rel. Carey et al. v. J. Y. Sanders*, Governor, 57 South. 924, this day decided, and, for the reasons set forth in the opinion handed down in that case, the judgment below is affirmed; appellants to pay costs of appeal.

(130 La.)

No. 19,198.

STATE v. WILLIAM.

(Supreme Court of Louisiana. Feb. 26, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1153*)—WITNESSES (§ 40*)—APPEAL—REVIEW—DISCRETION OF TRIAL COURT.

A wise discretion is left to the trial judge in deciding the competency of a child of tender years to testify; and where he examines the child and tests her understanding of the significance of an oath, and reaches the conclusion that she will be a competent witness, his ruling will not be set aside, unless for very manifest error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153; * Witnesses, Cent. Dig. §§ 97, 98; Dec. Dig. § 40.*]

2. CHARGE OF COURT—NO ERROR.

The charge of the trial court to the jury was free from error, and the judgment will not be disturbed.

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

King William, alias King John, was convicted of assault with intent to rape, and appeals. Affirmed.

T. M. Bankston, M. J. Allen, and F. W. Sherman, for appellant. Walter Guion, Atty. Gen., and W. H. McClendon, Dist. Atty. (G. A. Gondran, of counsel), for the State.

BREAUX, C. J. The grand jurors of Tangipahoa found a true bill against King Wil-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Ham, alias King John, charging that on the 5th day of August, 1910, he made an assault upon Luberta Lewis, a child under 12 years, with felonious intent of committing rape.

He was tried and found guilty as charged, and recommended to the mercy of the court.

A motion for a new trial was filed, in which several grounds were averred to set aside the verdict, the most important of which was that the prosecuting witness was not a competent witness. This is the only ground argued in the brief of learned counsel for defendant.

The motion for a new trial was overruled.

On the 25th day of October, 1911, the court sentenced him to serve a term of five years in the penitentiary.

Several bills of exceptions were reserved.

[1] In the first bill of exceptions, the defendant, through his counsel, urge that Luberta Lewis, the prosecuting witness, was not a competent witness by reason of her not knowing the meaning of an oath, and that she was too ignorant to testify on account of her tender years.

The court overruled defendant's objection to this testimony, and ruled that she could testify.

She was examined as a witness on her voir dire to test her competency; her testimony was annexed to the bill of exceptions.

The learned judge states in one of the bills of exceptions that she was seven to eight years of age; others thought that she was about six years old. When questioned about her father and mother, she testified intelligently enough. She talked of her father and mother and places to which she had been; her testimony about these was clear and succinct enough.

Questioned about the school she had attended, she had forgotten the name of her teacher. She said that it was some time since she had attended school; she did not know how long it was since she left school. She said that her father had taken her some time ago to Baton Rouge, then to Pontchartroula, and named persons at whose places she had stayed. She remembered sugar cane time, but at first knew nothing about Christmas, but said she was in Tangipahoa last Christmas and last "sugar cane time." When asked:

"How do you know that?"

—her answer was:

"I got some things Santa Claus brought me."

She failed to answer some of the questions that a child of her age should have answered. Toward the end of her testimony, she answered more satisfactorily.

After counsel had examined her as a witness, the court asked her:

"Q. If I were to tell you, little girl, that there is a box of candy in this drawer [indicating

drawer in his desk], and you looked at it and did not find one there, what would that be?

A. A story.

Q. That would be a story?

A. Yes, sir.

Q. If I was to tell you that there was a box of candy in this drawer, and you were to look into it and find it there, what would that be?

A. That would be the truth."

At another time, asked what would become of her if she told a story now, her answer was, "To the bad man."

Taking her answers together, we have concluded that the trial judge did not err in permitting her to testify. She had understanding enough to be a witness as to what attempts had been made on her person in connection with the charge brought against the defendant.

This court (Justice Parlange was the organ), in a case of the nature of the case under consideration, but much stronger for the defense on the point now before us, affirmed the ruling of the lower court. A large discretion is left to the judge of the trial court. *State v. Langford*, 45 La. Ann. 1177-1182, 14 South. 181, 40 Am. St. Rep. 277.

In *State v. Richie*, 28 La. Ann. 327, 26 Am. Rep. 100, the court held that the judge must examine the witness of tender years, and his admission or rejection must be dependent upon the sound discretion of the judge.

The conclusion arrived at in *State v. Williams*, 111 La. 181-186, 35 South. 505, was very similar, and a number of decisions were cited in support of the views of the court.

[2] The second bill of exceptions in the case before us for decision relates to the charge of the court.

The statement of the court in the per curiam fully justifies the charge and leaves the defendant without good ground of complaint. In answer to the objection in question, the court states that he charged the jury that the date of the offense was sufficiently stated. It was proven that the offense had been committed within a year previous to the filing of the indictment, beyond a reasonable doubt, and added that the jury had a right to consider the time intervening between the alleged time of the commission of the offense and the time of complaint, that the charge fully covered the law.

There was no error committed in giving this charge, and the defense in argument have not attempted to argue that there was error.

No bill of exceptions was reserved to the court's ruling, overruling the motion for a new trial. It follows that the grounds of the motion are not before us.

It only remains for us to affirm the judgment.

For reasons stated, the judgment is affirmed.

(130 La.)

No. 19,278.

DENEGRE v. W. G. TEBAUT FURNITURE & REALTY CO.In re FITZPATRICK, State Tax Collector.
(Supreme Court of Louisiana. Feb. 28, 1912.)*(Syllabus by the Court.)***1. COURTS (§ 224*)—JURISDICTION OF AMOUNT.**

Where there is an amount to be distributed, that amount is the test of jurisdiction, and not the respective amounts claimed by creditors.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 617; Dec. Dig. § 224.*]

*(Additional Syllabus by Editorial Staff.)***2. CERTIORARI (§ 5*)—WHEN LIES—REMEDY BY APPEAL—PROHIBITION.**

Where relator has a right of appeal, certiorari and prohibition are not the proper remedies.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 5; Dec. Dig. § 5.*]

Action by George Denegre against the W. G. Tebault Furniture & Realty Company. Judgment for plaintiff, and John Fitzpatrick, Tax Collector, filed a motion, claiming taxes due the state. Motion made absolute for taxes and the State Tax Collector applied for writ of certiorari. Petition dismissed.

Harry P. Sneed, for relator. H. H. Chaffe, for civil sheriff.

BREAUX, C. J. No jurisdiction *ratione materie*.

Over \$4,000 are claimed by plaintiff, secured by a lessor's lien and privilege.

The whole of defendant's property was assessed at \$12,500. His stock in trade was sold for \$1,298.15. This price is in the hands of the sheriff. This property was appraised at \$10,000.

The tax collector filed a motion, in which he claimed the taxes due to the state.

The judge *a quo* rendered judgment, in which he made the motion absolute for the taxes to be paid on the \$1,292.90.

Whereupon counsel for the state tax collector petitioned this court for a writ of certiorari.

The issues are before us on the application for a writ of certiorari.

The question to be decided is whether the amount of the taxes is due on \$12,500 or on \$1,292.90.

The amount in the hands of the sheriff to be distributed is over \$100.

The Supreme Court's jurisdiction extends to all cases where the matter in dispute or the fund to be distributed exceeds \$2,000 (*whatever may be the amount therein claimed*) are the words of the Constitution. (Italics ours.)

The Court of Appeal has jurisdiction when the matter in dispute or the fund to be distributed shall exceed \$100.

Moreover, the amount claimed by the state is over \$100, if we take into account the

different amounts which make up the claim of the state, as shown by the testimony.

[1] But to this we do not attach the least importance; for, even if the amount claimed is less than \$100, the amount to be distributed is the test of jurisdiction.

The Court of Appeal has jurisdiction.

[2] This court has again and again decided that if the relator has a right of appeal certiorari and prohibition are not the remedies in the case. *State ex rel. Jaubert Bros. v. Judge*, 113 La. 1, 36 South. 868.

The parties are left to their remedy before the tribunal having appellate jurisdiction.

The writ nisi is recalled and discharged; relator's demand is denied as in the case of nonsuit, and its petition is dismissed.

(130 La.)

No. 18,878.

MOSS et al. v. DROST et al.

(Supreme Court of Louisiana. Feb. 28, 1912.)

*(Syllabus by the Court.)***1. PLEADING (§ 8*)—FACTS OR CONCLUSIONS—FRAUD.**

Where an issue has been presented and settled by a judgment, one seeking to escape the effect of that judgment by alleging that it was obtained by fraud and ill practices must specifically allege the acts that constitute the fraud and ill practices, as there is a presumption in favor of the validity of a judgment; and facts negating this presumption should be alleged and proved.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8;* Fraud, Cent. Dig. § 37.]

2. BOUNDARIES (§ 27*)—ACTION TO ESTABLISH.

Where a plaintiff complains that the judgment in a former suit, wherein he was a party, ordered the fixing of a boundary line between tracts that are not adjacent, he cannot seek in another suit to have the correct line established between his land and that of defendant, as, the tracts not being adjacent, there can be no boundary line.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 143; Dec. Dig. § 27.*]

3. JUDGMENT (§ 460*)—SUIT TO VACATE—GROUNDS—PLEADING.

Plaintiff should have pleaded in the former suit to fix the boundary line that the tracts were not adjacent, and, not having alleged in the present suit that it is only since the former judgment that he has discovered that the tracts were not adjacent, this court will not disturb the former judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 879-891; Dec. Dig. § 460.*]

4. JUDGMENT (§ 405*)—VACATION—GROUNDS.

It is only when parties have used due diligence in defense of their rights, and by the exercise of such diligence have not been able to correctly ascertain their rights, that this court will revive issues once closed by a judgment; and, if there was any reason why plaintiff was not able to present a complete defense to the former suit, this reason should have been alleged.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 766, 767; Dec. Dig. § 405.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Action by Mary A. Moss and others against John Drost and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

R. L. Belden, for appellants. Pujo & Moss, for appellees.

BREAUX, C. J. Plaintiffs complain of a boundary line as fixed heretofore in another suit. The differences have arisen owing, they allege, to an erroneous survey made in accordance with an order of the court in proceedings in a suit to which they specially refer in their petition, and in which the judgment is assailed. Plaintiffs represent that the judgment, the legality of which they question, was obtained by ill practice and fraud, and that in consequence the boundary line is not correct. They aver that a new survey should be ordered to establish the true boundary.

The defendants were defendants in the former suit in which the judgment in question was rendered.

Defendants take issue with plaintiffs, and urge that plaintiffs have no cause of action, and that, furthermore, all the parties to the judgment plaintiffs seek to have annulled are not parties to this present suit; that the tracts of land, the dividing line of which plaintiff seeks to have changed and re-established, are not adjacent one to the other.

John A. Moss, one of the defendants, filed a plea of vagueness, and further averred that he was without interest in this litigation, and asked that the suit be dismissed as to him.

The court sustained the plea of no cause of action, and dismissed the suit.

Have plaintiffs good ground to have the suit dismissed? The answer is, it is not within the terms of the Code of Practice, art. 607.

[1] As to plaintiffs' allegation that the judgment was obtained by fraud and ill practice, the boundary was settled in a former suit. It cannot be assailed successfully, unless it be alleged in what respect there was fraud and ill practice. The presumption is that the judgment was regularly obtained. To overcome that presumption, the particular acts of fraud and ill practice, should have been alleged.

[2] Another fatal objection is plaintiffs allege that the defendant Drost was not and is not the owner of the adjacent land. If that be true, it would be extremely difficult, if not impossible, to establish boundary lines between two tracts of land, if they are not adjacent. It occurs to us that the defense that they were not adjacent should have been alleged, if it had any merit, it has not in the first suit. But, in any event, whether alleged in the first suit or in this suit, it

does not appear, that it is possible to fix the boundary line between two bodies of land that are not adjacent to each other.

[3, 4] Another objection which plaintiffs have failed to meet is that they have not alleged that they discovered that the two tracts were not adjacent to each other since the former suit was instituted. Plaintiffs have not been sufficiently diligent to enable them to maintain this action. Want of due diligence is fatal to the right to reopen issues settled by a judgment. This principle was laid down in each of the following decisions: *Norris v. Fristoe*, Administrator, 3 La. Ann. 646; *Lanfear v. Mestier*, 18 La. Ann. 497, 80 Am. Dec. 658; *Perry v. Rue*, 31 La. Ann. 288.

They might have presented all their grounds of defense in the former suit. If there was any cause preventing them from presenting a complete defense in the former suit, it is not here alleged.

The district court correctly maintained the plea of no cause of action.

It is therefore ordered, adjudged, and decreed that the judgment is affirmed.

(130 La.)

No. 18,722.

FIRST NAT. BANK OF ARCADIA v. JOHN-SON et al.

(Supreme Court of Louisiana. Feb. 12, 1912. Rehearing Denied March 11, 1912.)

(Syllabus by Editorial Staff.)

1. APPEARANCE (§ 9*) — NONRESIDENT DEFENDANTS—BONDING ATTACHMENT.

Where nonresidents, proceeded against through a curator and by attachment, bonded the attachment, they thereby appeared and submitted themselves to the court's jurisdiction, though they attempted to limit such appearance to the sole purpose of bonding the attachment.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. § 9.*]

2. APPEARANCE (§ 19*)—WANT OF JURISDICTION—DEFECTIVE PROCESS.

A defendant, without subjecting himself to the jurisdiction of the court, may appear and ask to be excused from answering the suit, or he may decline to appear, either because the court has no jurisdiction, or because the process for bringing him into court is insufficient, or he may appear to remove the suit to the federal court; but he may not apply for any other relief, without submitting himself to the court's jurisdiction.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 79-90; Dec. Dig. § 19.*]

3. FRAUDS, STATUTE OF (§ 17*)—DEBT OF THIRD PERSON—PAROL EVIDENCE.

Civ. Code, art. 2278, providing that parol evidence shall not be received to prove any promise to pay the debt of a third person, did not justify the exclusion of parol evidence to prove an agent's authority to indorse a note for defendant mill company, thereby establishing that the debt was that of the mill company, and not of a third person.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 15; Dec. Dig. § 17.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. CORPORATIONS (§ 432*)—AUTHORITY OF AGENT—INDORSEMENT OF NOTE.

Evidence held to warrant a finding that the agent of defendant mill company had authority to indorse a note to plaintiff bank, executed by one of the members of the company for money borrowed to pay for the maker's interest in the company, so as to render the company liable thereon as indorser.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1737, 1748, 1762; Dec. Dig. § 432.*]

Appeal from Third Judicial District Court, Parish of Bienville; B. P. Edwards, Judge.

Action by the First National Bank of Arcadia against Charles F. Johnson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Blanchard & Barret & Smith and Barnette, Roberts & Goff, for appellants. Stubbs, Russell & Theus and Wimberly & Reeves, for appellee.

PROVOSTY, J. In these two consolidated suits, plaintiff seeks to hold the Arcadia Planing Mill Company responsible on a note made to its order and bearing its indorsement. The maker of the note is J. A. Cleaton, who is also made defendant, and does not deny his liability. The note was accepted and indorsed for the company by W. F. Nelson, who also indorsed it individually, and is a defendant in the suit, and does not deny his liability. Judgment is asked also in solido against the members of said company, namely, O. F. Johnson, A. B. Bolinger, and Dait Young. Their defense, like that of the company, is that the said company never had any connection whatever with said note, which was improperly made payable to it, and was indorsed for it by Nelson without authority.

[1, 2] The said company and its members are nonresidents, and were proceeded against through a curator ad hoc and by attachment. They bonded the attachment; and the first question which arises in the case is as to whether they thereby accepted the jurisdiction of the court and made themselves parties to the suit. The affirmative has been several times decided. *Hollingsworth v. Atkins*, 48 La. Ann. 520, 15 South. 77; *Williams v. Gilkeson-Sloss Co.*, 45 La. Ann. 1013, 13 South. 394; *Succession of Baumgarden*, 35 La. Ann. 130; *Rathbone v. Ship London*, 6 La. Ann. 439; C. P. 259. In their petition for the bonding of the attachment, the defendants expressly reserved their right to except to the jurisdiction of the court and to the citation, and declared that they appeared in no way, except for the sole purpose of bonding the attachment; and they now contend that this special reservation differentiates this case from the foregoing decisions. The rule is that an appearance to the suit, except for the purpose of objecting to the jurisdiction, or to the process or citation, subjects defendant to the jurisdiction of the court. A defendant may, without subjecting himself to

the jurisdiction of the court, come in and ask to be dispensed from answering the suit, or, in other words, decline to appear, either because the court has no jurisdiction, or because the process for bringing him into court has been faulty, and therefore insufficient; and he may also ask for the removal of the suit from the state to the federal court; but he cannot, without subjecting himself to the jurisdiction of the court, apply for any other relief than this. The property stands in the court as his representative in his absence; if he comes in and withdraws the property and puts himself in its place, he must be considered as being in court for all the purposes of the suit.

The note sued on was executed under the following circumstances: A sawmill and planing plant and appurtenant timber lands were advertised to be sold at judicial sale at Arcadia in this state. The Union Mill & Lumber Company of St. Louis, Mo., composed of the same Johnson, Bolinger, and Young above named as composing the Arcadia Planing Mill Company, directed W. F. Nelson, its Louisiana agent at Shreveport (the same who indorsed the note sued on), to go to Arcadia and see about purchasing at the sale, and making arrangements for procuring locally the necessary funds. Nelson testified that his instructions included a special instruction to make the purchase jointly with J. A. Cleaton. Johnson, who gave the instructions, testified that they were to get "some one who was in close touch with the interest in this section" to take a one-third interest. He makes no mention of Cleaton. The sale was advertised to take place on Saturday, December 12, 1908. On the preceding day, Nelson had an interview with L. M. Tooke, cashier of the plaintiff bank, which is the local bank. As to what was said at this interview, Nelson and Tooke disagree. Nelson says that Tooke agreed to let the Union Mill & Lumber Company have two-thirds of whatever amount might be necessary for buying the property, and to accept its unsecured note for the loan, and also to let Cleaton have the money necessary to buy one-third, and to accept his unsecured note for the amount; that Tooke's identical words were that—

"he would let Cleaton have the money and not be hard on him; he could arrange for it there."

Tooke testifies that he agreed to let the Union Lumber Company, which he knew to be a large, strong concern, have on its note whatever amount it might need for purchasing the plant; and that nothing whatever was said about Cleaton. In a letter addressed to Tooke, under date of December 19, 1908, seven days after the sale, Nelson says:

"The St. Louis office instructed me not to take in any partners that could not arrange for their own funds."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In this same letter, he says:

"You will recall that the writer had an understanding with you about Mr. Cleaton's paper that day I was in Arcadia to bid on this property, which was December 12th, and you stated that you would let him have this money and would not be hard on him about the indorsement."

Tooke does not deny that on the day of the sale he agreed with Nelson to let Cleaton have the money, but says that what he told him was that he would not be too hard on Cleaton about securing the loan—

"That he guessed that Cleaton had some good collateral that he could secure the paper with, or give good indorsement."

Nelson and Cleaton both bid at the auction, whether in concert or in opposition to each other is not ascertainable from the record. The property was adjudicated to one Merritt; and both Nelson and Cleaton boarded the train to leave. As the train was moving off, they were informed that Merritt was unable to comply with the bid, and that the property would be again auctioned on the same day. At Gibbsland, which was, we understand, the first stop of the train, Nelson got off, and telephoned to Tooke with regard to bidding at this second crying. He testifies that his instructions were to bid in the property in the proportion of two-thirds to the Union Mill & Lumber Company and one-third to Cleaton. Cleaton testifies that he also telephoned to the same effect. Tooke testifies that Nelson alone telephoned him, and that the instructions were to buy for the Union Mill & Lumber Company. Several witnesses testified that he announced at the sale that he was buying for that company, under instructions from Nelson over the telephone, and that he himself incurred no responsibility whatever in the matter. The adjudication was made to the Union Mill & Lumber Company for \$5,520. On the following Wednesday, Nelson returned to Arcadia and caused the deed of sale to be made in favor of the Arcadia Planing Mill Company. The Arcadia Planing Mill Company was a new partnership, entered into for the purpose of taking and operating the sawmill and planing plant, and was composed of Cleaton and of the same three persons composing the Union Mill & Lumber Company, namely, Johnson, Bolinger, and Young. Nelson went to the plaintiff bank and executed in its favor the note of the Union Mill & Lumber company for \$3,680, being two-thirds of the price of the sale. It was agreed that this note should be exchanged later for another, signed by the St. Louis office. The bank paid the \$3,680 to the officer who had made the sale, and Nelson returned to Shreveport. Two days later, the bank having refused to accept Cleaton's note for the remainder of the purchase price, \$1,840, without security of some kind, the note was forwarded to Nelson at Shreveport for him to indorse for the

Union Mill & Lumber Company. This Nelson refused to do, and returned the note in a letter, in which he said that he had already told Tooke that he had no instructions from the St. Louis office to indorse for Cleaton, and that he (Tooke) had promised not to be hard on Cleaton about indorsements. Tooke mailed the note back to Nelson, saying that he could not let Cleaton have the money without security, and that the note had been sent to him for indorsement, because Cleaton had said that Nelson's company would indorse for him. Other letters passed between the parties. In one of them Nelson says to Tooke:

"I have had another talk with Cleaton. He is willing to give the interest he has purchased in this property as security for the loan."

This was not satisfactory to Tooke, and, on January 9, 1909, Nelson came again to Arcadia. How to arrange the matter was discussed by the parties, and the plan was adopted of Cleaton executing the note sued on in favor of the Arcadia Planing Mill Company, and of Nelson, acting as the agent of the company, indorsing it over to the plaintiff bank, and also indorsing it individually. The bank then paid the amount of the note to the officer making the sale.

[3, 4] Throughout the offering of evidence, objection was made to the admission of any parol evidence to prove authority on the part of Nelson to indorse for the Arcadia Planing Mill Company. The objection being founded on article 2278, C. C., to the effect that "parol evidence shall not be received to prove any promise to pay the debt of a third person. But the debt sued on is not the debt of a third person. It is that of the Arcadia Planing Mill Company. Tooke never consented to accept Cleaton as sole debtor on the note, and never in point of fact did so, and never let Cleaton have the money. What he did was to purchase from the Arcadia Planing Mill Company the note of Cleaton, and let the company have the money. And the question is, not as to whether Nelson had authority to indorse for a third person, but whether he, or he and Cleaton together, had authority to represent the Arcadia Planing Mill Company in the transaction by which the said note was executed and transferred in the manner stated. We think that the record leaves no doubt whatever on that score. The Arcadia Planing Mill Company was a subsidiary company to the Union Mill & Lumber Company; the members were the same, plus Cleaton. And Nelson was the Louisiana representative of the Union Mill & Lumber Company, or of its members, with apparently very extensive powers. Under his general authority, he entered into important contracts. As has been seen, he represented said company in the purchase of this sawmill and planing plant; the important point as to price being left to his good judgment,

with full powers to make arrangements for procuring the necessary funds locally. In so doing, he executed a note for said company. It was he who acted for the said company in forming the partnership with Cleaton. It was he who gave the name of Arcadia Planing Mill Company to this partnership. It was he who selected and appointed a manager for the affairs of this partnership, without even, as far as the record shows, consulting Cleaton, and fixed the amount of this manager's salary. In accrediting this manager to the plaintiff bank, he wrote:

"Mr. J. W. York went over this morning to take charge of the Arcadia Planing Mill for us, and he has full authority to represent us in the management of the plant in his hands. He is authorized to sign checks, indorse paper and execute any necessary writings. I have full authority personally to sign this letter; but if you wish the same in writing from our Mr. Johnson of St. Louis, advise me first what is wanted and I will take the matter up with the St. Louis office. This however is unnecessary."

This letter is written from Shreveport as of date January 14, 1906, and is signed "Union Mill and Lumber Company, per W. F. Nelson." True this was several days after the note sued on had been transferred to the plaintiff bank, but it shows what authority Nelson had to represent the St. Louis members of the Arcadia Planing Mill Company in organizing that company and starting it in business. And a necessary step in that connection was to pay for the sawmill and planing plant which had been adjudicated to his St. Louis principals; and this to the extent of one-third was done by accepting Cleaton's note and transferring it to the plaintiff bank in the manner stated.

Nelson and Cleaton testify that this note was thus executed and transferred under an understanding with Tooke that the Arcadia Planing Mill Company was to be a party merely as a matter of form; that the note should be considered to be that of Cleaton to the bank, and Cleaton and Nelson personally be alone responsible on it; that the Arcadia Planing Mill Company was not to be responsible on it, and that the shape in which we see it was given to it at the suggestion of Tooke, who said that an indorsement of some kind was necessary, in order to square him with the national banking laws, and who said, further, that the indorser would have to be apparently good, in order to square him with the board of directors of his bank, and that Nelson would not answer for this purpose, as he was peculiarly irresponsible; that this plan was carried out after Nelson had positively informed Tooke that he had no authority to sign for the Arcadia Planing Company. Tooke and the bookkeeper of the bank, in whose presence the transaction was agreed to, testify that there was no such understanding, and that Nelson did not disclaim authority to sign for the Ar-

cadia Planing Mill Company. We readily give greater credence to the latter witnesses, first, because the trial judge did so; and, secondly, because the probabilities are all on that side. It is utterly improbable that Tooke, the managing officer of a bank, would have consented to take Cleaton's unsecured note after having repeatedly and positively refused to do so, although strongly urged—we may say begged—to do so, and after having refused to accept the pledge or transfer of Cleaton's one-third interest in the company as such security. Moreover, some discredit is thrown upon the testimony of Nelson by its inconsistency with his letter of December 19, 1908, transcribed supra, and with the testimony of Johnson. In this testimony, he denies that in the conversation in which Tooke agreed to make the loan to Cleaton anything was said about indorsement. He undertakes to give Tooke's exact words, in order to show that the word "indorsement" was not spoken; and yet in his said letter he reminds Tooke that he had promised in this same conversation not to be hard upon Cleaton about "indorsement." He testifies positively that his instructions from Johnson were to form a partnership with Cleaton; whereas, Johnson says that the instructions were to "get some one who was in close touch with this section." And some discredit is thrown, also, upon the testimony of Cleaton. He went to St. Louis and transferred his one-third interest in the Arcadia Planing Mill Company to his associates. At his return, he told several persons that the consideration of the transfer had been his liberation from the note now sued on, and the assumption by his associates of all liability on the note; whereas, he testified in this case that the consideration of said transfer had been his share of the losses sustained by the partnership.

Johnson testified that the first knowledge he had of said note having been executed was when he received notice of its protest. But in that statement he is contradicted by one of his own letters.

After the Union Mill & Lumber Company had been made adjudicatee of the sawmill and planing plant, and had paid two-thirds of the price, Nelson, its agent, found himself in the awkward position of having to do something to pay for the remaining one-third, and thereby secure control of the plant, so as to set the partnership agoing. This he did by the execution and transfer of this note. The transaction was therefore in due course of the partnership business. Nelson represented the St. Louis members, and Cleaton, the remaining partner, acted for himself.

As just stated, Cleaton made a transfer of his one-third interest in the partnership to his St. Louis associates. The consideration of the transfer was \$1,840, the exact amount

of the note, cent for cent. When he came back, he told several persons that he had transferred his said interest in consideration of his said partners agreeing to hold him harmless on the note. He and Johnson testified that the consideration of the transfer was Cleaton's share of the losses in the business of the firm; and in that statement they are corroborated by a lady stenographer in the St. Louis office, who testified that she heard their conversation, and that the consideration of the transfer was Cleaton's share of the losses sustained by the partnership. In a sense, the debt represented by this note constituted a part of the losses, if losses there were, and we can readily understand that, from simply hearing a conversation between the two men, this lady may have gathered from it the meaning which she testifies to. But from the fact of the transfer having been made for the exact amount of the note, and from the statements made by Cleaton on his return, and, in fact, from all the circumstances of the case, the inference is irresistible that the assumption of the note was the consideration of the transfer.

There is an alternative demand that, in case the defendant company is not held liable on the note, the said transfer be set aside as in fraud of creditors. The trial judge, having held the company liable, passed this alternative demand in silence, and we, for the same reason, spare ourselves the trouble of discussing it.

After the absentee defendants had made themselves parties to the suit by appearing and asking that the property attached be released to them on bond, they filed an exception, urging that the appointment of the curator ad hoc to represent them was irregular, because the clerk of court who made it was without authority to do so; the clerk being authorized to make such appointments only in the absence of the judge from the parish, and the judge not having been absent from the parish at the time said appointment was made. The facts in that connection are that on the day the appointment was made the judge happened to be at a considerable distance from the parish seat, but near the boundary line of the parish; and that, as a matter of accommodation, he went into the adjoining parish and remained there a few hours, in order that in his absence from the parish the clerk might make the appointment.

The absentee defendants having waived citation by making voluntary appearance in the suit, and there being no prayer that the attachment be set aside on the ground of want of authority on the part of the clerk to grant the order under which it was made, or, in fact, on any other ground, we are dispensed from passing on the question thus raised as to whether the said absence of the

judge was of the character contemplated by the law.

Judgment affirmed.

(130 La.)

No. 18,604.

MOUTON v. SOUTHERN SAWMILL CO.
(Supreme Court of Louisiana. Feb. 12, 1912.
Rehearing Denied March 11, 1912.)

(Syllabus by the Court.)

ELECTION OF REMEDIES (§ 3*)—EXECUTION (§ 188*)—APPEAL AND ERROR (§ 1178*)—CLAIM BY THIRD PERSON—REMAND.

If a party sue at the same time for the ownership and possession of property, he shall then be considered as having renounced the possessory in order to resort to the petitory action. Code Prac. art. 54. The opposition of a third person, claiming the ownership and possession of property seized under execution, is a petitory action. Where the trial judge treats such an opposition as a possessory action, the case will be remanded for a decision of the issue of title.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. §§ 3, 4; Dec. Dig. § 3; * Execution, Cent. Dig. §§ 560-563; Dec. Dig. § 188; * Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

Appeal from Nineteenth Judicial District Court, Parish of St. Martin; James Simon, Judge.

Action by Charles O. Mouton against the Southern Sawmill Company, for the use of the Exchange Bank of Natchitoches. Judgment for plaintiff, and defendant appeals. Reversed.

Scarborough & Carver and E. Vuillemon. for appellant. Voorhies & Delahoussaye, for appellee.

LAND, J. This suit is a third opposition, coupled with an injunction in which the plaintiff claims ownership and possession of a certain tract of timber land and of a large number of staves cut thereon, which had been seized under executory process at the suit of the Southern Sawmill Company against the Breaux Bridge Lumber Company.

The defendant, after pleading certain exceptions, answered, denying the title and possession of the plaintiff, and averring title and possession in said lumber company, which had executed the mortgage under which the writ of seizure and sale had issued. Defendant prayed for the dissolution of the injunction, with damages, and for the recognition and enforcement of the mortgage.

Plaintiff excepted to collateral attack on his title, and in the alternative pleaded the prescriptions of 3, 10, 20, and 30 years.

The trial judge stated in his reason for judgment that the plaintiff was in actual physical possession of the property, and had been in possession for many years at the time of the seizure, under title translatif of property, and that such title and possession could not be disregarded, and that the seizing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

creditor must resort to a direct action against the plaintiff.

There was judgment maintaining the third opposition and perpetuating the injunction, with \$100 damages for attorney fees. The defendant has appealed.

The action brought by the plaintiff is purely petitory, and is based on allegations of ownership by valid recorded titles of the following described property situated in the parish of St. Martin:

"A certain tract of timber land containing one hundred and forty-four arpents in superficial area, bounded north by lands of estate of Alexander Mouton, or assigns; south by lands of Marie Mouton, wife of Dr. H. D. Guidry, or assigns; east by lands of estate of Alexander Mouton, or assigns."

While the petition alleges peaceable possession of the tract for many years, payment of taxes, and cutting of wood and staves thereon, the petitioner claims the ownership of the land and staves seized by the sheriff. The prayer is for judgment sustaining the third opposition, and recognizing opponent's title to and ownership of the staves seized, and perpetuating the injunction against the sale of the land and staves.

The action is clearly an opposition by a third person to set aside an order of seizure, on the ground that the property seized did not belong to the debtor in execution, but was owned, on the contrary, by the person making the opposition. Code of Practice, art. 398 et seq. After defendant had answered, denying plaintiff's title, and averring title in the Breaux Bridge Lumber Company, the plaintiff attempted by exception to convert his demand into a possessory action, excluding the consideration of the respective titles of the parties. This cannot be done. If a plaintiff "sue at the same time for the possession and ownership of property, he shall then be considered as having renounced the possessory action." C. P. art. 54.

Our learned Brother below erred in not passing on the issue of title, and this necessitates the remanding of the cause.

It is therefore ordered that the judgment below be reversed, and it is further ordered that this cause be remanded for the purpose of a decision on the issue of title, and for further proceedings according to law; plaintiff to pay costs of appeal.

(130 La.)

No. 19,123.

HAMILTON v. HAMILTON.

(Supreme Court of Louisiana. Feb. 12, 1912.)

(Syllabus by Editorial Staff.)

1. PARTITION (§ 108*)—SIMULATED SALES—COLLATERAL ATTACK.

In the absence of fraud, title obtained at a partition sale cannot be attacked as a merely simulated sale by the heir of an interdict who was an owner in indivision of the premises,

though the partition suit was brought by one of the owners and the property purchased by others, under an agreement to partition it amicably among certain of them, where they have held under such amicable partition for 30 years.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 340; Dec. Dig. § 108.*]

2. FRAUD (§ 50*)—PRESUMPTIONS.

Fraud is never presumed.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.*]

3. LIMITATION OF ACTIONS (§ 19*)—STATUTES.

Under Civ. Code, art. 1791, which provides that the nullity of agreements with an interdict cannot be pleaded by those with whom they are made, when sought to be enforced after the removal of a disability, or by those in charge of the rights of the interdict, the want of authority on the part of a guardian to give a valid consent to a partition for his interdict would give rise, not to an absolute, but to a relative, nullity only, which could be barred by prescription, and, under Civ. Code, art. 3542, which provides that an action for the rescission of partitions is prescribed by five years, an action by the heir of the interdict, brought six years after his death, to recover certain of the property partitioned was ineffectual as against a plea of prescription.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 73-85; Dec. Dig. § 19.*]

4. PARTITION (§ 108*)—SALE—EFFECT.

A partition suit and sale which are only relatively and not absolutely null may not be ignored in a suit to recover property involved.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 340; Dec. Dig. § 108.*]

5. PARTITION (§ 108*) — SALE—COLLATERAL ATTACK.

Recitals of official documents in a partition suit and sale may not be overthrown by inference after a lapse of 30 years.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 340; Dec. Dig. § 108.*]

6. PARTITION (§ 104*)—SALE—PAYMENT.

Under Civ. Code, art. 1343, which provides that any adult coheir at the sale of hereditary effects can become a purchaser to the amount of the portion due him from the succession, and may not be required to pay the surplus of the purchase money until his portion has been fixed by partition, heirs of an estate and their representatives properly paid for property of the estate purchased at partition by receipting to the sheriff for their shares and those of the persons whom they represented.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 341, 351, 375, 377, 380-395; Dec. Dig. § 104.*]

7. PARTITION (§ 108*)—CUSTODY OF ESTATE—INTERDICTS—ACTION AFTER REMOVAL OF DISABILITY.

Though an interdict or his heir never received any portion of the proceeds of a partition sale of property owned by the interdict in indivision with others for which the interdict's guardian receipted, relief cannot be had by petitory action against the property, but should be by action against the guardian.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 340; Dec. Dig. § 108.*]

Certiorari from Court of Appeal, First Circuit.

Action by Robert W. Hamilton against Scott Hamilton. From a judgment for defendant, plaintiff brings certiorari. Affirmed.

T. Cross Jones, for petitioner. Joseph L. Golson, for defendant.

PROVOSTY, J. Four brothers (J. S., J. H., W. S. D., and W. Hamilton) and their sister (Miss Penelope Hamilton) owned in indivision a plantation of 3,000 acres in the parish of West Feliciana. W. Hamilton was an inmate of the insane asylum at Jackson, Miss., and an interdict, and J. S. Hamilton was his guardian, or curator. In September, 1880, J. H. Hamilton brought a suit for partition. In kind, if possible; otherwise, by means of a sheriff's sale at public auction. Experts, duly appointed and sworn, reported that the property could not be partitioned in kind without diminution of value, and a sale was, in due course of proceedings, ordered to be made for cash, and it was duly advertised. On the day set for it to take place, and just before the crying, the three *sui juris* brothers agreed in writing to bid in the property, and thereafter divide it between themselves and their sister by assigning to each in severalty a specific part duly described in the agreement. The part of the price of the sale coming to the interdict and his share of the costs were to be paid by J. S. and J. H. Hamilton. The property was adjudicated to the three brothers. Appraisers, duly sworn, had appraised it at \$7,500; it was sold for \$10,000. Whether there was any competition at the sale is not shown. The parties were unable to agree in the choice of appraisers, and the court had to be applied to to make the selection. From this fact, the inference would be that the suit was not a mere consensual affair. The appraisement was made on the day itself of the sale, January 15, 1881. Whether before or after the said written agreement had been entered into, the record does not show. The sheriff's *procès-verbal* of the sale recites that the adjudicatees were "the last and highest bidder," and that the \$10,000 was paid cash. From the fact that the price of the sale exceeded the appraisement by \$2,500, the inference would be that there was competition. There is in the record a power of attorney from Miss Penelope Hamilton to one of the brothers, party to the agreement, to receive and receipt for her distributive share of the price of the sale. This power of attorney is dated the day itself of the sale, January 15, 1881. Whether it was executed before or after the agreement was entered into is not shown; but the inference would be that it was before, since it purports to have been executed at Laurel Hill, which is at a considerable distance from St. Francisville, the parish seat, where the sale took place, and where the agreement was entered into. On the day itself of the sale, the several parties gave their receipts to the sheriff for their shares of the price; the brother, agent of the sister, receipting for her. On February 7, about a month after the sale, the three

brothers, adjudicatees of the sale, made title to their sister to the part assigned to her in severalty in the agreement. The deed to her recites that it is made to carry out the agreement under which the property was purchased by the three brothers. W. S. D. Hamilton refused to carry out the agreement; and suit was brought against him on February 9, 1881, two days after the execution of the deed to the sister, to compel him to do so. The sister joined in this suit as a party plaintiff. A few days thereafter, the recalcitrant brother consented to carry out the agreement, and the suit was dismissed. The agreement was then consummated by each of the brothers being assigned his part in severalty as agreed. All this was done by authentic acts, duly recorded, and the agreement itself was recorded. J. S. Hamilton, the guardian, was a resident of Jackson, Miss., and he and the interdict were cited through a curator *ad hoc*. He appeared to the suit and fled an answer for himself individually and for the interdict. As guardian, he receipted to the sheriff for the share of the interdict, \$1,952.20. The interdict continued insane until his death, in May, 1904; and the present suit was brought by his son and heir six years and seven months thereafter, in December, 1910.

It is a petitory action to recover one-fifth undivided of a part of that part of the property that was assigned to the sister, and subsequently deeded to her, under the agreement. It is brought against the person in possession, who is alleged to be possessing without title and in bad faith for himself and as farmer, or lessee, of another. All the facts are alleged in *extenso* in the petition, and then the averment is made that the partition suit and sale were fraudulent simulations designed to divest the title of the interdict and enable the parties *sui juris* to make an amicable partition, and that the said partition and sale, being mere simulations, were null and ineffective; and that the same were, furthermore, null and ineffective, so far as divesting the title of the said interdict was concerned, for the reason that they were purely consensual, and the guardian of the interdict was without authority to give a valid consent for him.

The grounds thus alleged in the petition are now no longer relied on by the learned counsel for the plaintiff; but the contention now is that no part of the price of the partition sale was paid, and that, as a consequence, there was no sale, and the title of the interdict has never been divested. And, in support of this, the decision of this court in the case of *Miguez v. Delcambre*, 128 La. 333, 54 South. 870, is cited.

[1] J. H. Hamilton had a perfect right to bring the partition suit; he and his two brothers had a perfect right to buy at the sale, either separately or together, and had the perfect right to agree to buy together for

the purpose of afterwards partitioning amicably, and had the perfect right to agree in advance upon the terms of the said partition. They did buy, and did partition, and for 30 years have held under this new title. Under these circumstances, it certainly cannot be said of the partition suit and sale that they were simulations, whatever else may be said of them.

[2] We do not think there is any good ground for suspecting fraud. Fraud is never presumed; and the inability of the parties to agree upon the appraisers, and the fact that the property brought \$2,500 more than the appraisement, are, especially, at this late day, strong indications of good faith.

[3] The want of authority on the part of the guardian to give a valid consent for the interdict would give rise only to a relative, not to an absolute, nullity. C. C. art. 1791. Relative nullities in matters of partition are cured by the prescription of five years. C. C. art. 3542; *Vaughn v. Christine*, 3 La. Ann. 328; *Seyburn v. Deyris*, 25 La. Ann. 484; *Lea v. Myers*, 4 Rob. 8; *Jamison v. Smith*, 35 La. Ann. 609. And this prescription is pleaded by the defendant. This suit was brought six years after the death of the interdict.

[4] A partition suit and partition sale, if only relatively null, not absolutely null in the sense of nonexistence, cannot be ignored, as if having never taken place, in a suit to recover the property.

The present suit being a petitory action to recover the property—that is to say, a suit which ignores entirely the partition suit and the partition sale—the learned counsel for the plaintiff was wise in abandoning the said grounds, specifically set forth in the petition, and grasping at some other straw for saving his case.

[5, 6] From the fact that the sale to the sister by the three brothers was declared in the deed of sale to have been for the purpose of carrying out the agreement under which the three brothers purchased the property, the learned counsel for the plaintiff deduces the conclusion that the sister paid no part of the price, and from that he argues that, the sister not having paid her part of the price, the brothers did not pay theirs; and hence that no price was paid. After 30 years, it would not do to allow the recitals of official documents to be contradicted and overcome and titles overthrown by such inferences as these; but, even if it were conceded, for argument, that no price was paid, in the sense of no money having actually passed from hand to hand, what legal objection could there be to the three brothers buying at the sale and paying that part of the price that would eventually come to them by receipting to the sheriff for it? Learned counsel for the plaintiff admits there would be none. The law favors and

expressly sanctions such arrangements. C. C. art. 1343. Well, then, why should not the guardian for the interdict and the agent for the sister, have been in just as good a position to receipt in like manner to the sheriff; they being fully authorized to receive the actual money itself from the sheriff? The law looks to the substance of things, and not to idle forms; if the sale would have been valid if the three brothers had handed over the actual money to the sheriff, and the sheriff immediately handed it back to them, it was valid, if they and the sheriff, acting on the assumption that this idle ceremony would be gone through with if insisted upon by either party, dispensed with it, and simply passed their receipts for the money.

[7] The plaintiff testified that neither the interdict nor he ever received any part of the \$1,952.20, thus receipted for by the guardian. If so, the recourse is against the guardian.

In the *Miguez v. Delcambre Case*, supra, the court expressly said that the situation would have been different if the administrator himself, who, as partner in community, was competent to buy, had taken title.

Judgment affirmed.

(130 La.)

No. 18,851.

WADKINS v. PRODUCERS' OIL CO. et al.

(Supreme Court of Louisiana. Jan. 2, 1912.
On Application for Rehearing,
March 11, 1912.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE (§ 246*)—COMMUNITY PROPERTY—WHAT LAW GOVERNS.

In determining whether land acquired under the homestead laws of the United States falls into a community already dissolved by the death of the wife, which occurred between the date that the entry was made and the date that the patent was issued, the laws of the United States, which give the land under certain stated conditions, must be applied, and not the laws of this state relating to community property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 878; Dec. Dig. § 246.*]

2. PUBLIC LANDS (§ 32*)—HUSBAND AND WIFE (§ 252*)—DISPOSAL OF LANDS OF UNITED STATES—TRANSFER OF TITLE—COMMUNITY PROPERTY.

Between the day that the homesteader makes the entry and that on which the government issues the patent, the title to the land is still in the United States, in spite of the fact that the entryman has right of possession and cultivation. If the wife dies before the patent has been issued, and before the title has vested in the entryman, it certainly has never been in the community of which she was a partner.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 54-56; Dec. Dig. § 32;* *Husband and Wife*, Cent. Dig. § 895; Dec. Dig. § 252.*]

3. HUSBAND AND WIFE (§ 252*)—COMMUNITY PROPERTY—TITLE RELATING BACK.

The wife of an entryman, during his life, has no rights in the land, and if she dies, and he subsequently completes his title, this title does not refer back to the community which formerly existed. As the wife had no interest in the land during her lifetime, she could not acquire any after her death, and the doctrine of relations would have no application to the case.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 895; Dec. Dig. § 252.*]

4. HUSBAND AND WIFE (§ 252*)—COMMUNITY PROPERTY—POWER OF CONGRESS.

The power of Congress to control the land and its disposition until the homesteader has acquired an absolute title is undoubted, and, in its wisdom, it has seen fit to merge in the husband all the rights arising from the entry, and, ignoring the community system of this state, has given the wife no rights in the land which has been entered, as long as the husband is alive.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 895; Dec. Dig. § 252.*]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by W. H. Wadkins against the Producers' Oil Company and another. From a judgment for plaintiff, defendants appeal. Reversed, and petition dismissed.

Frank J. Looney, A. L. Beaty, and Story & Pugh, for appellant Producers' Oil Co. Herndon & Herndon and O'Neal & Allday, for appellant Atlanta & Shreveport Oil & Gas Co. Thigpen & Herold, for appellee.

BREAUX, C. J. This was a petitory action.

The tutor of Effie Bell Wadkins claimed an undivided half interest in the S. E. $\frac{1}{4}$ of township 20 N., range 16 W.

On the 25th day of February, 1895, W. H. Wadkins, father of Effie, filed his application for the entry of the land described under the homestead law. The entry was allowed and the necessary papers issued to him. At the end of five years, to wit, on September 8, 1899, he made final proof and obtained a patent.

W. H. Wadkins married Mary Jane McCatheron on June 24, 1894, and she died on the 5th day of December, 1896. There were two children born of this first marriage. One died at the age of about two years, and the other is the plaintiff, represented by her tutor.

The two defendants are oil and gas companies operating in the Caddo Oil and gas fields.

The Producers' Oil Company, under a lease from the Atlanta-Shreveport Oil & Gas Company, drilled a well on the property, which produced a large amount, and which is still producing.

Judgment was rendered in favor of plaintiff for a half interest in the land and for \$86,328.24 realized from the oil produced.

Wadkins personally had parted with the title to the land, and had sold all minerals, including oil, on the land sued for.

Plaintiff personally having settled on the land and obtained receipts of entry, before mentioned, sued as tutor of Effie to recover one-half of the land and the amount in cash, before mentioned, as having been realized from the oil.

From the foregoing, it will be seen that plaintiff's wife died about two years after plaintiff's entry on the land, as above stated. Plaintiff tutor claims that the late Mrs. Wadkins acquired an interest from the date of his entry upon the land.

As the plaintiff had only a right of possession and cultivation, he can scarcely maintain the proposition that his title dates from the time that he obtained the certificate allowing him to go into possession.

The three propositions for discussion are: First. The date from which the entryman under the homestead law of the United States acquires title. Second. The title by relation back to the entry of the settler on the land. Third. The interest *vel non* acquired by the heir of the wife.

[1] Before we enter upon the subject, we will take a passing view of the laws of the federal government under which homestead entries are made and of the state laws relating to the community between husband and wife.

From the earliest days in its history, the government has retained the right to dispose of public domain. The authority in this respect is not limited.

In the treaty of cession of the territory of Louisiana, it is mentioned that the public lands became part of the domain of the federal government, and the local authorities in those days embodied expressions of approval in this regard in the fundamental law of the state.

Ordinances annexed to the Constitution of 1812:

Since those days, the lawmaking power of the general government has always legislated from that point of view, and well-considered decisions have always recognized the right which remains in the government until the land is finally disposed of.

In fine, the public domain passes from the government to the grantee under the laws of the United States. Prior to the transfer of the title by the government to the homesteader, the government imposes its own conditions, as the land continues to be the property of the United States until the patent issues. *Shiver v. United States*, 159 U. S. 493, 16 Sup. Ct. 54, 40 L. Ed. 231.

[2] This leaves no ground for the application of the doctrine of relation back to another act. The title does not vest complete entry and payment. *Hall v. Russell*, 101 U. S. 503, 25 L. Ed. 829; *Menard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654.

The statute does not concern itself about the wife, while the husband is living, as a necessary party in perfecting the homestead.

She, any further than any other member of the family, is not a necessary party. That is, she stands on the same footing during the life of her husband as any other member of the family, and has no other right, whether the family consists of children or grandchildren, or any other person. In case of the husband's death, she, as his widow, by express provision of the statute succeeds to the privileges of the entry and of obtaining the final receiver's receipt and finally a patent. At her death, the heirs of the husband succeed to the privilege.

During the five years of possession and cultivation, the entryman has the right to perform such acts and of taking such steps as are necessary to the improvement of the property. He can protect it from waste and trespass as if it were his own; but it does not follow that on that account the land is transferred before the expiration of the time before mentioned, or before compliance with the provisions of the law.

In order to emphasize its right, as it were, the government provides that if the settler abandons the property over six months he loses all right under the homestead law. Had he acquired any interest, the six months would not be as fatal to his entry under the homestead law as it is.

He possesses the right of possession to the exclusion of all others; but this does not constitute title to the land. He is the "remainderman." *Shiver v. United States*, 159 U. S. 499, 18 Sup. Ct. 54, 40 L. Ed. 23. That is, his interest vests when earned.

The court, in the just-cited decision, informs us that the courts of original jurisdiction uniformly hold in regard to the date that the entryman acquires title, that it applies to all homestead entries, and cites a number of decisions in support of this view, and the court adds the general consensus of opinion is entitled to great weight as authority.

The uniform jurisprudence of this state is in accord with these decisions. In *Foley v. Harrison*, 5 La. Ann. 75, in strong, clear, and positive terms, the court held that until the patent issues the fee is in the general government. The judgment in this case was affirmed by the Supreme Court of the United States. *Foley v. Harrison*, 15 How. 433, 14 L. Ed. 761.

There are three decisions of this court of recent date to which learned counsel confidently refers and quotes from. As he contends that they are pertinent and controlling, we will consider them specially later. We are impressed by his argument, because he urges that they settle the rule of property, and agree with him that such a rule should not be changed, save in case of the utmost necessity.

We will determine later if it be as counsel urges.

[3] Having arrived at the conclusion in regard to the date of the title, in discussing our

first proposition, it behooves us to take up the second proposition and determine whether the title acquired relates back to the entry upon the land, and determine whether the fiction applies which considers the thing done of a recent date as if done at an anterior date.

That doctrine scarcely has application in a homestead case in favor of the heirs of the mother deceased, who died before the end of the five years necessary to complete the homestead entry. At her death, Mrs. Wadkins, the mother, had acquired no right in the land; therefore her heir, or the one who represents her, cannot invoke a prior right in support of a subsequent alleged but nonexisting right.

If this were the case, in the event that the homesteader remarries, and if the first wife acquires some interest in the land, it would follow that the second wife would also be entitled to some interest. There would be necessity for a division, for a partition of interest, as to which the law makes no provision.

According to plaintiff, there would be even two communities, one dissolved, and the other existing; but no such condition can arise under the homestead law.

It is different in case of the entryman or the entrywoman. Her right may relate back to the settlement; for as to these there is express provision made under the statute.

It is not possible; the title cannot relate back so as to confer right on the wife, although the husband's title relates back, or the widow, as before stated.

The decision in the *McCune v. Essig* Case, 199 U. S. 387, 26 Sup. Ct. 78, 50 L. Ed. 237, is very similar to the case before us for decision, both as relates to title by relation and as relates to the right of the community.

In the cited case, it was contended that the interest which the husband acquired by his entry was community property, and that it related back to the date of entry. It is proper to state here that at the death of the husband in the cited case the wife fulfilled the conditions of settlement and proof. The court held in that case that the title remained in the government; that no beneficial interest had passed to the husband under the doctrine of relation; and that the wife who had obtained the patent was the beneficiary of the grant.

The doctrine of relation was considered, also, in the case of *Hussman v. Durham*, 163 U. S. 149, 17 Sup. Ct. 253, 41 L. Ed. 664.

The definition of this doctrine by the court does not warrant the conclusion that one other than the homesteader can benefit by the doctrine.

If it were held that the right related back to the entry, as relates to others than the entryman, it would give rise to the thought that the statute intended nothing; that it was a mere dead letter when it specifically

states that the entryman should declare on his oath, forming part of his application, that the land that he seeks to enter is entered for himself, and not for the benefit of others; that he is not to give to others the benefit of the land entered, or make any agreement by which the title should inure, in whole or in part, to the benefit of any other person, except himself. See the federal homestead statute.

[4] The government has made provision regarding the wife.

The statute provides, "if the person making such entry, or if he be dead, his widow, or, in case of her death, his devise"—all from the same statute, all precluding the possibility of arriving at the conclusion that the wife, despite these provisions, has an interest in the land entered by her husband to which her heirs can lay claim after her death.

His heirs or devisees are the last mentioned. What other can this mean, if it is not his heirs or devisees?

This, in our opinion, settles the question of title by relation back to the settler's first entry on the land as a homesteader.

The next proposition has been somewhat anticipated unavoidably. That is, as to whether the heirs of the widow have acquired anything in the land.

While there may be something said in support of the proposition that, as between the government and the settler, these are correct positions that, as between the settler and his wife, and afterward his widow in case of his death, the land may be considered hers to the extent that the community is concerned.

If the statute was not as positive, it may be that such a conclusion might be reached. It does seem as if nearly all the rights merge in the husband when he is the entryman, and the only exception is in case of his death, and the right given to the widow to perfect the homestead. In the event of her death, we have seen that it is not her heirs, but his heirs, who are the possible beneficiaries. The statute is imperative.

Until the term of occupancy has elapsed and a patent has issued, the statute is controlling. It is different after it has passed out of the government, and a right has been acquired to the land. As to acquiring an interest before then, it is a well-known fact that the community system is ignored in the administration of the federal laws. *Cunningham v. Krutz*, 41 Wash. 190, 83 Pac. 109, 7 L. R. A. 968.

The heirs take as donees, and not by descent. The terms of the statute are clearly expressed. The attempt to add another condition by decreeing that an interest inured to the community or to the wife or to her heirs would be wanting in precision intended by its terms.

We have already stated that there are

three decisions, to which we said we would return later, to which counsel confidently refers. The first is the case of *Brown v. Fry*, 52 La. Ann. 58, 26 South. 748.

It is stated in a note to the *Cunningham v. Krutz* Case, cited above, with reference to this court, that it distinctly based its decision in the 52 La. Ann. 58, 26 South. 748, case upon the fact that all the rights of the homesteader and his wife are complete. They had passed the period of uncertainty in matter of land entry. There was no more any question possible in regard to the homesteader's right; it was final, and had passed out of the government. If that be the correct statement of the case (and we certainly think it is), it affords no good ground to plaintiff to invoke the decision in support of his claim.

In *Richard v. Moore*, 110 La. 435, 34 South. 593, the court held that the homesteader had not been in possession of the property five years at the date of the husband's death; that his widow remained in possession the five years and completed the title and obtained a patent; that the property became hers by the patent, and did not fall into the community, which was dissolved at the date of her husband's death; that the community could not acquire the title under the statute. When the title was acquired, the community had been dissolved.

In regard to the other cited decision, the following is from the note on the same, which we slightly abbreviate:

The case of *Crochet v. McCamant*, 116 La. 1, 40 South. 474, 114 Am. St. Rep. 538, appears in direct opposition to the doctrine announced in the *Cunningham v. Krutz* Case, 41 Wash. 190, 83 Pac. 109, 7 L. R. A. (N. S.) 767; for the court holds that the acquisition dates from the entry; that the final proof has a retroactive effect to the date of the entry, and, consequently, the homestead became the joint property of the husband and the wife at the time of the entry, even though proof was made after the death of the wife; that in that case the death of the wife occurred after the expiration of the five years; and that this fact may distinguish this case from *Cunningham v. Krutz*. But, it is stated further in the note in the opinion cited above, little weight appears to be attached to this fact, the decision being mainly upon the fact that immediately upon the entry the homesteader had a conditional ownership of the land, and the accomplishment of the condition under which he held retroacted to the entry, and consequently the land.

This dicta in the quoted opinion is erroneous. It was not necessary to the decree, and for that reason is not considered as controlling. But, with this dicta deducted, the decree is correct and in accord with the views before expressed.

To resume. Plaintiff acquired under the homestead law the right to go into posses-

sion and protect his possession; that is all.

The mere fact that one takes out the first papers, with the view of entering the property under the homestead law, is not equivalent to a title. *Guaranty Savings Bank v. Bladow*, 176 U. S. 456, 20 Sup. Ct. 425, 44 L. Ed. 540.

A final, and not a duplicate, receiver's receipt evidences title. *Hall & Leg v. Jeter*, 127 La. 234, 53 South. 533.

The title remains in the United States until the homesteader acquires a right to a final receiver's receipt. *Spokane Falls v. Ziegler*, 167 U. S. 73, 17 Sup. Ct. 728, 42 L. Ed. 79.

The *modus operandi* to which the Civil Code applies are acquisitions by purchases and by donation, made jointly to both spouses. *Hurst v. Thompson*, 118 La. 58, 42 South. 645. Then the property passes to the community—a condition which does not arise in the case under consideration.

For reasons stated, it is ordered, adjudged, and decreed that the judgment appealed from is avoided, annulled, and reversed; that plaintiff's demand be rejected and his petition dismissed in both courts, at his costs.

On Application for Rehearing.

PROVOSTY, J. The question being whether the land in dispute fell within the community of acquêts and gains between Wadkins and his now deceased wife, as heir of whom the plaintiff minor claims ownership of one-half of the property, the facts are that Wadkins settled upon the land with a view to acquiring it under the homestead laws of the United States in 1893, one year before his said marriage, which took place in 1894; that his application for entry was filed in 1895, during the existence of his marriage; that his wife died in 1896; that he made his final proofs and obtained his patent in 1898, and thereafter sold the land to the authors in title of the defendant company.

The court has not held, as counsel erroneously suppose, that property acquired under the United States homestead law, during the community of acquêts and gains, does not fall into the community. The contrary was expressly decided in the cases, among others, of *Brown v. Fry*, 52 La. Ann. 58, 26 South. 748, and *Simien v. Perrodin*, 35 La. Ann. 931; and the point has been considered by both bench and bar as being so fully settled that in the recent closely contested cases of *Richard v. Moore*, 110 La. 435, 34 South. 593, and *Crochet v. McCamant*, 116 La. 1, 40 South. 474, 114 Am. St. Rep. 538, no one thought of contesting it, but considered that the sole debatable question was as to the point of time when the title should be considered as having vested. Indeed, in the latter case the decision was that the property had fallen into the community; and in the former case the court

expressly stated that if the patent had issued during the husband's life the property would of necessity have fallen into the community. And we do not find that the legal situation in such a case is anywhere better expressed than in the following passage in plaintiff's learned counsel's brief:

"The homestead laws of the United States are to be construed with, and not in opposition to, the community laws of the state. In case of any conflict between the two, then, of course, the federal law must prevail. But, in the absence of anything in the federal statutes to deny the application of the state laws, then the state laws must be considered as written into the federal statutes, and as a part of them. To deny this proposition would be to assert an intention on the part of Congress to legislate upon local matters of land title, and to abolish the system of community property as to all lands acquired under the provisions of the homestead statutes."

But what the court has held is that the investiture of the title dates from the settlement upon the land, and not, as contended by plaintiff, from the filing of the application for entry. And this, as an effect of the act of Congress of 1880 (Act May 14, 1880, c. 89, 21 Stat. 141 [U. S. Comp. St. 1901, p. 1393]), and of our codal provisions touching the retroactive operation of the accomplishment of suspensive conditions. This retroactivity of the accomplishment of the suspensive condition is expounded in the case of *Crochet v. McCamant*, supra, and is relied upon by plaintiff in the present case.

In the *McCamant* Case, by the way, the attention of this court was not called to the said act of Congress of 1880; and, besides, the operation of said act would not have made any difference in the case, as the settlement and the filing of the application for entry had both taken place during the marriage.

Said act of 1880, referring to the homesteader, says:

"His right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws."

Plaintiff's learned counsel lay much stress upon the qualification, "the same as if he settled under the pre-emption laws," insisting that by said act of 1880 the nature of the right acquired by the homesteader by mere settlement was not changed, but continued the same as theretofore, and that, as theretofore, he did not become vested with any interest in the land until the filing of his application for entry, and we must admit that we are much impressed by the argument of the learned counsel on that point; but the Supreme Court of the United States has expressed the contrary opinion on two different occasions. True only *arguendo*; but our great respect for that high tribunal leads us to accept those expressions as conclusive, bearing, as they do, upon the interpretation of a federal statute.

In *Maddox v. Durnham*, 156 U. S. 546, 15 Sup. Ct. 448, 39 L. Ed. 527, between the date

of settlement upon the land by the homesteader and the date of his offering to file his application for entry, the lands were withdrawn from entry. They were subsequently granted to the state of Kansas, and by that state were granted to the Missouri, Kansas & Texas Railroad Co., and by that company sold to the plaintiff, who was suing to recover them from the homesteader. The court said:

"This claim of the defendant cannot be sustained. At the time of those transactions, the mere occupation of the land, with a purpose at some subsequent time of entering it for a homestead, gave to the party so entering no rights. The law in force (Act May 20, 1862, c. 75) 12 Stat. at L. 392) made the entry at the law office the initial fact. * * * So the law stood until May 14, 1880 (21 Stat. at L. 141), when an act was passed, the third section of which is as follows: * * * By this section for the first time the right of a party entering land under the homestead law was made to relate back to the time of his settlement."

By inference the court here holds that, if the defendant's settlement had been made subsequently to, instead of prior to, the adoption of the said act of 1880, the withdrawal of the land from entry would have been ineffective as against the rights acquired by the homesteader by his settlement.

The case of *Railway v. Donohue*, 210 U. S. 23, 28 Sup. Ct. 600, 52 L. Ed. 941, in its facts is even less closely analogous than that of *Maddox v. Burnham*; but the expressions of the court, the present Chief Justice being the organ of the court, are even stronger. Thus, at page 30 of 210 U. S., at page 602 of 28 Sup. Ct. (52 L. Ed. 941), the court said:

"It was not until May 14, 1880 (c. 89, 21 Stat. 141), that a homestead entry was permitted to be made upon unsurveyed public land. The statute which operated this important change, moreover, modified the homestead law in an important particular. Thus, for the first time, both as to the surveyed and unsurveyed lands, the right of the homestead settler was allowed to be initiated by and to arise from the act of settlement, and not from the record of the claim made in the land office."

Again:

"It is certain, however, that, viewing comprehensively the rulings of the Land Department, the subject has been considered in two aspects: First, the sufficiency of acts done by a settler upon or after initiating a claim to give notice to the extent of his claim to another settler; and, second, the sufficiency of like acts to entitle to a patent for the land as against the government. In both classes, it is undoubted that the administrative rule has been, as to surveyed and unsurveyed lands, that the notice effected solely by improvements upon the land is confined to land within the particular quarter section upon which the improvements are situated. [L. R. Hall] 5 L. D. 141. And this ruling was predicated upon the assumed import of the decision in *Quinby v. Conlan*, 104 U. S. 420 [26 L. Ed. 800].

"As to the second aspect—that is, the nature and character of the acts of the settler essen-

tial to initiate and preserve a claim to land as against the government—the rulings of the Land Department have been liberal towards the settler, and his good faith and honest purpose to comply with the demands of the statute have primarily been considered, thus carrying out the injunction of this court in *Tarpey v. Madsen*, 178 U. S. 220, 20 Sup. Ct. 849, 44 L. Ed. 1042, and cases there cited, to the effect that regard should be had, in passing on the rights of the settlers, to the fact that 'the law deals tenderly with one who, in good faith, goes upon the public lands with the view of making a home thereon.'"

Rehearing refused.

BREAUX, C. J., adhering to the first opinion, hands down the following:

All the decrees of this court on the subject-matter involved are in harmony. The texts of one of the decisions (possibly two) are broader than necessary. See *Crochet v. McCamant*, 116 La. 1, 40 South. 474, 114 Am. St. Rep. 538. See, also, upon the subject, note to 7 L. R. A. (N. S.) 967, 968.

We held in our decision heretofore handed down that between the government and the homesteader community rights cannot interfere with the general government. As relates to the government, it falls into the community after it has been acquired, not before.

I adhere to the first opinion, and agree with the court's action in refusing the rehearing.

STATE ex rel. CRENSHAW et al. v.
JOSEPH et al.

(Supreme Court of Alabama. Dec. 21, 1911.
Rehearing Denied Feb. 15, 1912.)

1. STATUTES (§ 30*)—ENACTMENT—APPROVAL BY GOVERNOR—FAILURE TO APPROVE OR RETURN—"ADJOURNMENT."

The constitutional provision that, if any bill shall not be returned by the Governor within six days after it shall be presented to him, it shall become a law as if he had signed it, unless the Legislature by its adjournment prevents its return, contemplates a final "adjournment," and not a mere recess.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 32; Dec. Dig. § 30.*]

For other definitions, see Words and Phrases, vol. 1, pp. 190-192.]

2. STATUTES (§ 29*)—ENACTMENT—APPROVAL BY GOVERNOR—FAILURE TO RETURN.

Under the constitutional provision that a bill shall become a law, as if signed by the Governor, if it shall not be returned by him within six days, Sundays excepted, after presented, the time within which the Governor may consider a bill without its becoming a law is measured by calendar days.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 31; Dec. Dig. § 29.*]

3. STATUTES (§ 30*)—ENACTMENT—APPROVAL BY GOVERNORS.

Under the constitutional provision that a bill shall become a law, as if signed by the Governor, if not returned by him within six

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

days after it is presented to him, unless the Legislature prevents return by adjournment, but, when return is prevented by recess, it must be returned to the original house within two days after the reassembling, a bill cannot be returned to any officer or aggregation of members of a house, when it is not in session; it being essential that it be returned while the house is in session.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 32; Dec. Dig. § 30.*]

4. STATUTES (§ 30*)—ENACTMENT—APPROVAL BY GOVERNOR—RETURN TO LEGISLATURE.

Where the return of a bill by the Governor to the house in which it originated is prevented by recess for more than a day, the two days after reassembling in which it must be returned to the house, under the Constitution, to prevent it from becoming a law, must necessarily be legislative days.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 32; Dec. Dig. § 30.*]

5. STATUTES (§ 284*)—ENACTMENT—APPROVAL BY GOVERNOR—EVIDENCE.

A memorandum made on the bill at the time by the Governor's recording secretary cannot be resorted to to show when a house bill, returned with objections to the House by the Governor, reached him, so as to determine whether it was so returned within six days, as required by the Constitution, as the legislative record of the bill, with amendments to obviate the Governor's objections, and the presumptions therefrom in favor of its constitutional enactment, are conclusive; and hence, where the legislative records and journals did not, and were not required to show, when the bill was presented to the Governor, such memorandum was not admissible to show that the bill was not returned within the six days.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 383, 388; Dec. Dig. § 284.*]

6. EVIDENCE (§ 33*)—JUDICIAL NOTICE.

The Supreme Court will take judicial notice of the journal of each legislative house.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 33.*]

7. STATUTES (§ 93*)—SPECIAL LAWS.

Gen. Acts, 1911, p. 204, provides for the appointment of commissioners in cities having a population of 100,000 inhabitants. Gen. Acts 1911, p. 280, provides for a commission government in the cities having a population of 25,000, and less than 50,000. Gen. Acts 1911, p. 330, provides for such government in cities and towns not within the operation of any other statute authorizing the commission government; and Gen. Acts 1911, p. 591, provides for such form of municipal government in cities having a population of more than 1,000, and not more than 25,000. *Held*, that the acts were separate statutes, and were not special laws, within the constitutional inhibition, although referring to the same general subject; a classification based on population being reasonable.

[Ed. Note.—For other cases, see Statutes Dec. Dig. § 93.*]

8. EVIDENCE (§ 25*)—JUDICIAL NOTICE—POPULATION OF CITIES.

The Supreme Court will take judicial notice that the city of Birmingham was the only city to which Gen. Acts 1911, p. 204, providing a commission form of government for cities having a population of 100,000, was applicable when the act was passed.

[Ed. Note.—For other cases, see Evidence Cent. Dig. §§ 31-33; Dec. Dig. § 25.*]

9. CONSTITUTIONAL LAW (§ 48*)—VALIDITY OF STATUTE.

The Supreme Court must sustain the validity of an act, unless it is clear, beyond a reasonable doubt, that it violates the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

Simpson and McClellan, JJ., dissenting.

Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge.

Information in the nature of quo warranto by the State, on the relation of C. M. Crenshaw, Jr., and another, against E. B. Joseph and others. From a judgment for defendants, relators appeal. Affirmed.

Arrington & Houghton, for appellants. W. A. Gunter and John V. Smith, for appellees.

SAYRE, J. This information in the nature of quo warranto was filed by the appellant Crenshaw, in the name and behalf of the state, and sought a judicial determination to the effect that defendants were not entitled to hold office as commissioners for the city of Montgomery, as they were assuming to do. By their answer, defendants justified their assumption of official power and functions under an appointment by the Governor, alleging that their said appointment was made in pursuance of the act "to provide and create a commission form of municipal government and to establish same in all cities of Alabama," etc.; the same being shown at pages 289-315 of the printed volume of the General Acts of 1911. The act here referred to provides for a commission of five, to consist of the then mayor and four others to be appointed by the Governor, who should exercise all the powers of the municipal government. The legislative history of this act, as evidenced by the journals of the two houses of the Legislature and the enrolled act on file in the office of the Secretary of State, is the history of an unimpeachable exercise of legislative power, as all parties concede, in every respect save one. At one point, a difference of opinion has arisen out of facts which we will here state: House Bill 323, out of which the act in question was developed by a course of legislative action, provided for a commission of three, to consist of the mayor and two others, who should be elected by the people. In this shape, the bill passed both houses and was signed by the Speaker of the House of Representatives and the Lieutenant Governor, presiding officer of the Senate, on March 22, 1911. The journal of the House next shows that on March 31st, the House being then in session, "the House concurred in and adopted the amendment offered by the Governor to the H. Bill 323, said Governor's amendment being as follows;" and here the amendment, which provided, among other things, for a commission of five, is set out at length. The Governor's message bears date March 31, 1911, and

was spread upon the journal in pursuance of the Constitution (section 125), which requires in such cases that the House in which the bill originated, and to which it is returned, "shall enter the objections at large upon the journal and proceed to reconsider" the bill. In the meantime, as the journals show, the Legislature, on March 22d, adjourned to the 24th, and on the 24th to the 29th, and on the 29th to the 31st. Of intervening days, March 26th fell on Sunday. The appellant's contention is that, under the Constitution, the bill became a law in its original shape by reason of the Governor's failure to sign or return the same, with the amendments of his proposal to the House of Representatives, within six days; and that what further was done with the bill is of no consequence, as being wholly without the power of the Legislature.

[1-4] So much of the Constitution as is necessarily involved in the decision of the question presented reads as follows: "Every bill which shall have passed both houses of the Legislature, except as otherwise provided in the Constitution, shall be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it originated, which shall enter the objections at large upon the journal and proceed to reconsider it. * * * If any bill shall not be returned by the Governor within six days, Sunday excepted, after it shall have been presented, the same shall become a law in like manner as if he had signed it, unless the Legislature, by its adjournment, prevent the return, in which case it shall not be a law; but when return is prevented by recess, such bill must be returned to the house in which it originated within two days after the reassembling, otherwise it shall become a law." The authorities are unanimous in holding that the adjournment of the Legislature contemplated in the quoted clause of the Constitution is a final adjournment. It seems necessary, also, to hold that the limit of time during the session—that is, where there has been no final adjournment—within which the Governor shall return a bill in order to prevent it becoming a law without his approval and signature, or, perhaps, it would better express the intent of the provision to say the period of time during which the Governor has the right to consider a bill without its becoming a law independently of him, must be measured by calendar days; for otherwise there would be no reason for excepting Sunday, on which day it is not the practice of legislative bodies in this country to sit for the business of legislation. When occasionally Legislatures have found it convenient or necessary to extend their sessions over into Sunday, it has been treated as an extension of the previous day. But the sixth must be a legislative day also; for the Governor

has six days in which he may consider the bill, and the requirement is that the bill, in case it be not approved, be returned to the house in which it originated. No congregation of the members of a house can, in a constitutional sense, constitute the House during the period of a recess, or exercise any of its constitutional functions. Nor can the return be made to any officer of the House when it is not in session. As was aptly said by Gov. Jones in a message to the Senate in 1893: "A message from the executive to either branch of the Legislature, delivered to an officer of the body, who may not even be a member, and when it is not in session, for transmission and delivery to 'the House' when it shall reconvene, is an anomaly in parliamentary law. Messages from the executive to either branch of the General Assembly are invariably delivered to the House while in session, and not to the officers for them. Such has been the immemorial usage, and the same custom obtains concerning messages from one house to the other. There is neither parliamentary nor statute law which confers any functions upon the secretary or clerk of either house, while they are in recess, concerning the reception of messages from the other house or from the executive. Parliamentary law absolutely divorces clerks and secretaries from such functions, and is so exacting in this regard that one house will not receive a message from the other if the house sending the message is not in session. Indeed, it would seem that the express language of the Constitution, which requires the return 'to the House,' would repeal any parliamentary or statute law or custom, if such had obtained, whereby the return might be made to the clerk or secretary of the House, while it was not in session, for delivery to it when it reconvenes." Sen. Jour. 1892-93, 304-310. Like considerations, and others arising out of the fact that during the period of a recess the Governor may find it exceedingly inconvenient, if not impossible, to communicate with the presiding officers of the houses, not to mention the element of unseemliness which may find its way into such an effort, lead to the conclusion that a bill may not be returned to the Speaker of the House or the presiding officer of the Senate in recess. So, then, a bill must be returned to the House while in session, which is to say that the sixth and last day during which the Governor may retain a bill without its becoming a law, if he sees fit to exercise his right of examination to the utmost, must be a legislative day. We conclude, also, that if the house in which a bill originated is in session on the sixth day after a bill has been presented to the Governor, so that the Governor has then an opportunity to return the bill, and there is a failure to return it, his constitutional right to return is exhausted. Any other rule would lead to the result that,

with the daily passage of bills originating in either house, the limitation of time would be ineffectual, unless the Legislature should each day remain in session until the last minute of the day—a result not contemplated, of course. But where a return is prevented by recess—an adjournment, not final, but for more than a day—the two days after the reassembling in which the bill may be returned must of necessity be legislative days. On one the house reassembles as an organized body; on the other the bill may be returned to the house so organized.

[5] Relator offered to show by a memorandum made at the time upon the bill by the Governor's recording secretary, and by other parol proof, that the bill reached the Governor's office and was delivered into the hand of his recording secretary on March 22d, and that this was the customary way of dealing with bills. The bill is not traced directly to the Governor's hand or notice before the 31st, the day on which he returned it to the House. If these facts constituted a presentation to the Governor, within the meaning of the Constitution, and if no rule of law or imperative policy, such as has always prevailed in cases of the character and in view of which the Constitution may be regarded as having been framed, stood in the way of a resort to parol evidence of them, then consideration of the dates to which we have referred, in connection with the interpretation given already to the clauses of the Constitution in question, must result in a judgment denying the validity of the act under which the respondents are holding office.

Cases have been cited from other jurisdictions to sustain the appellant's contention that the presentation shown by the memorandum was a presentation to the Governor. In *Wrede v. Richardson*, 77 Ohio St. 182, 82 N. E. 1072, 122 Am. St. Rep. 498, the ruling was that an entry in a record which was kept in the office of the Governor, pursuant to a requirement of law, and with his acquiescence used to perpetuate evidence of the presentation to him of bills which had been passed by the General Assembly, was competent and sufficient to prove such presentation. In *State v. Michel*, 52 La. Ann. 936, 27 South. 565, 49 L. R. A. 218, 78 Am. St. Rep. 364, it appears that the Constitution of Louisiana contains an imperative provision that, "as soon as bills are signed by the Speaker of the House and President of the Senate, they shall be taken at once, and on the same day, to the Governor by the clerk of the House of Representatives, or secretary of the Senate," and the validity of the act there in question was submitted to the court on an agreed statement of fact which stipulated the day of its presentation to the Governor. The bill having been presented to the Governor between 10 and 11 o'clock at night, and the

Governor having refused to receive it at that hour, the question litigated was whether such a tender of the bill was a constitutional presentation of it, and whether the fact that the Governor declined then to receive it rendered that presentation nugatory and ineffective. We have no doubt the question was properly decided against the Governor's pretensions. So, too, in *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432, the case was made upon agreed facts which stipulated that on a certain day the bill was, by the enrolling committee of the Senate, delivered to the Governor for his consideration. No question was raised concerning the fact of presentation; whether the Senate, by adjournment, had prevented a return, and whether the court had jurisdiction to compel the Governor, by mandamus, to cause the bill to be authenticated as a statute, are questions which constitute the entire subject-matter of the opinion. The same is true of *State v. South Norwalk*, 77 Conn. 257, 58 Atl. 759. The court in that case took occasion to say that "it [a bill] cannot be deemed to have been presented to him [the Governor] until it has been in some way put into his custody, or into that of some one properly representing him, in such manner that he has a reasonable opportunity to inspect and consider it," citing *Opinion of the Justices*, 99 Mass. 636. The court further said, "Due provision was made, shortly after the adoption of the Constitution, for such attendance on 'the Governor, or the person administering the office of Governor,' as might serve to secure his proper representation at the executive offices during the sessions of the General Assembly," citing the statutes of Connecticut. The case of *Soldiers' Voting Bill*, 45 N. H. 608, decided by the Supreme Court of New Hampshire in 1864, holds with the appellant on this point. In that case it was "assumed to be established" that the bill was "carried by the assistant clerk of the Senate to the executive chamber, in the state house, in accordance with the customary mode of presenting bills to the Governor, and was laid upon the table of the Governor, who was then absent from the room, but who had been there during the morning, and was expected to return that afternoon, but did not; that when said bill was thus laid upon the Governor's table some members of the executive council were present, and also Mr. Barrett, the State Auditor, who was the son-in-law of the Governor, and who had a table there in the executive chamber for the transaction of his business, near that of the Governor; that the assistant clerk of the Senate, when he entered the executive chamber with said bill, announced that he had a bill for the Governor." The Governor saw the bill on the next day, and the point at issue was whether there had been a presentation when the bill was laid

upon the Governor's table. In brief, the conclusion that the bill had been presented when laid upon the Governor's table was rested upon the absurdity of requiring the officers of the Legislature, in order to perform their duty, "to follow the Governor wherever he may chance to go, whether in the state or out of it, upon his private business as well as public, and present bills to him in person wherever he may happen to be." The clear effect of the decision was that the bill must be deposited in the usual place, and the attention of the Governor, secretary, or other person in charge of the room called to the fact. What different effect was given to the presence of members of the executive council with whom, under the Constitution of New Hampshire, the Governor was required, from time to time, "to hold a council for ordering and directing the affairs of the state, according to the laws of the land," or to the presence of the Governor's son-in-law, or whether the janitor would not have served the purpose as well, does not appear. At any rate, the case would seem to permit the authority of legislative acts to rest upon a very uncertain basis. Our own case of *State v. Porter*, 145 Ala. 541, 40 South. 144, is also relied upon. That case drew into question the right of commissioners, appointed by the Governor, to hold an election to locate a county seat under the act of March 3, 1903. Gen. Acts 1903, p. 117. The act provided for the appointment of commissioners whenever a majority of the qualified electors of a county should "petition the Governor in writing." Relator relied upon a petition of withdrawal. Justice Anderson said: "The law provides that the petition must be presented to the Governor, meaning that it must be lodged with him or his official force in some formal manner, so as to become an official document. And section 2 (page 118) of the act requires the Secretary of State to furnish a copy of said petition to the county site commissioners when he issues to them their commissions. Thus it must be observed that this original petition must get within the actual custody and control of the Governor. It therefore stands to reason that, in order for any of the signers to withdraw therefrom, they must do so with a degree of formality corresponding with that contemplated by the law in presenting the original petition." And it was held that a withdrawal petition, presented to Capt. Sedberry, who had been sent by the Governor to Cleburne county to investigate the bona fides of the original petition, but which never in fact reached the Governor's hands, was of no avail. Clearly that case rested upon considerations which have no place in the case at hand; for there no question of legislative procedure was involved. Per contra to the rule in New Hampshire, in Massachusetts, in a case where the Governor was out of the state when a

bill passed the Legislature, the Supreme Judicial Court reasoned that as the duty of revision by the Governor was a personal duty, with which he alone was intrusted, it was necessary that the bill should be laid before him personally; that the Governor, whose duty it was to sign the bill, was entitled to have it before him, that he might have the opportunity to sign or return it with his objections. In this state, we have no constitutional or statutory provision requiring the presentation to be made to the Governor within any fixed time, nor any requiring an official record of such presentation to be kept. There is therefore no presumption of duty discharged by other officials to set over against the presumption that the Governor has observed the law, nor any record required by law to be kept, on which to place a finding that the bill was presented to the Governor more than six days before its return to the House. What effect the practice of subordinate officers of the two houses to present bills to the Governor's recording secretary and of the Governor's acquiescence in that practice should have in determining the sufficiency of such presentation may be left where we find it, with the apparent weight of reason and authority opposed to appellant's contention; for at some time prior to its return to the House the Governor took cognizance of the bill. The unavoidable question is whether parol should have been received to show the point of time at which presentation was made, and this we have decided upon considerations which will be stated.

Attentive regard for the authorities and the reasons suggested pro and con has convinced us that, whatever parol evidence may have been available to appellant in support of his contention as to the fact, and however cogent that evidence may seem to the mind unconstrained by the rules of law and those considerations of vital policy obtaining with the courts whenever they come to the task of passing upon the constitutional validity of the acts of the co-ordinate Legislature, we are concluded by the legislative record of the law in question and the presumptions arising out of that record in favor of its constitutional enactment.

[8] No view can be entertained which would cast the least doubt upon the court's complete acceptance of the doctrine that the mandates of the Constitution are the supreme law to all departments of the government, or the court's readiness to enforce the supreme law by declaring a legislative act invalid, where that fact is made to appear by competent evidence. But in this case the journals of the two houses and the enrolled bill, signed by the Governor and lodged with the Secretary of State for promulgation as law, present the official history of one continuous dealing with one bill, House Bill 323. On its face, the record is that of a

statute valid in every particular of its enactment. The Constitution requires that each house shall keep a journal of its proceedings, and of the record thus made the courts take judicial cognizance. *Moody v. State*, 48 Ala. 118, 17 Am. Rep. 28; *Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 425, 28 South. 497, 51 L. R. A. 396, 85 Am. St. Rep. 42. And the decisions of this court have settled the proposition: "That in determining whether a bill enrolled, signed by the president of the Senate and the Speaker of the House of Representatives, and approved by the Governor, was in fact regularly and constitutionally enacted in all its provisions, and contains all the provisions which were enacted by the General Assembly, recourse can be had only to the bill itself as so enrolled, signed, and approved, and to the journals of the two houses of the Assembly. The bill itself, wrought by such enrollment, signatures, and approval into an apparently valid enactment of the legislative department of the government, is a record of its own existence and integrity, in many jurisdictions constituting the only record to be looked to, and carries with it a presumption that it is the bill which the two houses concurred in passing; and this presumption can only be overcome by the contrary being made to affirmatively appear from that other record, the journals—the bound volumes of the proceedings transcribed, and signed by the presiding officers and deposited with and kept by the Secretary of State—of the respective houses of the General Assembly." *Robertson v. State*, 130 Ala. 169, 30 South. 494. And in *Ex parte Howard-Harrison Company*, 119 Ala. 484, 24 South. 516, 72 Am. St. Rep. 928, the language of the court is: "No other evidence is admissible. The journals can neither be contradicted nor amplified by loose memoranda made by clerical officers of the houses. Nor will it be presumed from the silence of the journals on a matter of which it is proper for them to speak that either house has disregarded a constitutional requirement in the passage of an act, except in those cases where the organic law expressly requires the journals to show the action taken, as where it requires the yeas and nays to be entered." But appellant says it is the elementary duty of the court to know the statute law of the state, though judicial knowledge is not the personal knowledge of the judge, and for that reason he has the right to resort to any source of information which in its nature is capable of conveying to the judicial mind clear and satisfactory information, and it is urged that, since the relator stood ready to furnish evidence for informing the judicial knowledge, of greater moral weight than the mere presumptions which arise in favor of the observance by the Legislature and the Governor of constitutional mandates, and to the effect that those mandates were not observed in fact,

the court cannot avoid knowing that in fact the Governor did retain the bill for more than six days after it had been presented to him without signing it, and that thus it became law in its original shape. It is to be conceded that there may be cases in which the courts must enter into allunde investigations as to the existence of a statute, or as to the time when it received executive approval by signing, or as to the time when it became law without such approval (*Walker v. Griffith*, 60 Ala. 367; *Gardner v. Collector*, 6 Wall. 499, 18 L. Ed. 890), though, to paraphrase the language of Judge Miller in the last-named case, we should reasonably expect to find a duty so very important as that of making some official written statement as to when a bill is presented to the executive, and when signed by him, the neglect of which may be followed by the most serious consequences, prescribed by some positive and express provision of the Constitution, or, at least, by some act of the Legislature. The court would repudiate any record or any part of any record which depends upon forgery or other unlawful interpolation for its semblance of law, and such forgery or interpolation might be proved to the court as in the case of any other instrument which the court is bound to know; and where the Constitution requires, as a condition to the validity of a statute, that certain facts in respect to its legislative history must appear upon the journals, the court gives effect to the supreme law by declaring void a statute with a defective record; and where two irreconcilable laws are approved on the same day, or rights may depend upon the exact date of an approval which is not denied, nothing appearing in that respect, necessarily evidence is taken to make certain a fact otherwise at large. Here the case is different. Appellant does not deny the integrity of the record of the act under which defendants claim; nor does he claim that it is required by any rule of Constitution or statute to show more than it does. As before said, the statute in its last shape is perfect in its appearance, so far as concerns the regularity of its enactment; and its genealogy shows no break. The record history of the bill does not end with its first passage through the Legislature. It is resumed at a later day in the journals of the two houses, that of the House of Representatives showing that the bill was returned without approval, and with the proposal of amendments which would meet the Governor's objections. Subsequent dealing with the bill, down to and including the Governor's approval of it in its last shape, is admitted to have been perfectly regular, if the return was made in time. Appellant would impeach the effect of the record of the bill in its last shape by evidence in pais of a fact, concerning which a proper record is required to show nothing, contrary to what was the necessary finding

of the Governor and the Legislature. This on a comprehensive theory that judicial knowledge must embrace every act of every official concerned in any way in the business of passing laws. Now, when the bill went back to the Legislature, it was within both the power and duty of that body to know whether the bill had become a law by reason of the Governor's failure to return it within the time limited by the Constitution, thus foreclosing all right to deal with the subject-matter except by a new bill, or whether the legislation thereby proposed was still in fieri and subject to amendment. Its power to proceed depended upon a question of fact which its sworn duty required it to decide, and which it was competent to decide, and which it did decide, thereby establishing, by necessary inference, the fact in accord with the implications of the Governor's return. On such a record, the presumption is conclusive that the facts were consistent with the legislative assumption of power. The principle here applied is set forth in the case of *United States v. Arredondo*, 6 Pet. 691-729 (8 L. Ed. 547), in these words: "It is a universal principle that, where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made on the act done by the tribunal or officer, whether executive ([*Marbury v. Madison*] 1 Cranch, 170, 171 [2 L. Ed. 60]), legislative ([*McCulloch v. Maryland*] 4 Wheat. 423 [4 L. Ed. 579]; [*Satterlee v. Matthewson*] 2 Pet. 412 [7 L. Ed. 458]; [*Craig v. Missouri*] 4 Pet. 563 [7 L. Ed. 903]), judicial ([*Perkins v. Fairfield*] 11 Mass. 227; [*McPherson v. Cunniff*] 11 Serg. & R. [Pa.] 429 [14 Am. Dec. 642], adopted in [*Thompson v. Tolmie*] 2 Pet. 167, 168 [7 L. Ed. 381]), or special ([*Rogers v. Bradshaw*] 20 Johns. [N. Y.] 739, 740; 2 Dow. P. Cas. 521, etc.), unless an appeal is provided for, or other revision, by same appellate or supervisory tribunal, is prescribed by law." The rule here stated confines judicial knowledge to the record, where the record is authentic and complete in itself.

This rule is based upon practical considerations of the utmost importance. It would lead to intolerable conditions if the validity of statutes, evidenced in every way provided for authentication by the common law, by the Constitution, and by statutes made to that end, and under which the affairs of individuals and communities may have been

long administered, were permitted to depend upon the precarious memory of witnesses and the uncertainties of parol proof. It is clear that if one of the steps necessarily involved in the enactment of a law, and not required by the Constitution to be affirmatively shown, or for the due exposition of which no law has been made, may be shown by evidence in pais not to have been taken, or not to have been taken properly, on the theory that the court knows all such things, "the entire subject of what the law is is withdrawn from the protection of the rules devised and applied for the purpose of securing certainty where doubt would be intolerable. The prompt aversion of the legal mind from the consideration of evidence in pais to show the invalidity of an officially promulgated statute is justified by a contemplation of the consequences which would follow." *Wrede v. Richardson*, supra. Our conclusion that the trial court properly refused to receive the testimony offered by the relator in impeachment of the act, and that the memorandum stamped by the recording secretary upon the bill as first enrolled is of no consequence, to the extent, at least, it is inconsistent with the course of the Legislature, which treated it as untrue in fact, is required by the necessities of organized society, and is sustained by the weight of well-considered authorities in those states where these and closely allied questions have been carried to the courts for decision. *People v. McCullough*, 210 Ill. 488, 71 N. E. 602; *Wrede v. Richardson*, supra; *Danielly v. Cabaniss*, 52 Ga. 211; *Sherman v. Story*, 30 Cal. 274, 89 Am. Dec. 93; *Rumsey v. People*, 19 N. Y. 41; *State ex rel. Reed v. Jones*, 6 Wash. 450, 34 Pac. 201, 23 L. R. A. 340, and note; *Stevenson v. Colgan*, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, and note, 25 Am. St. Rep. 230.

[7-9] At its last session, the Legislature passed four different acts on the subject of commission government for municipalities in this state. On March 31st the Governor approved an act providing for the appointment of commissioners in all cities now having, or which may hereafter have, a population of as much as 100,000 according to the last federal census, or any such census which may hereafter be taken. Gen. Acts 1911, p. 204. We judicially know that this act applies at this time to the city of Birmingham alone. On April 6th an act was approved, providing for a commission in cities now having, or which may hereafter have, a population of as much as 25,000 and less than 50,000 according to the last census. Gen. Acts, p. 289. This act applies to the city of Montgomery alone, as populations now are. April 8th an act was approved for the government by commission of cities and towns which, to quote the act, "now are not, or hereafter may not be, within the influence or operation of any other valid legislative enactment authorizing or adopting

the commission form of government." Gen. Acts, p. 330. Under this act, a commission for the city of Mobile has been organized, and a commission for any other town or city in the state, except Birmingham and Montgomery, might have been organized but for the passage, on April 21st, of an act providing for government by commissioners in all cities now having, or which may hereafter have, a population of more than 1,000 and not more than 25,000. Gen. Acts, p. 591. The effect of this last enactment was to leave the city of Mobile as the only city in the state which might adopt the commission form of government, as provided in the act of April 8th, and the government of that city has been organized under that act. These acts differ much in detail; but the one broad purpose common to them is to abolish the government of municipalities by mayors and boards of aldermen, and to substitute therefor a board of commissioners to be elected generally by the people, but in all cases, save those provided for in the act of April 8th, the first board of commissioners was to be appointed by the Governor. In the case of cities falling within the operation of the acts of April 8th and 21st, it is provided that a vote of the people be first taken to ascertain whether they desire a change in the form of government. By the acts of March 31st and April 6th, no opportunity is given for an expression of the popular will; but the appointment of commissioners in the first place is made mandatory upon the Governor. On these acts and the differences to be noted in their provisions, some only of which have been mentioned, appellant bases an argument that the act of April 6th is unconstitutional as being a local act. If the act is local it is unconstitutional. It will be observed that these acts, taken together, arrange the cities and towns of the state into four classes: (1) Cities and towns having a population between 1,000 and 25,000; (2) those between 25,000 and 50,000; (3) those between 50,000 and 100,000; and (4) those of 100,000 and over. And provision is made by which cities shift from one class to another as their populations change. The Constitution does not prohibit classification on substantial grounds; and this court has recognized differences in population as a proper basis for the classification of municipal corporations. *Griffin v. Drennen*, 145 Ala. 128, 40 South. 1016. But in *State v. Weakley*, 153 Ala. 648, 45 South. 175, ruling here, too, in accord with the authorities generally, it is held that indiscriminate classification as a mere pretext for the enactment of laws essentially local or special cannot be allowed. The argument for appellant is that there are no essential differences between cities of these different classes, such as call for differences in the regulation of their municipal powers and local government; and, further, that these four acts are in *pari materia*, and must

be construed as one act, and that, when considered so and in connection with well-known agitations of public opinion going on at the time, it is apparent that the purpose was to legislate to meet local conditions and demands, rather than to frame a code of laws applicable to all cities similarly situated. It is our duty to sustain these acts, unless it is clear, beyond a reasonable doubt, that they violate some provision of the fundamental law. The argument against them presents a novel application of the doctrine of construing statutes in *pari materia*. To link a number of separate acts together, each unobjectionable in itself, for the purpose of destroying all or any of them, would, so far as we are advised, be without precedent. We think rather that each of these acts is to be judged on its merits as they appear in the act itself. Classification by numbers having been recognized as legitimate, it must be a task of great difficulty to say just when the Legislature has overstepped the bounds of its power in arranging a classification on that basis. And while our knowledge, in an undefined and irresponsible way, of conditions and opinions operating upon the Legislature at the time of these acts may be such as to create suspicion that the effort was to provide differently for each of the three largest cities of the state on consideration of local demands, not based on essential differences of situation or the real interests of their inhabitants, we cannot look beyond the act itself for motives. A case might occur in which this basis of classification might be pushed so far that the court would be required to pronounce it unconstitutional. The Supreme Court of Pennsylvania, whose decisions on this subject we have followed, found such a case in *Ayar's Appeal*, 122 Pa. 266, 16 Atl. 356, 2 L. R. A. 577; but we think that condition is not sufficiently demonstrated by this statute. In form, at least, the act is not open to the objection taken to it. The range of numbers in the class in which the city of Montgomery falls is fairly large; and we are unable to say with perfect assurance that the Legislature may not have found differences between cities of this class and others having populations of less than 25,000 or more than 50,000 which justified differences in organization and local regulation. While not disposed to encourage this character of legislation, we cannot in this case say it transcends the constitutional power of the Legislature, and so are constrained to withhold interference.

Our conclusion is that the judgment of the court below must be affirmed.

Affirmed.

MAYFIELD and SOMERVILLE, JJ., concur. DOWDELL, C. J., not sitting.

ANDERSON, J. While concurring in the conclusion and in the affirmance of the judg-

ment of the trial court, I wish to ground my action in doing so upon reasons other than those advanced in the opinion of my Brother SAYRE. I think that it may be conceded that there was such a presentation to the Governor on March 22d, as disclosed by the stamp upon the bill by the recording secretary of the Governor, and his receipt for same upon the book kept by the enrolling clerk of the House, and that the position assumed by Justices SIMPSON and McCLELLAN on this proposition is sound; yet I am of the opinion that the bill so presented did not become a law because of a default on the part of the Governor in failing to return the same within the time prescribed by section 125 of the Constitution of 1901.

Section 125, among other things, provides: "If any bill shall not be returned by the Governor within six days, Sunday excepted, after it shall have been presented, the same shall become a law in like manner as if he had signed it, unless the Legislature, by its adjournment prevent the return, in which case it shall not be a law; *but when return is prevented by recess, such bill must be returned to the house in which it originated within two days after the reassembling, otherwise it shall become a law,*" etc. (Italics mine.) It is manifest that the Governor is given six full calendar days; therefore, excluding March 22d and the intervening Sunday, the sixth day was March 29th, and the Governor had all of that day within which to get it to the House, and could not be in default, unless the House was in session contemporaneously with the expiration of his time. If the House is at recess upon the expiration of the time given the Governor for the consideration and retention of bills, he then has two legislative days after the House reassembles within which to return bills. All seem to agree that the six days, which excludes Sunday, mean calendar, as distinguished from legislative, days, and that the other two days given mean legislative days; then, to my mind, it would be monstrous to charge the Governor with calendar days in computing the time, and at the same time credit him only with legislative or fractional calendar days, for the purpose of striking down a solemn legislative enactment. In other words the contention is that the Governor must return the bill within six calendar instead of legislative days, yet when the sixth day arrives, and although he is given six full days within which to return the bill, he is in default if he fails to get it to the House while in session on said sixth day, notwithstanding it may assemble early in the morning and recess or disburse within a few minutes thereafter and until same future day. To adhere to this contention, as some of my Brothers seem inclined to do, is not only inconsistent, but is, to my mind, violative of the letter, spirit, and intent of section 125 of the Constitution. The Consti-

tution does not give the Governor five full calendar days and so much of the sixth day only as may be covered by the session of the House on said day, but gives him six full days, whether the House is or is not in session; and he is only required to get it to the House on said sixth day, in case it happens to be in session up to the expiration of same, or until 12 o'clock that night.

"Recess" has a plain and well-known meaning, when applied to legislative bodies. It is defined in Webster's International Dictionary, par. 3, as follows: "Remission or suspension of business or procedure; intermission, as of a legislative body, court, or school." I doubt if there was a single member of the constitutional convention who entertained the slightest doubt that recess did not mean every intermission or suspension of the legislative body, as distinguished from the previously known Christmas holiday; and they did not mean to make it cover and apply only to the customary Christmas holidays, for the reason that the same convention changed the time for the legislative sessions from November to January, thus, in effect, practically excluding Christmas. It was evidently intended that "recess" should cover any suspension or remission of either house short of a final adjournment, whether it be from one day to another, one week to another, or one month to another. Therefore, if the House was not in session up to 12 o'clock of the night of March 29th, the Governor was necessarily prevented from returning the bill, if he saw fit to consider and hold it the full time given him under the Constitution; and he had two legislative days after the reassembling of the House within which to return said bill, and which the record shows he did. "Words of common use are to be understood in their natural, plain, ordinary, and genuine signification, as applied to the subject-matter of the enactment." Endlich, Interpretation of Statutes, § 2. "When the language is not only plain, but admits of but one meaning, the task of interpretation can hardly be said to arise (and these incidental rules which are mere aids, when the meaning is clouded, are not to be regarded). * * * It is not allowable, says Vattel, 'to interpret what has no need of interpretation.' The Legislature must be intended to mean what it has plainly expressed; and consequently there is no reason for construction." Parks v. State, 100 Ala. 653, 13 South. 756.

The Journal does not recite the arrival of 12 o'clock and the adjournment of the House, but merely shows that the House adjourned on the night of the 29th of March, and is silent as to the hour; therefore it did not adjourn after 12 o'clock, but must have adjourned before the 30th, and presumably before 12 o'clock, and it was not therefore in session contemporaneously with the expiration of the time given the Gover-

nor within which to return the bill. This presumption is strengthened by the subsequent receipt and consideration of the bill, and which was a legislative determination that the Governor was not in default on the night of the 29th, and that a return of the bill on said night was prevented by a recess of the House before his time for returning same had expired. Nor do I think that the trial court erred in refusing to appellant the right to show by parol that the House adjourned the morning of the 30th, instead of on the 29th of March, as recited in the Journal, as this would impeach or contradict the legislative record by parol, and which should not be permitted.

It is my opinion that the act in question was legally passed, and that the act, as presented to the Governor on March the 22d, did not become a law. I therefore concur in the affirmance of the judgment of the circuit court.

SIMPSON, J. (dissenting). I hold that, even though the law may not specifically provide how the record shall be kept in regard to bills which are passed and transmitted to the Governor for approval, yet, if a record is in fact kept and preserved in connection with the proceedings of the Legislature, the court should have the benefit of that record in tracing the history of the bill. If it is true that a book is kept by the clerical officers of the Legislature, in which the recording secretary of the Governor signs receipts for bills when presented, and that book is, with the other papers required by law to be filed in the office of Secretary of State, filed in said office, said book should be admitted in evidence by the court.

I hold, also, that the record kept by the recording secretary of the Governor, showing the dates when the bills are presented to that office, and his official stamp on the bill, should have been admitted in evidence. These are not in the nature of parol testimony, but constitute the official record of the history of the bill, through its various stages, until it becomes a law.

For these reasons, I dissent from the opinion of the majority of the court.

MCLELLAN, J. (dissenting.) The journals of the House of Representatives and of the Senate show that House Bill 323 was signed by the Speaker of the House and by the President of the Senate on March 22, 1911. Its title foreshadowed an act "to provide and create a commission form of government and to establish same in all cities of Alabama which now have, or may hereafter have, a population of as much as twenty-five thousand and less than fifty thousand," etc. It also appears from these journals that on March 22, 1911, the bodies adjourned to March 24, 1911; that on March 24, 1911, they adjourned to March 29, 1911;

and that on March 29, 1911, they adjourned till March 31, 1911.

It is conceded that there is no allusion in the journal of either body to House Bill 323 on March 24th and March 29th, the days on which the bodies were in session. On March 31, 1911, the House Journal recites that the House concurred in and adopted the amendment proposed by the executive to House Bill 323, setting out the amendment proposed by the Governor, as well as the executive's message, dated March 31, 1911, in that connection.

The respondents would justify their tenure of the offices of commissioners of the city of Montgomery upon the proposition that the amendment proposed by the executive on March 31, 1911, became a part of the act establishing the commission form of government in the city of Montgomery.

Under the bill as signed by the presiding officers of the two houses on March 22, 1911, two commissioners, with the mayor, were to constitute the governing body of the city; the two commissioners to be elected by the people. The amendment proposed by the executive provided for a commission of five, four of them to be appointed by the executive, and the then mayor to be the fifth.

The relator (appellant) insists that the amendment proposed on March 31, 1911, by the executive, and on that date adopted by the houses, never became a part of the act in question, for that the executive's failure or inaction for more than six days after the presentation of the bill to sign it, or to veto it, or to propose an amendment thereto, according to the requirement of section 125 of the Constitution, operated to impress the act, as signed by the presiding officers of the two houses on March 22, 1911, with the character and quality of a complete statute, incapable of change or amendment or repeal, save in and by recourse to the constitutional methods of changing, amending, or repealing that which is already law.

It thus appears that the solution of the issue presented is to be found in the determination of the inquiry, Did the amendment proposed, March 31, 1911, by the executive become law? What is the law is a matter, necessarily and in respect of *finality* of pronouncement, committed for decision to the judicial department of the government, when properly invited to do so. Cooley's Const. Lim. pp. 76, 77, 131, 133, 228; Walnut v. Wade, 103 U. S. 683, 689, 26 L. Ed. 526; Town of South Ottawa v. Perkins, 94 U. S. 260, 267, 24 L. Ed. 154; 8 Cyc., pp. 806, 807, 843.

In this instance, the judicial function is invoked to determine whether the amendment suggested by the executive became law under procedure conformable to constitutional requirements. It is only by observance of those requirements that law may be enacted; and whether such requirements have been observed in the given case is the subject of ju-

dicial inquiry and determination. *Jones v. Hutchinson*, 43 Ala. 721, 724, 725; *Moog v. Randolph*, 77 Ala. 597, 599; *Cooley*, pp. 186, 187; *Gardner v. Collector*, 6 Wall. 511, 18 L. Ed. 890; *Town of South Ottawa v. Perkins*, 94 U. S. 260, 268, 269, 24 L. Ed. 154. Whether these constitutional requirements were, in a particular instance, observed is a question solvable alone by the court in the light of its *satisfactorily advised judicial knowledge*, and so necessarily excluding the advice or service of a jury in deciding it. *Town of South Ottawa v. Perkins*, *supra*; *Gardner v. Collector*, *supra*; *Jones v. United States*, 137 U. S. 202, 216, 11 Sup. Ct. 80, 34 L. Ed. 691; *Walnut v. Wade*, 103 U. S. 689, 26 L. Ed. 526. The *means* whereby the judicial mind is so advised as to be able, consistently with the irrefutable presumption and assumption that the courts know the law, to respond to the inquiry involving the *existence* of a statute, etc., is, in a sense, *evidence, evidence* leading to a finding of *law*, not of *fact*. *Walnut v. Wade*, 103 U. S. 688, 689, 26 L. Ed. 526. "Any particular state may, by its Constitution and laws, prescribe what shall be conclusive evidence of the existence or nonexistence of a statute; but the question of such existence or nonexistence being a judicial one in its nature, the mode of ascertaining and using that evidence must rest in the sound discretion of the court on which the duty in any particular case is imposed."

Of the character, generally speaking, of the evidence, properly advisory of the judicial mind in respect to matters of judicial cognizance, it is said, in *White v. Rankin*, 90 Ala. 541, 8 South. 118: "If the cognizance extends beyond actual knowledge, the judge may resort to any authoritative sources of information, and inform himself of the fact in any way he may deem best, in his discretion," etc. In *Gardner v. Collector*, *supra*, it was said "that, whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question, always seeking first for that which in its nature is most appropriate, unless positive law has enacted a different rule." The doctrine of this decision was favorably noted in *Walker v. Griffith*, 60 Ala. 367. To like effect is *Town of South Ottawa v. Perkins*, *supra*; 7 Ency. of Ev. pp. 961-963, 1081, and notes thereon.

It is hardly necessary to add that rules of law pertaining to the introduction or admissibility of evidence in trials of ordinary issues of fact have no effect or bearing, when the judicial mind seeks or is seeking to avail of information to enable it to exercise judicial knowledge. 7 Ency. of Ev. p. 879, and notes thereon.

Under our organic law, to the executive is

apportioned an important part in the performance of the legislative function. And it is entirely plain from the Constitution that the executive cannot delegate *his* part in the legislative process to anyone; for it is to the judgment of the person lawfully exercising the authority of the executive that the Constitution commits so much of the legislative function as it imposes upon the executive. The particulars and the extent of that legislative function, thus imposed upon the executive, is, so far as affects the present inquiry, to be found in section 125 of the Constitution. The section (125) is as follows:

"Every bill which shall have passed both houses of the Legislature, except as otherwise provided in this Constitution, shall be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it originated, which shall enter the objections at large upon the journal and proceed to reconsider it. If the Governor's message proposes no amendment which would remove his objections to the bill, the house in which the bill originated may proceed to reconsider it, and if a majority of the whole number elected to that house vote for the passage of the bill, it shall be sent to the other house, which shall in like manner reconsider, and if a majority of the whole number elected to that house vote for the passage of the bill, the same shall become a law, notwithstanding the Governor's veto. If the Governor's message proposes amendment, which would remove his objections, the house to which it is sent may so amend the bill and send it with the Governor's message to the other house, which may adopt, but cannot amend, said amendment; and both houses concurring in the amendment, the bill shall again be sent to the Governor and acted on by him as other bills. If the house to which the bill is returned refuses to make such amendment, it shall proceed to reconsider it; and if a majority of the whole number elected to that house shall vote for the passage of the bill, it shall be sent with the objections to the other house, by which it shall likewise be reconsidered, and if approved by a majority of the whole number elected to that house, it shall become a law. If the house to which the bill is returned makes the amendment, and the other house declines to pass the same, that house shall proceed to reconsider it, as though the bill had originated therein, and such proceedings shall be taken thereon as above provided. In every such case the vote of both houses shall be determined by yeas and nays, and the names of the members voting for or against the bill shall be entered upon the journals of each house, respectively. If any bill shall not be returned by the Governor within six days, Sundays excepted, after it shall have been presented, the same shall become a law in like manner as if he had

signed it, unless the Legislature, by its adjournment, prevent the return, in which case it shall not be a law; but when return is prevented by recess, such bill must be returned to the house in which it originated within two days after the reassembling, otherwise it shall be a law, but bills presented to the Governor within five days before the final adjournment of the Legislature may be approved by the Governor at any time within ten days after such adjournment, and if approved and deposited with the Secretary of State within that time shall become law. Every vote, order, or resolution to which concurrence of both houses may be necessary, except on questions of adjournment and the bringing on of elections by the two houses, and amending this Constitution, shall be presented to the Governor; and, before the same shall take effect, be approved by him; or, being disapproved, shall be repassed by both houses according to the rules and limitations prescribed in the case of a bill."

Omitting consideration of "appropriation bills," for which special provision is made (section 126), the executive may, within the time prescribed, take one of several courses, as he may be advised, with respect to a bill presented to him, viz.: (a) Permit it to become a law by withholding therefrom his approving signature until the period prescribed has elapsed; (b) approve the bill by signing it within the period prescribed; (c) return the bill, without signing and within the period prescribed, to the house in which it originated, with his objections thereto and such amendments as would obviate his objections; (d) within the period prescribed return the bill to the house originating it, proposing no amendment which would remove his objections. The last two alternatives are, in effect, affirmative disapprovals—a veto—though the subsequent legislative course is different in the two instances. In the former, it is the legislative right to consider and determine whether the amendment seasonably proposed by the executive shall be accepted by the legislative bodies; while in the latter the legislative right is to decide whether the bill shall pass, notwithstanding the seasonably expressed executive objection, in which event, to make the bill a law, a majority of the elected membership of each house must vote to that end. The alternatives enumerated are executive prerogatives, the exercise of which no other department of the government can hinder or impair, much less defeat. And it is the duty and supreme province of the judicial department, in its proper sphere of interpreting the Constitution and of deciding what is the law, when properly invited to so determine, to pronounce in accord with the requirements of the organic law, and to protect and effectuate the powers and functions

assured thereby to each department of the government.

It is not open to question or to doubt that the reference to *adjournment*, in section 125, is to *final adjournment*—the end of (for) the session stipulated in the organic law; and that the reference to *recess* is to suspensions of legislative deliberation (by the house to which the executive return of the bill may be made) for some measure of time beyond *one day*. It is equally as clear that the return of a bill, by the executive, must be to the body—the house—in its organized capacity, and not to an official, or other representative, of the body to which the executive may make, within his prerogative, his return of the bill.

Three periods, two controlled by contingencies, are allowed the executive for his action or nonaction, leading to the legislative consequence before indicated. He must, if he would prevent the bill's becoming a law by his nonaction, properly return it "within six days, Sundays excepted." Since Sundays are expressly excepted, and since that day is universally respected by all the departments of the government, it is clear that the *six-day* limitation for the return of bills contemplates calendar days. But since, also, the executive return of a bill must be to the house originating it, when in session, to avail of the power given him to that end, the return on the last or sixth day must be effected, if that body is in session, on that day; hence to that extent the *full* calendar day, on the sixth day, must yield to the other mentioned requirement of the organic law. If such was not the rule, the limitation of *six days* for the executive's action would be prolonged beyond that expressly provided for by the Constitution. The general publicity of legislative action, the proximity, though separate, of the executive offices to the places of legislative deliberation, and the necessarily constant communication, in the discharge of the respective public duties with which those departments are mutually concerned, between those departments refute the suggestion that either body of the lawmaking department could assemble on a day without such knowledge of the executive as would enable him to return a bill as he might be advised.

If the house in which the bill originated is *in recess* on the sixth day after the presentation of the bill to the executive, *two days* after reassembling are allowed him in which to return the bill, which opportunity for action, if not availed of, permits the bill to become a law. The two days thus stipulated must, in consequence, be days on which the body originating the bill is in session.

There is still another period provided for in section 125, and that relates to the limitation for the *approval* of bills by the executive after *final adjournment* of the Legislature. That period is *ten days*. These are

calendar days of course; no return to the body originating the bill being contemplated or possible. But this period is conditioned on the presentation of the bill to the executive "within five days before final adjournment of the Legislature." Obviously the stated *five-days* prescription is a *condition precedent* to the executive right to *approve and deposit* the bill, *as a law*, with the Secretary of State, during the *ten days after final adjournment*.

It is insisted by counsel for the respondents that the *presentation* prescribed in section 125 contemplates and requires that bills be "presented in fact to the Governor in person," and this upon that which is unwarrantably (though in the abstract it is obviously sound) assumed to be the premise, viz., that in the process of legislation the executive's undelegable judgment and discretion is the constitutional intent. That contention is wholly untenable upon reason and authority.

The transmission of a bill from the Legislature to the executive is particularly referred to five times in section 125. This act of transmission is required, in four instances, by the use of the term "presented." In prescribing what shall be done with a bill to which the executive has proposed amendment, and in which amendment both houses concur, it is written, "the bill shall again be sent to the Governor *and* acted on by him as other bills." While the direction for transmission is there prescribed by the word "sent," the immediately following provision expressly commits the bill, so amended upon the executive's proposal, to the identical category, subjects it to the same provisions, in which are "other bills"; and thereby clearly negating any notion that bills amended by the Legislature, on the seasonable proposal of the executive, occupy any character or status, with respect to executive action, different from that of "other bills." It is evident from this use of "sent," as stated, that the Constitution makers never intended, through the mere employment of "presented," to invest the process of transmission of a bill to the executive with the strictness a literal translation the term "present" in some instances imports. In short, the use of "sent," in reference to the same character of act with respect to which "present" is employed is forceful to show that "present" was not regarded as having any particular, strict significance; and that the obligation imposed on the Legislature is discharged when a bill that has passed is "sent to the Governor," a distinct conceit from that expressed in the literal interpretation of the personal proffer or delivery of it to the executive, wherever he may be searched out and found. "Presented" has had place, in the connection with which we are now concerned, in each of our Constitutions since the admission of the state into

the Union. In the natural order of things, every bill passed by the Legislature (or General Assembly, as formerly called) during *90 years* of the state's life has invoked the construction, observance, and application, in legislation, of the provision of the organic law of which *presentation* of bills to the executive has been and is now, in substance, a part.

Contemporaneous and practical construction or interpretation of constitutional provisions by the executive and legislative departments of the government will and should be considered by the courts in passing upon constitutional questions; and, though not accepted, except as to questions of a discretionary character, by the courts as conclusive, such practical, contemporaneous construction by departments particularly charged with the observance or execution of the provision under consideration, and acquiesced in for a great period of time, is of peculiar potency in the make-up of the judicial construction, provided the practice be not in contravention of the clear constitutional intent. Cooley, pp. 102-107; 8 Cyc. pp. 736-739, and notes thereon. If, under a constitutional provision with the observance or execution of which the executive and legislative departments are concerned, a distinct practice has been observed or prevailed, it cannot be a matter of doubt that the reordination of the provision in a subsequent organic law necessarily brings with it for the consideration, by way of advice, of the judicial mind, in the interpretation or construction of that provision, the well-understood practice which has been pursued by those departments in the effort, in presumed good faith, to carry out the mandates, and to respect the restraints, of the Constitution, unless, of course, as has been stated, the clear intent of the provision, when read in the light of the whole instrument, forbade or forbids the practice so pursued. If, as has been ruled by the highest judicial authority in our country, general customs and usage have the force and effect of law, if not opposed to positive law (*United States v. Arredondo*, 6 Pet. 691, 8 L. Ed. 547; *Slidell v. Grandjean*, 111 U. S. 412, 421, 4 Sup. Ct. 475, 28 L. Ed. 321), obviously the best wisdom commands to the judicial mind, called to interpret constitutional provisions, of long existence and execution, of the class now under judgment, the ascertainment and consideration of the practice thereunder by those whose duties required their observance or execution of such provisions. Reason not only suggests this aid to construction, but that and a proper regard for orderly processes in government demand the taking account thereof as a conservative means of discovering the *true* constitutional intent. The principle has been pointedly recognized by this court in *Taylor v. Hutchinson*, 145 Ala. 202, 206, 40 South. 108; *Ex parte Hardy*, 68 Ala. 303, 318; *Moog v. Randolph*, 77 Ala. 597, 606; *Farrior v. New Eng. Mortg. Co.*, 88 Ala. 275, 279, 7 South. 200.

In determining whether the presentation, under section 125, of bills that have passed the houses to the executive requires their proffer or delivery to him *in person*, or whether the constitutional prescription is met by the lodgment of bills that have passed the houses in the executive office, *and* with a member or members of the executive secretarial force, it is the duty of the court, called to construe and to interpret and to give effect to the constitutional requirement of such long existence and obligation, to advise itself of the practice pursued by those departments of the government in respect of the transmission of bills to the executive.

Besides numerous persons who have served in the legislative department, and who have been long familiar with the process of transmission of bills to the executive, our citizenship at this time numbers five former executives of the state, viz., Hon. Rufus W. Cobb, Thomas G. Jones, Joseph F. Johnston, William D. Jelks, and Braxton B. Comer, who, with the present executive, Hon. Emmet O'Neal, are peculiarly favored to speak, and that with every assurance of the utmost credibility, with reference to the practice of the presentation of bills for executive consideration, and so for periods, though disconnected prior to 1896, beginning in 1878 and extending to the adjournment of the Legislature in 1911, covering approximately 20 years of the life of the state. One of these eminent citizens, Hon. Thomas G. Jones, was a member of the convention which wrote the present Constitution, and chairman of the committee reporting section 125, among others, of that instrument. From these sources, together with such pertinent and reliable documentary matter as may be available to satisfy the judicial mind, should this court seek for information as to the practice in respect of the presentation of bills to the executive consideration.

If, as the writer is advised, the long-recognized general practice in the premises has been to lodge bills that have passed the houses in the executive office with one or more of his official force, its receipt and the date thereof being noted by the receiving official upon the enrolled bill, or entered in a book kept for that purpose, or both being done, and no practice to the contrary is discoverable, the plain duty of this court appears; and that is to accept the interpretation of the constitutional provision that has thus long prevailed and hence pronounce such a lodgment of a bill in the executive office, with his official force, a valid presentation, within the Constitution, squaring with the obviously sound and immediately authoritative ruling made in the comparatively recent decision of State ex rel. v. Porter, 145 Ala. 541, 547, 40 South. 144, 145, where it is said, Justice Anderson writing: "The law provides that the petition must be *presented* to the Governor, meaning that it must be lodged with him *or his official force in some formal manner, so as to be-*

come an official document." (Italics supplied.) In that instance, the personal, nondelegable, judgment of the executive on the matter of the petition was the law's prescription, just as, in the performance of his constitutional function with respect to the making of laws, the executive personally must determine the matters within his prerogative.

If "presented," in section 125, is interpreted to mean and require the proffer or delivery of the bills to the executive *in person*, patently no statute can be *constitutionally* enacted that would or could permit the presentation of bills other than to the executive *in person*. So that the consequence of that conclusion upon the meaning of "presented," in section 125, cannot be qualified or temporarily avoided by recourse to or hope for legislative relief from the condition thus wrought; nor could the executive delegate to one or more of his official force the power to accept, in his stead, presentations of bills that have passed the houses.

The meaning and effect of the constitutional requirement for the *presentation* of bills to the executive, and when there has been such *presentation* as the organic law contemplates, was considered, in 1864, in the opinion of the justices on the constitutional validity of the soldiers' voting bill, 45 N. H. 607, 611, 612. One of the concrete questions propounded to the justices was this, "(3) When was said bill presented to the Governor?" Treating the inquiries submitted "as upon a case stated," the opinion thus rehearses the facts assumed to be established: "That said bill originated in the House of Representatives, passed both branches of the Legislature, was duly engrossed, signed by the presiding officers of both branches, and about noon on Wednesday, August 17, 1864, was carried by the assistant clerk of the Senate to the executive chamber, in the state house, in accordance with the customary mode of presenting bills to the Governor, and was laid upon the table of the Governor, who was then absent from the room, but who had been there during the morning, and was expected to return that afternoon, but did not; that when said bill was thus laid upon the Governor's table some members of the executive council were present, and also Mr. Barrett, the State Auditor, who was the son-in-law of the Governor, and who had a table there in the executive chamber for the transaction of his business, near that of the Governor; that the assistant clerk of the Senate, when he entered the executive chamber with said bill, announced that he had a bill for the Governor; that the Governor saw said bill on Thursday, August 18th, when he came into the executive chamber and found it upon his table there; that both houses adjourned from Saturday, the 20th, to Tuesday, the 23d, of August, and were not in session on Monday, August 22d; that, on Wednesday, August 24th, in the afternoon, the Governor sent a message to the House of Representatives by Mr. Sinclair, a

member of said House, who gave notice to the speaker, in the House, when in session, that he had a message from the Governor to present; that the Speaker declined to receive it from him; that said message was not received by any action of the Speaker or of the House, and was not read in their hearing, but that, near the close of the session that afternoon, while the yeas and nays were being taken on a motion to adjourn, which was decided in the affirmative, the Secretary of State laid said message on the Speaker's table, stating it to be a message from his excellency, the Governor; that this message was not opened or read in the House, but was afterwards, on a subsequent day, referred to a select committee; and that in this message of the Governor he stated his objections to the bill in question, and returned said bill therewith to the House."

The constitutional provision [part 2, art. 43] involved was as follows: "Every bill which shall have passed both houses of the General Court, shall, before it becomes a law, be presented to the Governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated. * * * If any bill shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Legislature, by their adjournment, prevent its return, in which case it shall not be a law."

It thus plainly appears that a vital factor to proper response to the inquiries submitted, specially that quoted above, was the determination whether the *presentation* required was a proffer or delivery of the bill to the Governor *in person*, the facts showing that the bill did not come to the Governor's *personal* notice or attention until August 18, 1864; whereas, the bill was transmitted on August 17, 1864, to the Governor's office and "laid upon the table of the Governor, who was then absent from the room," not returning thereto, as had been expected.

The justices ruled that the bill was presented on August 17, 1864; whereas, had a presentation to the executive *in person* been the mandate of the organic law, the bill there under consideration would have been held *not* presented until August 18, 1864, the day and date the executive saw the bill. It was there said: "But it would be absurd to hold that the officers of the Senate and House of Representatives are obliged, in order to perform their duty, to follow the Governor wherever he may chance to go, whether in the state or out of it, upon his private business as well as public, and present bills to him in person, wherever he may happen to be."

It is common knowledge that this state provides offices for its executive in the state house. The laws provide for a messenger to the "chief executive office," and for serv-

ants for the executive offices at the capitol. Code, §§ 561, 563. A private secretary and a recording secretary are also provided for. Code, §§ 555, 556. Indeed, every convenience for the consideration and dispatch of the public business with which the executive may be concerned is afforded at and for the office of the executive in the state house. There is universal public acquaintance with the fact that quarters and the official force of the executive are in the state house. It is just as universally known and expected that the executive quarters is the place at which it is the duty and practice of the executive to attend and consider his public duties. These matters of general knowledge underlie and support the conclusion with respect to the sufficiency of *presentation* which is before quoted from State ex rel. v. Porter, 145 Ala. 547, 40 South. 144.

The wholesomeness and rationality of this view of the constitutional requirement for the presentation of bills to the executive invited and received the approval of the Supreme Court of Louisiana, in State ex rel. v. Michel, 52 La. Ann. 936, 27 South. 565, 49 L. R. A. 218, 78 Am. St. Rep. 364. The headnotes of the decision were prepared by Justice Blanchard, who wrote the opinion for the court. As is perfectly apparent from the opinion, it was not only proper but necessary that the constitutional provision of that state, with respect to presentation of bills to the executive, should be construed. The first headnote is as follows: "(1) A bill which has passed both houses of the General Assembly, and been signed by the presiding officers thereof, is presented to the Governor, within the meaning of the Constitution, when the clerk of the House of Representatives or secretary of the Senate carries the same to the executive office, and offers or tenders it to the Governor or *his secretary*." (Italics supplied.)

The reasoning of the court in that case aptly demonstrates that, if a *presentation* to the executive *in person* was affirmed as the constitutional mandate, the executive would be vested with the power, if he remained within the commonwealth (Const. § 128), to defeat, by absence from his office, or otherwise the presentation of bills to him, and thereby render wholly vain legislative work.

In the opinion of the Justices of Massachusetts (99 Mass. 636-638), the pertinent section of the Constitution of that state was construed as requiring that bills that have passed "must" to become law, "*be laid before the Governor personally*." The constitutional provision there construed provided "that no bill shall become a law, and have force as such, *until it shall have been laid before the Governor for his review*, * * * and in order to prevent unnecessary delays, if any bill shall not be returned by the Governor, within five days after it shall have been *presented*, the same

shall have the force of law." (Italics supplied.) That provision was, as appears, not the counterpart of ours; for the presentation latterly mentioned in the organic law of that state was colored in *meaning* and *effect* by the preceding requirement that bills, to become law, should be *laid before the Governor*. And the response given by the justices appears not to have taken account of a long-recognized practice, by the departments concerned, of lodging bills with the executive secretarial force in the executive office. *State v. South Norwalk*, 77 Conn. 257, 264, 58 Atl. 759.

What the view of the justices would have been, had the practice indicated long prevailed under that provision of that Constitution, and then the reordination thereof effected in a later organic law, cannot be discovered in their opinion. In short, the question determined there had not the factors of constitutional terms and long-recognized practice and of reordination of those terms that must be considered by this court in this instance. On the concrete question propounded to them, viz., whether presentation to an "independent officer" (Secretary of State) was a compliance with the constitutional mandate there to be interpreted, there could be no real room for argument or doubt.

In *State v. South Norwalk*, supra, treating a constitutional provision very similar to our own, with respect to presentation of bills to the executive, the court said: "It cannot be deemed to have been presented to him until it has been in some way put into his custody, or into that of some one properly representing him, in such manner that he has reasonable opportunity to inspect and consider it." The court then alludes to the statutory provision made, soon after the Constitution was adopted, for the proper representation of the Governor at the executive offices during sessions of the General Assembly. This legislative action was interpretative only; for, if the organic law required a personal presentation to the Governor, the lawmakers were powerless to alter the requirement, so as to allow the presentation to a *representative* of the Governor. The statutory interpretation in that instance should not be more forceful or valuable in aid of correct construction than the long practice in this state, to which allusion had been made.

In the light of these considerations, weighed with that caution with which courts of last resort wisely proceed when invoked to interpret a provision of the organic law to an effect materially different from that great departments of the government have long attributed to, and executed it, the conclusion would seem to be unescapable that the quoted, pertinent, pronouncement of *State ex rel. v. Porter*, supra, expresses the meaning and effect of "presented," as that term

appears in section 125 of the Constitution.

Was House Bill 323 *presented* to the executive; and, if so, when?

By the act approved February 22, 1866 (Acts 1865-66, p. 88), provision was made for, among others, the compensation of these "officers in the executive departments of the state," viz., "private secretary of the Governor" and "recording secretary of the Governor." These positions appear to have had statutory recognition ever since, being provided for at this time by Code 1907, §§ 555, 556. These constitute the strictly secretarial force of the executive office. The selection of the person to serve in each of these places is committed to the executive, who, it is provided, may *employ* them, and may *discontinue* their services, in his discretion. Section 557. They have no fixed tenure. They serve at the pleasure of the executive engaging them. Some of the duties of the private secretary of the executive are prescribed by statutes. Those of the recording secretary are not particularly prescribed by statute. "A secretary is an official scribe; an amanuensis or writer; a person employed to write orders, records and the like"—and the word "secretary" is, according to proper usage, synonymous with "clerk." 7 Words and Phrases, p. 6381. From the statute-prescribed source of their selection, their un-fixed tenure, and the words employed to designate them, these secretaries are obviously closely related to the person of the executive in his public service. They are his personal staff. The name "recording secretary" is indicative of the character of the service contemplated of performance by the person employed for that position. When coupled with "secretary," it is clear that the descriptive word "recording" intends a public servant, whose duty should be to enter or keep the records of the executive office. *Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 448, 28 South. 497, 51 L. R. A. 896, 85 Am. St. Rep. 42. Performing public duties of the gravest importance, among which are those concerning the legislative function prescribed by section 125 of the Constitution, it is apparent that the executive must have and cause to be kept *records* of official acts. It is inconceivable that so important a public service as the executive constantly performs could be performed without the keeping of *record* thereof. The creation, at the public expense, of the position of *recording secretary* is alone conclusive, not only of the *necessity* for a *record* to be kept of executive official acts, but that such a *record* is, in fact, kept by that secretary. Surely it cannot be assumed that the expense of compensating a recording secretary to the executive would be charged upon the public treasury if the service his official title suggests was not to be performed by him. It may, hence, be asserted with every assurance of correctness that the creation of a recording sec-

retaryship is as emphatic an expression of the executive necessity and duty of the keeping of a record of his official acts, etc., as would have been a legislative command that the executive cause to be kept a general record of the official proceedings, as was the statutory requirement in Ohio, alluded to in *Wrede v. Richardson*, 77 Ohio St. 182, 82 N. E. 1072, 1074, 122 Am. St. Rep. 498. And consulting the relevant custom prevailing in the executive office, as should be done, and as was done in *Wrede v. Richardson*, supra, it is known that, in the performance of his service in the executive office, the recording secretary's duty and practice, under the present executive administration, was to receive bills that had passed the houses, and that were brought to the executive office for the executive consideration, and to receipt the legislative clerk or messenger therefor, and that the recording secretary kept a book in which he entered the date of such delivery of the enrolled bill to him, and that a stamp was also provided and customarily used wherewith to stamp, upon the enrolled bill itself, the fact and date of reception of the enrolled bill in the executive office. Under these circumstances, it is evident that writings made by the recording secretary, in his official capacity, are public records; and so even under strict rules of evidence, serviceable upon the trial of ordinary issues of fact, that are not to be thoughtfully doubted.

It has been suggested that a writing, to be a record and admissible in evidence, must be kept or made under statutory authority or command. Recourse to the highest authority on the subject demonstrates that such is *not* the law. "Although a book kept by a public officer is not required to be kept by any statute, yet, if it is necessary or proper and convenient to the adequate discharge of his duties, it is an official book, and admissible as such to prove the facts therein stated. So entries or indorsements which are necessary to a proper discharge of official duty are competent, though not expressly authorized or required by law." 10 Ency. of Ev. pp. 716, 717, and notes thereon; *Sandy White v. U. S.*, 164 U. S. 100, 17 Sup. Ct. 38, 41 L. Ed. 365; 1 Greenleaf, §§ 483-485; *Evanston v. Gunn*, 99 U. S. 660, 665, 25 L. Ed. 306; *Jones on Ev.* §§ 508, 509.

In *Sandy White's Appeal*, supra, one question was whether book entries made by a jailer, showing the names and dates of prisoners received and discharged, were admissible in evidence on the trial of the defendant, who was charged with presenting false, fictitious, and fraudulent claims against the United States. The court said: "We think no error was committed by the trial court in this ruling [i. e., in admitting in evidence the jailer's entries]. It was not necessary that a statute of Alabama should provide for the keeping of such a book. A jailer of a county jail is a public officer, and

the book kept by him was one kept by him in his capacity as such officer, and because he was required so to do. Whether such duty was enjoined upon him by statute or by his superior officer in the performance of his official duty is not material. So long as he was discharging his public and official duty in keeping the book, it was sufficient. The nature of the office would seem to require it."

The rule is thus set down in *Evanston v. Gunn*, supra: "* * * Official registers or records kept by persons in public office, in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observations, are admissible in evidence. To entitle them to admission, it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty. 1 Green. Evid. § 496. *Nor need they be kept by a public officer himself, if the entries are made under his direction by a person authorized by him.*" (Italics supplied.)

When it is remembered that the executive duties and prerogatives established by section 125 are of such grave importance in the making of laws that they are restricted, for seasonable, effectual exercise, to a stipulated period, that they are almost constantly invoked for application during a legislative session, that their exercise naturally involves, in the executive view, fidelity to the public policies to which he has, before the electorate, committed and obliged his administration, that the multitude of executive duties, along with those imposed by section 125, forbid even the effort to retain in memory the executive acts, much less the inception of the limitation periods stipulated in section 125, it may be said to be unimaginable that the executive functions, particularly with respect to the duties imposed by section 125, could be performed, with any approach to orderliness, without the keeping of a record thereof. The nature of the office of chief executive, and of that of its subordinate, intimately related functionary, the recording secretary, requires the keeping of records, the entry and indorsement, of official acts, and of processes leading thereto.

The like considerations and conclusions apply to a book kept by the clerk or messenger of the respective Houses, wherein the recording secretary receipted for bills transmitted to the executive office, in observance of the requirements, in that regard, of section 125 of the Constitution. Such a book falls within the provision of Code, § 909, which reads: "At the close of each session, the secretary of the Senate, and the clerk of the House of Representatives, and Secretary of State, must select all papers belonging to the Legislature, except such as relate to unfinished business, and deposit them in the office of the Secretary of State." Such

papers are, of necessity, public documents; and their required deposit with the Secretary of State refutes the notion that such documents were or are the *mere private memoranda* of those who serve the houses in clerical capacities. Code, §§ 909, 912. This is particularly true of the receipt book, kept by legislative officers, of bills transmitted to the executive office—an act (transmission) required of the Legislature in the performance of its functions under section 125 of the organic law.

The following records, kept or made by officials in their official capacities, show that the enrolled House Bill 323 was transmitted to the executive office on March 22, 1911, and delivered to the recording secretary of the Governor; (a) The receipt thereof and therefor, by the recording secretary, in the receipt book kept by the enrolling clerk of the House of Representatives of enrolled bills so transmitted, which receipt book is now deposited in the office of the Secretary of State. (b) The book kept by the recording secretary of the Governor, in which he entered the date of the receipt, by him, of the enrolled bill so transmitted from the Legislature to the executive office. (c) The following words, indorsed by the recording secretary on enrolled House Bill 323: "No. 162. Received March 22, 1911, Governor's office." The number "162" being the Governor's number. From the "record book" kept by the recording secretary (Mr. Nunnelee), he testified that the enrolled bill left the executive office March 31, 1911. The executive's message, before mentioned, with respect to House Bill 323, bears the like date; and the House Journal, as previously stated, shows that to have been the date of the return of the bill by the executive.

From these public records, made by public agents in the orderly process of promoting and invoking, according to constitutional mandate (section 125), the executive's legislative function in the enactment of laws, it appears *with absolute certainty* that House Bill 323 was *presented* to the executive on March 22, 1911.

The presentation on March 22, 1911, being established and effected, the constitutional limitation, within which the executive must have acted in order to avert the bill's becoming a law, began to run against executive action. Obviously the Legislature was powerless to suspend the running of the limitation. Aside from the recall of the bill from the executive custody and his return of the bill in accordance with that request, the only action of the Legislature by which the limitation (for executive action) could be affected was by *recessing*.

The sole effect of a recess, as plainly provided by section 125, is to add two legislative days, where return within the six-day period is prevented by *recess* of the house originating the bill. There is no semblance

of warrant in the organic law for the notion that the Legislature may *suspend* the running of the limitation; it having once begun. The result necessarily is that by the very letter, expressive of the clear spirit and purpose, of the Constitution, the omission of the executive to act on the bill within the prescribed period after presentation makes it a *law*—constitutes the bill an *enactment*. If the Legislature might pronounce otherwise, the legislative *will*, and not the Constitution, would be supreme. If the Legislature may treat a bill presented to and retained beyond the period by the executive as still in fieri, still subject to the mold of legislation, when in record-established fact it has passed, under clear constitutional pronouncement, that stage, it cannot be said that the Constitution is the paramount law of this state. Given a presentation of a bill to the executive, which presentation has not been withdrawn by perfected recall of the bill, the constitutional limitation begins; and, if not interrupted in one of the modes thereby (section 125) prescribed, the bill becomes a *law*. To hold otherwise would subvert the organic law in respect of its plain provisions.

The House originating Bill 323 was, as shown by its Journal, in session on March 29, 1911. March 25, 1911, was Sunday. Hence the last (sixth) day on which the executive might return House Bill 323, and thereby prevent its becoming a law as signed by the presiding officers of the houses on March 22, 1911, was March 29, 1911. Not having returned the bill till, as is shown with all certainty, March 31, 1911, the bill, as presented to him on March 22, 1911, became a law, and so by *express mandate of the organic law*. Section 125.

The idea that the Legislature on March 31, 1911, approximately two days after House Bill 323 became a law, might or did, by necessary or reasonable implication from its unqualified action on the amendment proposed by the executive on March 31, 1911, investigate and determine conclusively on all that the executive return of the bill was seasonable is, as before indicated, wholly untenable. The bill having been presented so as to require its return by the executive not later than March 29, 1911, if the Legislature had solemnly pronounced, on March 31, 1911, that the executive return was within the prescribed time, it would have been utterly vain, unless it could be affirmed that, notwithstanding constitutional limitations and mandates, the Legislature may conclusively declare that an act is a bill, and not a law, which in truth and fact had, *pursuant to constitutional provision*, become a law. The Constitution is the supreme law to all departments of our government. And it is finally accepted here "that, under our Constitution, a bill becomes a law only after it has passed through all the forms prescribed,

and made necessary to give validity to legislative enactments." *Stein v. Leeper*, 78 Ala. 517, 521; *Jones v. Hutchinson*, 43 Ala. 721; *Moog v. Randolph*, 77 Ala. 597. Under our Constitution, that which has become a law cannot be changed or amended by legislative action taken otherwise than in the manner and according to the constitutional prescriptions for the enactment of laws, which is by bill formulated, in title and substance, as the organic law prescribes, and conformable to the rules of committee consideration and passage which that instrument particularly requires.

It has been suggested that to accept the specified record evidence of presentation of this bill on March 22, 1911, institutes a conflict with or contradiction by the journals of the houses. In the journals of the houses, there is no reference whatever to the matter of seasonable return of this bill by the executive. It is by attributing to mere action, by the Legislature, upon the amendment proposed by the executive that the journals are said to express anything anent the seasonableness of the executive return of the bill. The journal is an official narrative of the proceedings of the respective houses. *State ex rel. v. Greene*, 154 Ala. 249, 259, 46 South. 268.

It is common knowledge that the executive of this state does not sit with the Legislature, and that his offices are removed from the legislative chambers. It appears, also, that the Constitution makers were particularly cognizant of these facts, since they provided for the transmission of bills that had passed the houses to the executive by such verbiage as necessarily imports the idea of his removal from the presence of the houses. The presentation of bills to the executive being, therefore, an act transpiring *outside the presence* of the houses, the fact thereof could have no place on the journals of the houses; and in consequence even an assertion (not here present) of the fact of presentation, with its date, upon the journals of the houses would be matter foreign to the journals; for the houses, unless presentation was made in one or both of them, cannot record a fact occurring elsewhere. What verity or effect would or should be given the journal record of a report, in regular course of legislative work, by a messenger or officer of one or both of the houses, reciting that he had presented a certain bill to the executive in accordance with section 125, when that report is in conflict with executive records, would raise questions not pertinent here; for no such report appears to have been made or spread upon the journal of either house. In fact, the receipt book kept by the enrolling clerk of the House of Representatives conforms, in respect of the date of presentation of House Bill 323, to the records kept in the executive office, and to the fact of presentation indorsed on the enrolled House Bill 323.

It has been also suggested, as upon the authority of *Robertson v. State*, 130 Ala. 164, 30 South. 494, *Ex parte Howard-Harrison Iron Company*, 119 Ala. 484, 24 South. 516, 72 Am. St. Rep. 928, and *Montgomery B. B. Works v. Gaston*, 126 Ala. 425, 28 South. 497, 51 L. R. A. 396, 85 Am. St. Rep. 42, that the act as promulgated, coming as it does from the custody of the proper custodian of enactments of this state, its journal history fair, and bearing the approving signature of the executive, must be finally accepted by the courts as duly enacted in all particulars; fraud or forgery not being shown in respect to it. None of these decisions should or do control the conclusion on the question here involved. In *Ex parte Howard-Harrison Iron Company*, the question was whether the bill approved by the executive was the bill, not materially variant from the bill, passed by the houses. It was ruled that the presumption favored their identity; and that that presumption could only be overcome by the journals kept by the houses. Obviously that ruling was sound; for the highest and only evidence of what bill the houses passed were the journals thereof.

In *Montgomery B. B. Works v. Gaston*, the contest invoked the decision of the question whether the houses passed or adopted the same bill. It was necessary, in determining this question, to ascertain what was the journal; whether it was the loose memorandum kept by the clerks, or the compiled and bound volume. It was held that the bound volume was the journal; and, consulting it as the conclusive evidence of legislative action by the houses, the view prevailed that therefrom it appeared that the lower house had not adopted the Senate amendments, and thereby, as of course, leading to the constitutional invalidity of the enactment.

In *Robertson v. State*, these objections, as leading to constitutional invalidity, were asserted: (1) That the act was "wholly changed in its title and purpose during its passage through the" lower house; (2) that it was not read on three different days in either of the houses; (3) that it was not signed by the Speaker, its signature being by the Speaker pro tempore, Mr. Tunstall; the Speaker, Mr. Pettus, being ill at the time. The court held the act valid, and so in respect to the objections other than the last (third), upon the authority of the mentioned two decisions in 119 Ala. 484, 24 South. 516, 72 Am. St. Rep. 928, and 126 Ala. 425, 28 South. 497, 51 L. R. A. 396, 85 Am. St. Rep. 42.

In these cases, presenting the questions stated, it cannot be that this court ruled or intended to rule that matters necessarily and invariably, according to common and judicial knowledge, occurring in the executive office, removed from the legislative chambers, could or should properly appear upon the journals. By no sort of assumption could that be affirmed of these decisions. They

did not, even remotely, invite the construction of section 125 in the particular with which this appeal is concerned. Whether the acts there considered became *law*, under the limitations and prescriptions of section 125 for executive action, was not involved or taken into account in any way. These cases, however broad their language, are without bearing here. This doctrine is, however, too deeply imbedded in our law to be now doubted, much less disturbed: That *no bill* can become a *law* until it has been enacted according to the forms prescribed by the Constitution. Whether, in a given case, those forms have been observed is essentially a judicial question. Author, *supra*.

When the constitutional prescriptions are such as the houses are required to observe, and their observance is shown by the *record* (the journals) thereof, the courts accept finally the assertions of that record. This according to the wholesome notion of verity with which courts are accustomed to view the memorials of tribunals jurisdictioned to make them.

The right of the Legislature to *act upon* an amendment proposed by the executive is particularly prescribed in section 125. *The condition* to that right is the executive *return* of the bill, with his proposed amendment, within the period prescribed. The consequence of delay in this particular beyond the period is that the bill adopted by the houses, and signed by the presiding officers thereof, becomes a *law*.

The right of the executive to return a bill, with proposed amendment, depends upon his action within a prescribed period. The right of the executive to veto a bill, thereby preventing its becoming a law, unless subsequently reconsidered and passed by the houses as the organic law requires, likewise depends upon his action within the prescribed period. Each right is limited, restricted, to a definite period. Beyond that period, neither the executive nor the Legislature has any power or authority to defer, or defeat, or to alter the legislative will as expressed in the bill presented to him, except by a new enactment. These are constitutional restraints—mandates—just as supreme and binding as any others, to be found in that instrument.

Does mere presumption (to say nothing, at his time, of the refutatory executive records on which particular reference has been made) of conformation to constitutional requirements in the enactment of laws conclude judicial inquiry, when pointedly invoked, whether the act promulgated became a *law* a consequence of observance of constitutional commands?

When, as here, the executive action or inaction, within a constitutionally prescribed period, is the determining factor, it is obviously no answer to say that this court as given a concluding effect to the journals of the houses in respect to matters properly

appearing upon them, or that it has indulged, to finality, the presumption that, though the journals are silent, the rightful processes of legislation *in the houses* were observed.

In *Sadler v. Langham*, 34 Ala. 311, 322, it was ruled that the character of the presumption, of conformation to constitutional requirements by the Legislature, in the enactment of laws, was *not conclusive*—not conclusive upon the judicial department, to which, in the division of governmental powers (the express restriction of each department to its sphere) such inquiries are committed by the organic law. Const. §§ 42, 43.

If the stated, conclusive presumption should be accepted, it may be inquired whether those provisions of the organic law (section 125), whereby executive action is required within prescribed periods, as affecting the enactment of laws, are not bereft of any means or tribunal for their enforcement, or of any force in the constitutional methods for the enactment of laws; whether the stated presumption has not stricken from the organic law these limitations and prescriptions, even the pronouncement that a bill, not seasonably *returned*, "shall become a law in like manner as if he had signed it"?

If a promulgated bill, apparently valid, is assailed for fraud or forgery in respect of executive action thereupon, would the presumption stated shield it from judicial inquiry in the premises? If it would *not*, it may be inquired whether the nonobservance of clear constitutional mandates is not as fatal to *valid* legislation as the grave wrongs of the class to which fraud and forgery belong? If a litigant may, in promotion or defense of a right, say, "the executive did not sign, approve, that bill, though his name appears thereto," ought not another litigant, in promotion or defense of his right, be permitted to assert and show, by public records kept, in regular course, in the executive office, that the executive delayed his return or veto of the bill until the *Constitution* pronounced it a law "in like manner as if he had signed it"?

In this instance, relator contends that the *presented* (on March 22, 1911) bill became and is the law; while, on the other hand, the respondents assert that the bill, with the amendment proposed by the executive, became and is the law. The former's insistence is justified by the *public records* of the executive office and that kept by the enrolling clerk of the House of Representatives; the bill, signed by the presiding officers of the houses on March 22, 1911, not having been *returned* by the executive within the period prescribed by the Constitution, became a law under the express mandate of the Constitution. Such being the case, the amendment proposed by the executive on March 31, 1911, and adopted by the houses, never had the force of law; the orderly processes for the amendment or change of that

which was already a *law* not having been conformed to in the adoption of the amendment so proposed by the executive.

The opinion is therefore entertained that the respondents were not and are not lawfully constituted commissioners of the city of Montgomery; that their appointments were and are without the sanction or authority of law, and hence were void.

BIRMINGHAM TRUST & SAVINGS CO. v. CURREY et al.

(Supreme Court of Alabama. Dec. 21, 1911.)

1. APPEAL AND ERROR (§ 474*)—SUPERSEDEAS—CURING DEFECTS.

Appellant could not on appeal cure the defects in a supersedeas bond, defective for not naming a defendant with the obligees, and not naming the sureties in the body of the bond; a suggestion that such defendant was dead being required to be made below where the other defects should also have been remedied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2244; Dec. Dig. § 474.*]

2. APPEAL AND ERROR (§ 784*)—PRESENTATION BELOW—DEFECTS IN SUPERSEDEAS BOND.

Appellees, who were defendants below, cannot first object on appeal to a supersedeas bond defective in not naming one of the defendants among the obligees, and in not naming the sureties in the body of the bond, since it is not wholly ineffectual; and hence such defect was not ground for dismissing the appeal, in view of Code 1907, § 2885, prohibiting a dismissal because of any irregularity in the taking of the appeal, and section 2886 prohibiting dismissal for want of a sufficient appeal bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 784.*]

3. APPEAL AND ERROR (§ 194*)—PRESENTATION BELOW—NECESSITY.

Only those grounds of objection to pleas which were taken below by demurrer and renewed on appeal will be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241-1246; Dec. Dig. § 194.* Pleading, Cent. Dig. §§ 1375-1394, 1397-1407.]

4. GAMING (§ 48*)—ACTIONS—PLEAS OF ILLEGALITY—CONSTRUCTION.

In an action on a promissory note claimed to have been executed by defendant to plaintiff's assignor for margins advanced, and commissions for purchasing cotton on margins without actual delivery, the plea alleged that it was not contemplated or intended by either of the parties to the transaction that the actual cotton would be delivered, but that it was contemplated and intended by all such parties that at the time of delivery differences would be settled by paying or receiving the difference between the price when sold and the price at the time of delivery. *Held*, that the plea sufficiently alleged that the parties mutually intended that the transaction should be adjusted by the payment of differences only, so as to make the contracts unlawful; the word "contemplation," as used in the plea, signifying "purpose" or "intention."

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 96-99; Dec. Dig. § 48.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1485, 1486.]

5. GAMING (§ 11*)—VALIDITY—WAGERING CONTRACTS—PURCHASING ON MARGIN.

An agreement by defendant with plaintiff's assignor to procure contracts for the purchase and sale of cotton on margins only, without actual delivery, was void as between the parties, preventing recovery of commissions, or of margins advanced by the assignor in furtherance of the agreement, whether the contracts actually made with others by plaintiff's assignor were for the actual purchase of the cotton or not; that being a mere evidential fact bearing on whether the contract between defendant and such assignor was a wagering contract.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 19-21, 23, 26; Dec. Dig. § 11.*]

6. GAMING (§ 19*)—LEGALITY OF CONTRACT—RATIFICATION.

Though plaintiff's assignor had no knowledge that the note sued on, which was executed to him by defendant, was for the amount of margins advanced for purchasing cotton, by accepting the note, which included commissions for making the unlawful purchases, he adopted the illegal transaction as a whole, thereby preventing recovery on the note, since it could not be determined what part of the consideration induced its execution.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 39-44; Dec. Dig. § 19.*]

7. EVIDENCE (§ 183*)—ACTIONS—ADMISSION OF EVIDENCE.

In an action on a promissory note claimed to have been executed by defendant to plaintiff's assignor for commissions and for margins advanced for purchasing cotton, evidence was admissible, on the question whether the parties intended the purchases to be wagering contracts, that there had never been any actual deliveries in other transactions between the parties involving the purchase of cotton for future delivery, though evidence as to gambling transactions between plaintiff's assignor and third persons was not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 392, 394, 404, 405; Dec. Dig. § 183.*]

8. TRIAL (§ 207*)—INSTRUCTIONS—PURPOSE OF EVIDENCE.

Where evidence was only admissible for a particular purpose, a requested charge limiting it to that purpose should have been given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 498, 499, 501; Dec. Dig. § 207.*]

9. STATUTES (§ 267*)—RETROACTIVE STATUTES—STATUTES AFFECTING REMEDY.

Statutes which merely relate to the remedy, without affecting a right of action, are retroactive, and affect existing causes of action as well as those subsequently accruing, so that Code 1907, § 3351, enacted in 1907, providing that proof that anything of value agreed to be sold and delivered was not actually delivered at the time of making the agreement, and that one of the party deposited "margins," should constitute prima facie evidence of a contract declared void by the preceding sections, relating to future contracts, etc., would apply in an action commenced in 1904 and tried in 1910.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 350-359; Dec. Dig. § 267.*]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Action by the Birmingham Trust & Savings Company against W. W. Currey and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

See, also, 160 Ala. 370, 49 South. 819, 135 Am. St. Rep. 102.

The action is in assumpsit on certain promissory notes executed by Currey, with the others named as sureties, to Hooper & Co., and by Hooper & Co. indorsed to the plaintiff. The pleas mentioned are as follows:

(10) "And for further plea on this behalf the defendants say that part of the consideration of the note sued on was and is a gambling consideration, which arose as follows: Defendant Currey contracted with A. B. Hooper that said A. B. Hooper should purchase for the use and benefit of defendant Currey from certain person or persons in the state of New York cotton for future deliveries by merely staking margins, it not being contemplated, either by said Hooper, or by said Currey, or by said person or persons in New York, that the actual cotton would be delivered, but that when the time for delivery arrived differences would be settled by paying or receiving the difference between price when sold and at the time stipulated for delivery, and that at the time of the making of said contract it was not intended, either by said Hooper or said Currey, or by said person or persons in New York, that the actual cotton would be delivered, but the real intention of said Hooper and said Currey and said persons in New York was that the differences would be settled by paying or receiving the difference between price when sold and at the time stipulated for delivery. That said A. B. Hooper used the name of J. F. Hooper in making said transaction. That part of the consideration of the note sued on was and is commissions charged by the said A. B. Hooper for his services as a broker in negotiating and consummating said transaction. That the law in the state of New York was at the time of making said contract as follows, viz.: 'All wagers, bets or stakes made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful. All contracts for and on account of any money or property or thing in action so wagered, bet or staked shall be void. Any person who shall pay, deliver or deposit any money, property or thing in action upon the event of any wager or bet herein prohibited may sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands shall be deposited any such wager, bet or stake or any part thereof, whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not.'"

(12) "That the consideration of the note sued on was and is a gambling consideration, which arose as follows: Defendant Currey contracted with J. F. Hooper that J. F. Hooper would purchase for the use and benefit of defendant Currey from person or persons

in the state of New York cotton for future delivery by merely staking margins, it not being contemplated or intended by either of the parties, Hooper or Currey, or the person or persons in the state of New York, that the actual cotton would be delivered, but being contemplated and intended by all of said parties that when the time for delivery arrived differences would be settled by paying or receiving the difference between the price when sold and the price at the time of delivery. That cotton declined, and the note sued on was given for margins advanced or staked by Hooper for defendant Currey, at his request, in accordance with the said illegal contract above set out. That in said transaction Hooper acted as broker of defendant Currey, and received certain commissions as compensation for such services as broker, which are also a part of said note sued on. That the contract with said person or persons in the state of New York was made in the name J. F. Hooper, and the defendants aver that the laws of the state of New York provide as follows: 'All wagers, bets or stakes made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful. All contracts for and on account of any money or property or thing in action so wagered, bet or staked shall be void. Any person who shall pay, deliver or deposit any money or property or thing in action upon the event of any wager or bet herein prohibited may sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands shall be deposited any such wager, bet or stake or any part thereof, whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not.'"

(13) "And for further plea on this behalf the defendants say that the consideration of the note sued on was and is a gambling consideration, which arose as follows: Defendant Currey contracted with J. F. Hooper, the payee of said note, that said Hooper should purchase for the use and benefit of defendant Currey, through A. Norden & Co., brokers, in the state of New York, cotton for future delivery, by merely staking margins with said A. Norden & Co., the margins to be advanced by Hooper as called for by said A. Norden & Co., it not being contemplated by either or by said Norden & Co., that the actual cotton would be delivered, but that the said contract of purchase should be settled by paying or receiving losses or winnings resulting from fluctuations in the market, and that at the time of the making of said contract it was not intended, either by said Hooper or Currey, or by Norden & Co., that the actual cotton would be delivered; but the real intention of said Hooper and Currey, and said Norden & Co. was that

said contract of purchase should be settled by paying or receiving the losses or winnings resulting from fluctuations in the market. That said contract of purchase was to be made in, and in fact was governed by the laws of, the state of New York. That at the time of making said contract of purchase the laws of the state of New York provided as follows: 'All wagers, bets or stakes made to depend upon any race, or any gambling by lot or chance, or upon any lot, chance, casualty or unknown contingent event whatever, shall be unlawful. All contracts for and on account of any money or property or thing in action so wagered, bet or staked shall be void. Any person who shall pay, deliver or deposit any money, property or thing in action upon the event of any wager or bet herein prohibited may sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands shall be deposited any such wager or bet or stake, or any part thereof, whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not.' And defendants aver that the note sued on was given for margins advanced or staked by said Hooper for defendant Currey, at his request, in accordance with said illegal contract, and also for commissions charged said Currey by said Hooper for services rendered in procuring said illegal contract."

The demurrers assigned are: "(1) The facts relied on to show a gambling consideration are averred by way of recital. (2) The averment that the defendant bought cotton by simply staking the margins is indefinite and uncertain. (3) It is not averred that it was mutually understood and agreed between the buyer and the seller that there was to be no delivery of the cotton contracted for. (4) The fact well pleaded does not show that the contract was a gambling one. (5) The averment that the margins were staked in accordance with the original illegal contract is the averment of a conclusion. (6) It is not averred that the person from whom Norden & Co. bought the cotton participated in the illegal intention not to deliver the cotton. (7) It is not averred that both buyer and seller agreed either expressly or impliedly that there should be no delivery of the cotton." These demurrers were filed to plea 13. The same demurrers were filed to plea 12, with these additional grounds: "It is not averred that it was understood or agreed by the seller of cotton, at the time the contract was made, that there should be no delivery of the cotton. The plea does not aver that both parties to the contract agreed that cotton should not be delivered. It is not shown how the said illegal contract entered into the note as a part of the consideration thereof." These same demurrers were interposed to plea 10.

Street & Isbell and M. W. Howard, for appellant. Goodhue, Brindley & White, for appellees.

SAYRE, J. [1, 2] Appellant, having lost its case and suffered judgment for costs in the court below, undertook to execute a supersedeas as provided by section 2873 of the Code rather than security for costs only as provided by section 2873. This supersedeas is defective in two particulars: Thomas R. Roberts, who was one of the parties defendant to the judgment, is not named among the obligees. The sureties are not named in the body of the bond. No notice was taken of these defects at the time of the submission; but now appellees urge in their brief that the appeal ought to be dismissed by this court *ex mero*. Besides taking issue on the propriety of the proposition thus advanced, appellant has lodged with the clerk an affidavit showing that said Roberts was dead at the time the judgment was rendered, and offers to the court through the same agency a sufficient supersedeas bond in all respects regular as to form. These efforts to present a better record come too late, and, so far as the suggestion of the death of Roberts is concerned, that should have been made in the trial court. Appellees' suggestion, if meritorious at all, is likewise too late. The bond, though defective, is not ineffectual, and the objection to it should have been so timed as to afford appellant an opportunity of curing its defects. Code, §§ 2885-2886, and cases cited in the annotations to section 2885.

[3, 4] This action was brought by appellant as indorsee of a promissory note executed by the defendants to J. F. Hooper, and by the latter negotiated to the plaintiff. The defense was rested upon the alleged illegality of the consideration, taking the form, to state it generally, that the obligation sued upon arose out of gambling transactions in cotton futures by the defendant Currey. The other defendants joined in the note as sureties. Pleas 10, 12, and 13, the issues made by which were submitted to the jury, and the sufficiency of which is questioned on this appeal, will be set out by the reporter in his statement of the case. However defective these pleas may be, we are to consider only that ground of objection to them taken in the court below and renewed here as a reason for reversal. Something is said in the brief to the effect that material facts are averred in the way of recital only, but we think the criticism may be said to be hypercritical at best, and we find nothing of it in the demurrer. The objection to be considered briefly is that defendants have failed to aver that it was mutually understood and agreed between the parties to the contracts for the sale of future delivery cotton that there was to be no delivery in fact. The language of plea 12, to deal with that as fairly illustrative of the rest, is that it was not

"contemplated or intended by either of the parties * * * that the actual cotton would be delivered," but it was "contemplated and intended by all of said parties that, when the time for delivery arrived, differences would be settled by paying or receiving the difference between the price when sold and the price at the time of delivery." The argument seems to seize upon the word "contemplated" in the plea as if used to indicate that the parties had in view a discharge of the obligation of the contract between them by the payment of differences as a mere contingency, a method of settlement which the parties might in the then future lawfully agree upon if in the beginning they had a bona fide contract for actual delivery. That is a permissible use of the word, and it expresses the mind of the Supreme Judicial Court of Massachusetts when it said in *Barnes v. Smith*, 159 Mass. 344, 34 N. E. 408: "But a mere expectation on the part of plaintiff and of the defendant," who were parties in that court to an issue identical with that here in hand, "that the purchaser of shares would be willing to adjust the transactions on the basis of receiving or paying differences when there was no agreement or understanding to that effect, or to the effect that the plaintiff should protect the defendant from being called on to make or accept any actual deliveries of shares, would not be sufficient to render the contract illegal." So, also, in respect to Chicago Board of Trade v. Christie, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, where this language was used: "The fact that contracts are satisfied in this way by set-off and the payment of differences detracts in no degree from the good faith of the parties, and, if the parties know when they make such contracts that they are very likely to have a chance to satisfy them in that way and intend to make use of it, that fact is perfectly consistent with a serious business purpose and an intent that the contract shall mean what it says." The court added: "There is no doubt from the rules of the Board of Trade or the evidence that the contracts made between the members are intended and supposed to be binding in manner and form as they are made." But "contemplation" also signifies "purpose" or "intention" more definitely, and the purport of these pleas, in which contemplation and intention are conjoined, is that the parties mutually contemplated and intended in the beginning that their transactions should be adjusted by the payment of differences only. That intention rendered the contracts unlawful alike in New York and Alabama. *Hawley v. Bibb*, 69 Ala. 52; *Perryman v. Wolfe*, 93 Ala. 290, 9 South. 148; *Allen v. Caldwell*, 149 Ala. 293, 42 South. 835; *Story v. Salomon*, 71 N. Y. 420; *Embrey v. Jemison*, 131 U. S. 338, 9 Sup. Ct. 776, 33 L. Ed. 172. Demurrers to these pleas were properly overruled.

[5] Plea 13 alleges that defendant Currey contracted with J. F. Hooper to purchase cotton for future delivery through Norden & Co., brokers in New York, there being no intention on the part of defendant, Hooper, or Norden & Co., that the cotton should be delivered. The replication avers that Norden & Co. purchased from Weld & Co. and others, and that the sellers "did not know of and participate in the alleged unlawful purpose of Currey." The theory of the replication is that the contracts of sale were between the New York sellers and the defendant Currey, and that the concurring unlawful purpose or intention of both parties is necessary to render these contracts unlawful. The proposition of law involved in this contention is not denied in its proper application. But the pith of the plea is that defendant employed Hooper to procure for him contracts with others which were to be settled by the payment of differences only; Hooper advancing money or credit for that purpose. If Hooper, under this employment, procured contracts which could be settled only by the actual delivery of cotton on the demand of either party, Hooper, or those through whom he acted, if they contracted in their own names, assumed the burden of such contracts. He could not work a change in the nature of Currey's obligation without his assent. The contracts which, according to the plea, Hooper agreed to procure for Currey, being denounced by statute alike in New York and Alabama, the contracts between Hooper and Currey to the end of their procurement were unlawful also, and the former cannot recover commissions or money advanced for their furtherance. What may have been the nature of the contracts with third parties into which Hooper entered for the purpose of executing his agreement with Currey as matter of substantive law is immaterial to the parties to the present litigation. At best, it is a mere evidential circumstance corroborative of plaintiff's version of the facts. *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; *Embrey v. Jemison*, supra; *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 40, 5 L. R. A. 200, 15 Am. St. Rep. 159; *Fareira v. Gabell*, 89 Pa. 91; *Rogers v. Marriott*, 59 Neb. 759, 82 N. W. 21; *Kennedy v. Stout*, 26 Ill. App. 133; *Jamieson v. Wallace*, 167 Ill. 388, 47 N. E. 762, 59 Am. St. Rep. 302. We find nothing to the contrary in *White v. Barber*, 123 U. S. 392, 8 Sup. Ct. 221, 31 L. Ed. 243, cited by appellant. In that case it was determined in the trial court, and on appeal it was assumed as a fact, that the contracts involved were not intended to be wagering speculations. Nor do we see that the cases of *Bluthenthal v. McWhorter*, 131 Ala. 642, 31 South. 559, and *Oxford Co. v. Quinchett*, 44 Ala. 487, or the authorities cited in connection with them, stand in the way of our conclusion. Conceding that, to disable himself to recover

money lent, the lender must do something more than simply advance the money with a knowledge of the unlawful purpose for which it is wanted, that to have that effect he must promote the enterprise more directly, the averment here, we note, is in effect that plaintiff's assignor, if he kept within the limits of his authority, if he procured such contracts as he was expected to procure, as we must assume he did, actually staked the money on the result of unlawful contracts.

[6] In plea 10 plaintiff's assignor is not shown to have been a party to the transactions out of which arose the liability sought to be enforced. The averment is that A. B. Hooper used the name of plaintiff's assignor, and that "part of the consideration of the note sued on was and is commissions charged by the said A. B. Hooper for his services as a broker in negotiating and consummating said transaction," all the parties to which, to state the further effect of the plea, intended it for a gambling transaction. The demurrer to the replication, which averred that the note was executed by the defendant to plaintiff's assignor to reimburse him for money of his used in the transaction, was no doubt sustained on the idea that whether plaintiff's assignor did or did not know the illegal nature of the transaction, and though, if ignorant, he was entitled to have his money, yet, when he accepted and sued on a note securing unlawful commissions along with the rest, he adopted the transaction as a whole. The note was tainted with illegality. It was impossible to say which part of the consideration induced the promise; and defendant's demurrer to the replication was properly sustained. *Folmar v. Siler*, 132 Ala. 297, 31 South. 719; *Pettit v. Pettit*, 32 Ala. 288.

[7] It appeared without conflict that A. B. Hooper, son of plaintiff's assignor, J. F. Hooper, assisted his father in carrying on the latter's business, which in general was banking, and the transactions in controversy were negotiated by him in his father's name. There was no question about A. B. Hooper's agency to procure for customers contracts for the purchase or sale of cotton for future delivery, nor was anything said of commissions in pleas 12 and 13, so that, under these pleas and the undisputed facts, the only questions at issue were whether A. B. Hooper and Currey mutually intended that the contracts to be negotiated in New York should be wagers, and, if so, whether plaintiff's assignor had knowledge of that fact. As tending to establish defendant's contention in respect to these issues, he was permitted to show that in other transactions involving the purchase for future delivery of cotton and ribs, some of them between Hooper and Currey, others between Hooper and other parties, there had never been any actual deliveries, and that settlements had

been made in those instances by the payment of differences only. To these rulings exceptions were duly reserved, and they are assigned for error. When this case was here on a former appeal (160 Ala. 370, 49 South. 319, 135 Am. St. Rep. 102), it was ruled that in determining J. F. Hooper's knowledge of the nature of the transactions it was competent to show similar transactions with others had with his knowledge and consent. Unquestionably the validity of every separate transaction is to be determined upon its own facts. But it does not follow that the admissibility of every evidential circumstance must be tested by its own intrinsic probative force without regard to its relation with other evidence in the case. "It is the bearing, not the independent force of the particular fact or circumstance, upon which its relevancy depends." *Nelms v. Steiner*, 113 Ala. 562, 22 South. 435. It is to be observed, also, that the former pronouncement in this case had nothing to do with the manner of proving the intrinsic illegality of contracts for future delivery, but touched only upon the method of fastening upon the principal notice of the illegality of contracts negotiated by his agent; such illegality being assumed in the statement. It related to the relevancy of a course of dealing between principal and agent as going to show the agent's general authority, and the principal's knowledge of what his agent had done in a particular case. The questions now presented, both by objections to evidence and by charges seeking to limit the field in which such evidence should operate, are different. The authorities are in conflict as to whether other and distinct transactions between the same parties are admissible upon the question of the legality of such contracts as are involved in this suit. We think the correct rule is to be found stated in *Crandell v. White*, 164 Mass. 54, 41 N. E. 204, a case of the same general character as this, as follows: "It is a general rule that separate and distinct acts unconnected with those in suit are not admissible for the purpose of raising an inference that a party did the particular things which he is charged with doing. But we think in this case that the transactions objected to were of such a nature and were so connected with those in suit, and so near to them in time, that they might fairly be regarded as having some tendency to show that the defendant White had reasonable cause to believe that no intention existed actually to perform the contracts which form the basis of the present suit." But it is held, and properly we think, that the fact that a party has engaged in gambling transactions with strangers is wholly irrelevant. *Potts v. Dunlap*, 110 Pa. 177, 20 Atl. 413. Such evidence, in general, "it would be manifestly unjust to admit, since the conduct of one man under certain circumstances or towards certain individuals, varying as it will necessarily do according to the motives which influence him, the qual-

ities he possesses and his knowledge of the character of those with whom he is dealing, can never afford a safe criterion by which to judge of the behavior of another man similarly situated, or of the same man toward other persons." 1 Tayl. Ev. (10th Ed.) § 317, quoted in Jones, Ev. § 140. All the considerations which make against admissibility of *res inter alios actæ* obtain here. However, this testimony being relevant to one aspect of the case, or rather to one issue involved in the case, as was held on the former appeal, it was properly admitted. [8] But in charges 15 and 16, refused by the court, appellant sought to limit the operation and effect of this evidence in accordance with the views we have expressed in regard to its relevancy. That was the approved method of reaching the end desired, and in refusing these charges the court committed error.

[9] It has long been a part of the statute law of this state that "all contracts, founded in whole or in part, on a gambling consideration, are void." Code, § 3338. The act of March 7, 1907 (Acts, p. 448 et seq.; Code, §§ 3349-3352, 6478-6478), enumerates and declares void certain "future contracts," including contracts for the sale of cotton, provides criminal punishment for all persons who become parties to such contracts, and establishes a rule of evidence for controversies arising out of such contracts. In so far as the act of 1907 enumerates those contracts which shall be held void, its probable effect, if not its purpose, was to withhold the law's denunciation from contracts in commodities not enumerated. In so far as it declares void the enumerated contracts, it re-enacts section 3338, and declares again the law as it had been declared by this court on several occasions. It does not purport to effect, nor could it effect, any change in the substantive rights of the parties to the transactions at issue which were had before the statute of 1907. It was in terms limited to take effect from the beginning of the year 1908. This suit was commenced in 1904 and tried in 1910. The substantive rights of the parties were to be decided according to the law as it existed when the action was begun; but the general principle is that statutory alterations in the rules and methods of procedure, including rules of evidence, are always retrospective unless there be some good reason against it. Endlich, Interp. Stat. §§ 282-286. "Statutes which relate alone to the remedy, without creating, enlarging, or destroying the right, operate generally on existing causes of action, as well as those which afterwards accrue." *Coosa River Co. v. Barclay*, 30 Ala. 120; *Tutwiler v. Tuscaloosa Co.*, 89 Ala. 391, 7 South. 398. There is no vested right in the rules of evidence. It is clear that there was no actual delivery of cotton at any time, and that "margins" were deposited or secured. The rule of evidence en-

acted in section 3351 of the Code was therefore operative in the case. And on this rule, in connection with all the circumstances in evidence, it was for the jury to say whether A. B. Hooper and Currey had a common purpose that there should be no deliveries of cotton, and, if so, whether plaintiff's assignor had knowledge of that fact.

We have considered the questions raised. For the error pointed out the judgment is reversed; the cause is remanded.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

BRANNAN v. HENRY.

(Supreme Court of Alabama. Jan. 18, 1912.)

1. PUBLIC LANDS (§ 61*)—STATUTES—CONSTITUTIONALITY.

The act of February 12, 1879 (Acts 1878-79, p. 198), entitled "An act to regulate sales of swamp and overflowed lands, and validating purported sales of such land," is constitutional.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 192-213; Dec. Dig. § 61.*]

2. STATUTES (§ 117*)—TITLES OF ACTS.

The provision giving a prima facie evidential effect to documents, reciting the deposit of a receipt or certificate of an officer authorized to receive money in payment for swamp lands, found in Act April 4, 1911 (Acts 1911, p. 192), entitled "An act to authorize the introduction in evidence of documents executed prior to Feb. 12, 1879, purporting to convey state lands and certified copies of the record of any such documents which have been recorded for as much as twenty years," does not render the act in violation of Const. 1901, § 45, providing that each law shall contain but one subject, which shall be clearly expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 153-157; Dec. Dig. § 117.*]

3. CONSTITUTIONAL LAW (§ 191*)—RETROSPECTIVE LAWS.

Act April 4, 1911 (Acts 1911, p. 192), authorizing the introduction in evidence of documents executed prior to 1879, by the Governor or his secretary, purporting to convey state lands, but ineffective as conveyances, and giving such documents a prima facie evidential effect, is not, in its application to cases arising prior to its passage, in violation of Const. 1901, § 95, providing that, after suit has commenced, the Legislature shall have no power to take away such cause of action or destroy existing defenses, for, while *ex post facto* laws are prohibited, the rule is otherwise as to changes in the rules of evidence which pertain only to the remedy, and not to the right.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 534; Dec. Dig. § 191.*]

4. CONSTITUTIONAL LAW (§ 196*)—POWER OF LEGISLATURE.

The Legislature has the power to pass curative acts giving effect to defective conveyances of public lands.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 543, 544; Dec. Dig. § 196.*]

5. EVIDENCE (§ 372*)—DOCUMENTARY EVIDENCE—ANCIENT DOCUMENTS.

An ancient document coming from proper custody is self-proving and admissible without evidence of its authenticity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1613-1627; Dec. Dig. § 372.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

6. EVIDENCE (§ 10*)—JUDICIAL NOTICE.

The court will take judicial notice that there are two tracts of land in Mobile county which answer to the description "N. E. ¼ of section 36, township 2, range 4."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 9-14; Dec. Dig. § 10.*]

7. ADVERSE POSSESSION (§ 80*)—COLOR OF TITLE—AMBIGUOUS DEED.

Where one holds land adversely, claiming under a paper title, which indifferently describes the land claimed or other land, the deed whether the ambiguity is latent or patent is admissible to show color of title, for the possession thereunder should put the true owner on the inquiry.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 463-467; Dec. Dig. § 80.*]

8. ADVERSE POSSESSION (§ 95*)—HOSTILITY OF POSSESSION—EVIDENCE.

Payment of taxes upon land, in connection with visible acts of ownership, done on the premises, is evidence to show claim of ownership and the extent of possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 530-532; Dec. Dig. § 95.*]

9. ADVERSE POSSESSION (§ 95*)—HOSTILITY OF POSSESSION—EVIDENCE.

One holding land adversely may prove payment of taxes without producing receipts; the substantive fact of payment and not proof of the receipts being the matter sought to be shown in evidence.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 530-532; Dec. Dig. § 95.*]

10. ADVERSE POSSESSION (§ 114*)—COLOR OF TITLE—EFFECT.

Color of title in itself is not evidence of adverse possession, and requires evidence of visible acts of ownership, and can only draw and impart to a whole tract of land the same claim and character of possession which is impressed on it by actual possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682-690; Dec. Dig. § 114.*]

11. ADVERSE POSSESSION (§ 88*)—HOSTILITY OF POSSESSION—PAYMENT OF TAXES.

Payment of taxes on land being only evidence tending, in connection with other matters, to show adverse possession, cannot alone establish the adverse holding.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 509-511; Dec. Dig. § 88.*]

12. ADVERSE POSSESSION (§ 114*)—EVIDENCE—SUFFICIENCY.

In an action to recover land claimed adversely by defendant, evidence held insufficient to show defendant's prescriptive title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682-690; Dec. Dig. § 114.*]

13. APPEAL AND ERROR (§ 1056*)—REVIEW—HARMLESS ERROR.

The improper exclusion of a deed offered by defendant to show his color of title was harmless, where the evidence of adverse possession was insufficient to establish his right to any part of the land.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

Anderson and McClellan, JJ., dissenting.

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by Mary Henry against Lewis I. Brannan. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 142 Ala. 698, 39 South. 92, 110 Am. St. Rep. 55.

Rich & Hamilton, for appellant. Ervin & McAleer, for appellee.

SAYRE, J. [1] In this case the appellee recovered judgment against the appellant in statutory ejectment for a quarter section of what was proved to have been swamp and overflowed lands conveyed by the government of the United States to the state of Alabama. Plaintiff claimed under the state. The defendant relied upon title acquired by an adverse possession for 10 years. Plaintiff put in evidence a patent purporting to have been issued by the state on January 2, 1872, to Thomas Henry, who is described therein as assignee of W. D. Mann, and a certified copy of the probated will of Thomas Henry devising to her the land described in the declaration. On the theory perhaps that they were private acts, plaintiff also offered in evidence the act of February 12, 1879, entitled, "An act to further regulate the securing, preservation and sales of the swamp and overflowed lands of the state" (Acts 1878-79, p. 198), and the act of April 4, 1911, entitled, "An act to authorize the introduction in evidence of documents executed prior to February 12, 1879, by the Governor in person or in his name by his secretary, purporting to convey any of the state's lands, but ineffective as conveyances, and certified copies of the record of any such documents which have been recorded for as much as twenty years, and to prescribe the probative effect of such documents and copies." Gen. Acts 1911, p. 192. Appellant holds that both these acts are unconstitutional, void, and of no avail to plaintiff, the effect of whose patent depended upon these statutes, the first confirming prior sales of swamp and overflowed lands where the purchase money had been paid to persons acting, or professing to act, for the state, the second giving evidential effect to patents defectively executed, and which recite either the payment of the purchase money or the deposit of a receipt or certificate of the officer authorized to receive the money acknowledging that payment had been made.

The act of 1879 had full discussion by able counsel in *Jordan v. McLure Lumber Company*, 170 Ala. 289, 54 South. 415, was carefully considered by the entire court, and was held to be free of constitutional objections such as are now urged against it. We do not see that any good purpose could be served by reopening the discussion.

[2] Several faults are found in the act of 1911 as applicable to this case. For one, it is said that the title of the act gives no warn-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing of that provision which gives a prima facie evidential effect to documents which recite the deposit of a receipt or certificate of the officer authorized to receive the money acknowledging that such payment had been made, as is the case in the patent put in evidence by the plaintiff. The argument seems to concede the validity of so much of the statute as gives effect to documents purporting to convey lands of the state and reciting payment of the purchase money; at least, it says nothing to the contrary. But it is said that the recital of a receipt or certificate of payment is nothing more than the recital of a recital. True; but we are unable to approve the inference drawn by appellant. If the title of the act had undertaken to catalogue those considerations which conveyances to be affected should recite, had particularly provided for the case of conveyances reciting payment, and had omitted mention of the case of those reciting mere receipts or certificates, the argument would hold. But that is not the nature of the title. It is comprehensively broad, and foreshadows an act dealing with documents purporting to convey any lands of the state without regard to the character of the recital of consideration to be found in such documents, without regard indeed to whether there is any recital of the sort. Section 45 of the Constitution 1901, to which the appellant here refers, has been much discussed, and is well understood. Mere generality of title does not invalidate a statute, so long as it fairly and reasonably expresses the subject-matter of the act, and is not made a cover for legislation incongruous in itself. *Toole v. State*, 170 Ala. 41, 54 South. 195; *State v. Street*, 117 Ala. 203, 23 South. 807. In this case the title of the act is not unreasonably broad. It does fairly cover the provision to which the appellant objects, and contains no misleading catalogue. The act, as for anything appearing so far, is valid.

The last cited case of *State v. Street* sufficiently demonstrates the defect in appellant's argument that the act contains two subject-matters because it provides, not only for the probative effect of the original document, but provides for the introduction in evidence of certified copies where the original had been recorded for as much as twenty years. No reason why the Legislature might not in one act dispose of the subject of the patents it had in mind by giving effect to them as muniments of title and providing means of proving them can bulk large enough to require extended notice. The proposition contended for in the argument would seriously embarrass legislation by requiring laws to be narrowly and excessively restrictive in scope and operation, and by the multiplication of their number, without avoiding or suppressing any mischief against which the constitutional provision is directed.

[3, 4] But this suit was brought some four

or five years before the passage of the act of 1911, and on this fact appellant bases a contention that it is unconstitutional in its application to this case. A clause of section 95 of the Constitution provides that: "After suit has been commenced on any cause of action, the Legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit." Retrospective legislation dealing with the laws of evidence in criminal prosecutions and rendering a conviction more easy than it would have been at the time when the offense was committed is *ex post facto* and prohibited; but "the rule is otherwise as to changes in the rules of evidence in civil cases. These pertain to the remedy, and form no part of the obligation of an existing contract. It is a plain proposition, free from all doubt, that no one possesses a vested right to existing rules of evidence, in civil causes of action, and the lawmaking power is at liberty to change them, from time to time, within the broad latitude of their sound discretion." *Goodlett v. Kelly*, 74 Ala. 213; *State v. Thomas*, 144 Ala. 77, 40 South. 271, 2 L. R. A. (N. S.) 1011, 113 Am. St. Rep. 17, 6 Ann. Cas. 744. And the general principle is that statutory alterations in rules and methods of procedure, including rules of evidence, are always retrospective unless there be some good reason against it. *Endlich*, *Interp. Stat.* §§ 282, 286. "Statutes which relate alone to the remedy, without creating, enlarging, or destroying the right, operate generally on existing causes of action, as well as those which afterwards accrue." *Coosa River Co. v. Barclay*, 30 Ala. 120; *Tutwiler v. Tuskaloosa Co.*, 89 Ala. 391, 7 South. 398; *Birmingham Trust & Savings Co. v. Currey*, 57 South. 962. The act of 1911 in form provides a rule of evidence. By the act of 1879 the patent of 1872 became in effect a transfer of the state's original and undisputed title upon condition that the purchase money had been paid, and, under the act of 1911, it became in effect a deed subject to be defeated by proof that the purchase money had not been paid. Both statutes are curative in form and in effect. Curative statutes are by their very nature intended to act upon past transactions, and are therefore wholly retrospective. Their effect, in the absence of an express provision to the contrary, and saving the vested rights of innocent third parties, is to make the acts to which they relate valid ab initio. The power to cure past transactions defectively executed is a beneficent power. The last clause of section 95 of the Constitution does not abrogate the power of the Legislature to act in that way. It preserves the rights of the parties to pending causes as they existed under the law at the time of the passage of an act, but puts no restraint upon the power of the Legislature in respect to the regulation of the manner in which those rights may be proved, except that it must not, under the

guise of regulating the presentation of evidence, contrive in pending suits to take away a cause of action or destroy any existing defense. The act of 1911 has no inhibited effect. It cannot operate to impair any right defendant then had or may have since acquired. As to causes of action and rights of defense it leaves parties just where they were, but arms them, whether plaintiffs or defendants with means of proving a fact about which, in view of the state's repeated recognition of it, there ought now to be no doubt. It leaves the defendant as free as he ever was to prove any title he may have acquired at any time or in any way. To take cognizance of the difficulties in making proof which, as it happens in this case, the statute shifts from the plaintiff to the defendant—proof which, it may be noted, does not affect defendant's title, though it does go to plaintiff's title in its bare legal aspect—for the purpose of destroying the statute, would be to deny the right of the Legislature to pass laws affecting the rules of evidence. That power has been too often conceded by the courts to be now denied, and doubtless the difficulty of proving facts has in the great majority of cases furnished the reason why such acts have been passed. So, then, conceding for the argument that at the time of the passage of the act of 1911 the defendant by virtue of section 95 of the Constitution had a vested right in that rule of law which permitted him to defeat plaintiff's action by showing, an outstanding title in the state, and thereby conceding also that the state might not have made its acknowledgment of the receipt of the purchase money for this land conclusive as to all the world, instead of prima facie only, we conclude that the acts of 1879 and 1911 were not in excess of legislative power, and that the objections to those acts and the plaintiff's patent were properly overruled.

[5] The patent purported to be an ancient document, came from the proper custody, and was free of circumstances casting suspicion upon its genuineness. Under these conditions, it was self-proving, and needed no further evidence of its authenticity (*Jordan v. McLure Lumber Co.*, supra), or its date (*Brown v. Nelson*, 164 Ala. 397, 51 South. 360). It was properly admitted in evidence.

[8, 7] Defendant testified that he had, with intermissions—intermissions of which we will speak more in detail hereafter—been in possession of the land in controversy since 1890, and in connection with this testimony he offered in evidence what purported to be a tax deed made to him by Cyrus D. Hogue, auditor, on April 3, 1890, conveying the N. E. $\frac{1}{4}$ of section 36, township 2, range 4, lying and being situated in Mobile county, Ala. The deed was not offered as a muniment of title, but the offer was expressly limited to the purpose of showing color of title. The court sus-

tained plaintiff's objection to this deed, and this ruling was objected to, and is assigned for error. This same question was raised in this case on a former appeal. 142 Ala. 698, 39 South. 92, 110 Am. St. Rep. 55. As then stated, the court judicially knows that there are two tracts of land in Mobile county answering to the description in the auditor's deed. But the court conceding, grudgingly it seems, that this description constituted a patent ambiguity which rendered the conveyance void for uncertainty and unavailable as color of title, as seems to have been held also in the later case of *Henry v. Frolichstein*, 149 Ala. 337, 43 South. 126, found relief from the situation by having recourse to a recital of the deed to the effect that the land so described had been advertised and sold in 1881 for taxes due from M. D. Mann, the owner of said land, holding that this reference to the ownership of the land would authorize a resort to competent parol evidence in aid of the description, and that, therefore, the deed should have been admitted for the purpose of showing color of title. The court concluded: "The defendant should, under the rule above declared, have been permitted to show that he purchased the land and paid for it, and that he was claiming under the purchase. This does not mean that the deed would have been admissible in evidence without proof aliunde aiding the description." The court below seems to have understood this to mean that, in order to get the deed before the jury as color of title, it was necessary that there should be some evidence that Mann owned the land. There was no such evidence, and the court excluded the deed. Appellant understands that evidence that he had taken possession under the patent of land answering its description was enough to identify the land and render the patent available for color of title. He relies upon *Barron v. Barron*, 122 Ala. 194, 25 South. 55, and the cases there cited. In that case the conveyance described the land as "the east half of the southwest fourth of section thirteen, township thirteen, range four east," without giving state or county, or saying whether the land lay east of St. Stephens or Huntsville meridian. It was held competent by parol evidence to identify the land, and thus supply the deficiency in description in the mortgage. We think our cases, in connection with the theory underlying the doctrine of color of title, lead to the conclusion that, where one holds land adversely claiming under a paper title which describes indifferently the tract held and another, whether the ambiguity be latent or patent, and though the paper title be void for other reasons, possession so held puts the true owner on inquiry which, it must be presumed, will disclose the character and territorial extent of the adverse claim. See *Crowder v. T. O. I. Co.*, 162 Ala.

151, 50 South. 230, 136 Am. St. Rep. 17, and cases there cited.

[8, 9] Defendant should have been allowed to prove payment of taxes from 1890 to the time the suit was brought. Payment of taxes, in connection with visible acts of ownership done upon the premises, is evidence tending to show claim of ownership and extent of possession. *Baucum v. George*, 65 Ala. 259; *Green v. Jordan*, 83 Ala. 221, 3 South. 513, 3 Am. St. Rep. 711; *Knight v. Hunter*, 155 Ala. 238, 46 South. 235. And this, notwithstanding defendant's failure to produce receipts. The effort was not to prove the contents of receipts that may have been given, but to prove the substantive fact of payment. 2 Wig. Ev. § 1245; *Johnson v. Cunningham*, 1 Ala. 249; *Bank v. Borland*, 5 Ala. 531; *Fletcher v. Riley*, 169 Ala. 433, 53 South. 816.

[19-13] But the errors indicated did no harm to the defendant. The theory of this court's decisions heretofore has been that color of title is not of itself evidence of adverse possession, and that it requires as much evidence of visible acts of ownership exercised on the premises to prove an adverse holding with color as without it. "It can only draw and impart to the whole the same claim and character of possession which is impressed upon the part by actual possession." *Crowder's Case*, supra. The payment of taxes also is evidential in the way indicated above; but, standing alone, it can avail nothing. Assuming, then, that defendant proved color of title and the payment of taxes, both covering the entire period from 1890 to 1907, when this suit was brought, it appears upon an analysis of the evidence that during the interval between 1894, in which year defendant ceased to cut timber from the land, and the small house and the fence around the ox lot which he had built disappeared, and the year 1900 when the trees were boxed for turpentine and cross-ties were cut, plaintiff went upon the land on two occasions only. Upon those occasions he went for timber for axe handles and wagon spokes. At another place defendant testifies that he and his brother cut firewood at times, but hauled nothing from the land. The only other purpose to which the land was put during this interval of six years was that defendant's cattle grazed on it, being turned out at the house, which we take to mean defendant's dwelling in the neighborhood, but not on the land. The neighbors' cattle also grazed there. Sheep were turned into the woods and stayed there, because, as plaintiff states, they would not cross the water, meaning by water a slough which defined the tract on one side. We know that the grazing of cattle on inclosed land signifies nothing, and that the occasional gathering of firewood amounts to hardly anything more. Nor did the cumulative effect of all the facts

warrant the inference of any open, notorious, and hostile possession for any continuous period of 10 years. Whatever may have been the character and effect of the possession shown by the defendant during the period from 1890 to 1894, and however much it may belong to the jury to say what effect shall be given in the ordinary case to mere short-lived intermissions in the physical demonstration on the premises of a hostile claim, we are of the opinion in this case that, after according to defendant's evidence the utmost probative force it was entitled to receive under the rules of evidence, the facts shown in respect to the possession of this land during the interval of six years show a serious break in the continuity of possession fatal to the appellant's claim of title. There is no dispute about the principles of law obtaining in such cases. They are of familiar and oft-repeated statement. It may be conceded, however, that our cases have shown some diversity of opinion as to their application to the facts of cases as they have arisen. We have considered the evidence in this case in all its bearings, and are of opinion that the facts testified to on behalf of the appellant, whatever they may be held to show in respect of his intention to claim ownership during the period of six years, or thereabouts, they fail to show that continuity of possession without which mere intention amounts to nothing. They show at most only occasional disjointed acts of possession affording in our judgment no sufficient basis for a verdict which would divest the true owner of his title. The trial court might well have given the general affirmative charge for plaintiff, since the burden of proving title by adverse possession was upon the defendant. This conclusion eliminates all question as to rulings assigned for error, other than those we have noticed, and the judgment will be affirmed.

Affirmed. All the Justices concur except DOWDELL, C. J., not sitting, and ANDERSON and McCLELLAN, J., dissenting.

McCLELLAN, J. The announcement in the opinion of the court that the conjoint effect of the acts of 1879 and of 1911, upon the patent from the state, was that "it became in effect a deed subject to be defeated by proof that the purchase money had not been paid," was not, as appears from the feature of the opinion treating these acts, intended to affirm that these acts operated upon the instrument or title in any direct, immediate sense, or that they (acts), together or alone, changed the condition precedent of the act of 1879 to a condition subsequent in respect of the payment of the purchase money. The sum of this announcement is that the general result wrought by these acts was to impose the perhaps difficult task of refuting the

prima facie evidence of compliance with the condition of previous payment fixed in the act of 1879 upon him whose asserted right rests for vindication or enforcement upon the noncompliance by the patent holder with the condition of previous payment of the purchase money. Such must, of course, be the meaning of the quoted announcement; for otherwise the ruling, in which the writer concurs, that that act (1911) only established rules of evidence would be necessarily departed from, and thereby leave the decision with inconsistent conclusions pronounced.

The act of 1911, when considered in connection with that of 1879, does not change the burden of proof from where it was under the act of 1879; but, and at most, it aids, arms, the patentee and his successors in right with means to meet his obligation to show prima facie that his purchase was within the benefit of the act of 1879.

2. The court below having erred, as this court holds, in excluding the testimony of defendant that he had paid taxes on the land continuously for 21 years, beginning in 1890, and also in excluding the auditor's deed to defendant, as color of title under which defendant entered the possession in 1890—in both of which rulings the writer concurs—the writer is of the opinion that a reversal for these errors should enter. This result, cannot, it seems to the writer, be soundly avoided by the further finding that the affirmative charge upon the issue of adverse possession was plaintiff's due. If it would not too greatly lengthen this opinion at this time, I should set out the defendant's testimony, by which, in my judgment, the matter was clearly made a jury question. At a future and more convenient time this testimony will be fully stated, if not its material substance quoted.

In my opinion the judgment should be reversed.

LEATH v. COBIA et al.

(Supreme Court of Alabama. Feb. 6, 1912.)

1. APPEAL AND ERROR (§ 852*)—REVIEW.

Besides a plea "since the last continuance," "not guilty" is the only proper plea in ejectment, so that where a case was tried and a verdict for defendant rendered on that plea, the action of the court on motion to strike and demurrers to special pleas will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3402; Dec. Dig. § 852.*]

2. EMINENT DOMAIN (§ 242*)—PROCEEDINGS—COLLATERAL ATTACK—EJECTMENT.

That a petition for condemnation of land was addressed to the judge of probate, instead of to the probate court, as required by Code 1907, § 3889, cannot be asserted in ejectment to affect the validity of the title of the defendant who claims thereunder.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 626; Dec. Dig. § 242.*]

3. EMINENT DOMAIN (§ 191*)—PROCEEDINGS—PETITION.

A petition for condemnation, which prays that "a writ issue from your honorable court of probate," etc., that "summons may issue from your honor's court of probate," etc., and requiring that the inquest be returned to "your honor's court of probate," sufficiently shows that the proceeding is in the probate court, and is sufficient, under Code 1907, § 3889, which requires that the petition be addressed to the probate court.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 509-518; Dec. Dig. § 191.*]

4. EMINENT DOMAIN (§ 242*)—COLLATERAL ATTACK—EJECTMENT.

While, in condemnation proceedings, the petition must state the jurisdictional facts, defects which would be fatal on demurrer or other direct attack on the petition are not fatal when collaterally attacked, where the presumption of regularity obtains, so that though such a petition does not mention the age and residence of the party owning land sought to be condemned, where it appears that summons was served on him, and his own testimony showed that he was over 21 years of age, the final decree showing that the amount of condemnation money was paid, the proceedings are sufficient as against attack in ejectment against one claiming under the condemnation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 626; Dec. Dig. § 242.*]

5. JUDGMENT (§ 287*)—ENTRY.

The records of courts import absolute verity and cannot be contradicted by parol, so that, in ejectment, parol testimony that a decree of condemnation, under which the defendant claimed, was written on the record by the judge before whom the proceedings were had, upon the misplacement of the final decree, after the expiration of his term of office, is inadmissible, where the record on its face shows that the decree was rendered and entered within the time prescribed and on a date during the term of the judge.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 567, 568; Dec. Dig. § 287.*]

6. EMINENT DOMAIN (§ 191*)—PROCEEDINGS—RAISING A DAM—PETITION.

Under Code 1907, § 3904, which authorized a proceeding to raise a dam only where a previous dam has been "erected under this article," one who had commenced the erection of a dam without authority of law could only proceed to raise it as though he had no dam, and that his petition was "to establish a dam" would not render the condemnation proceedings void.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 509-518; Dec. Dig. § 191.*]

7. EJECTMENT (§ 49*)—SERVICE OF PROCESS—NOTICE TO LANDLORD.

Under Code 1907, § 3840, which provides that upon service of a landlord with a copy of the summons and complaint against his tenant 20 days before the commencement of an action of ejectment, the action shall proceed against him as though he had come in and had himself made a party as provided in section 3841, which authorizes a landlord to be made a party on motion of the tenant or upon his own application, the landlord simply becomes a party, but not the sole party to the suit, so that, though a tenant suggested his landlord as a party, the tenant remained a party, and where the landlord, during the pendency of the suit,

conveyed the premises to him, he could still defend under the title granted.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 144; Dec. Dig. § 49.*]

Appeal from Circuit Court, Cherokee County; W. W. Haralson, Judge.

Ejectment by E. Leath against Eugene Cobia and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Burnett, Hood & Murphree, for appellant. Hugh Reed and James Fouché Matthews, for appellees.

SIMPSON, J. This is a statutory action of ejectment, by the appellant, for the recovery of one acre of land described in the pleading. Other lands and interests were originally mentioned, but were eliminated by disclaimer, and while the defendant set up an easement, that was abandoned, and the verdict was for the defendant for the one acre of land only, and that alone will be considered.

[1] It is unnecessary to consider the action of the court on motion to strike and on demurrers to special pleas, as this court has frequently decided that, besides a plea since last continuance, the plea of "not guilty" is the only proper plea in an action of ejectment; and this case was tried and the verdict rendered on that plea. *Vadeboncoeur v. Hannon*, 159 Ala. 617, 49 South. 292; *Edinburgh-American Land Mortgage Co. v. Canterbury*, 169 Ala. 444, 53 South. 823; *Etowah Mining Co. v. Doe ex dem. Carlisle*, 127 Ala. 668, 669, 29 South. 7; *Webb et al. v. Reynolds*, 139 Ala. 398, 36 South. 15.

The defendant set up title to the one acre of land under certain proceedings in the probate court in 1904, for the condemnation of said one acre for the purpose of enabling him to build a dam, for a public gristmill on the opposite bank of the Chattooga river.

[2] In this collateral proceeding it does not affect the validity of the condemnation proceedings that the petition for condemnation was addressed to the judge of probate, in place of to the probate court, as required by section 3889 of the Code of 1907.

[3] The petition prays that "a writ issue from your honorable court of probate," etc., that "summons may issue from your honor's court of probate," etc., requiring the inquest to be returned to "your honor's court of probate," showing that the proceeding was in the probate court.

[4] Nor is it material that the petition does not mention the age and the residence of Leath, the party who owned the one acre of land on the opposite side of the river, as it prays that summons be served on him; the further proceeding shows that summons was served on him, his own testimony shows that he was over 21 years of age, and the final decree shows that the amount of condemnation money was paid.

It is true that, in proceedings of this

kind, the petition must state the jurisdictional facts, and when that is the case, the court acquires jurisdiction, but there are many defects which would be fatal on demurrer, or some direct proceeding, yet are not fatal in a collateral proceeding, in which the presumption of regularity is reversed. 2 Mayf. Dig. p. 946, § 205; Id. p. 947, § 220.

The act of 1822 (Laws 1822, p. 56) required petitions for sale of real estate to state the names of the heirs, and "which are of age, which are infants or femes covert," yet, in a case where the petition failed to state which of the heirs were of full age, this court held that to be a mere irregularity and not jurisdictional. *Field's Heirs v. Goldsby*, 23 Ala. 218, 221, 222, 224, 225, 65 Am. Dec. 841.

Under the Code of 1852, § 1755, where the petitioner merely expressed his opinion, in place of stating the facts as required by the statute, and gave a description of the land which would have been held, had as a matter of pleading, this court held that on collateral attack the defects were immaterial, and (speaking through Brickell, J.) said: "As a matter of pleading these averments are wholly insufficient. * * * If the sufficiency of the petition had been put in issue by demurrer, or assailed on error, judgment against it must have been pronounced. Then, as has been said by this court, all intendments would have been indulged against the pleader. When the proceedings ripen into a decree, and are collaterally assailed, and rights of property have attached, the rule is changed, and every reasonable intendment is made in favor of the validity of the decree." Also, that "an amendable defect of this character, we cannot believe, will ever justify a sentence of nullity against judicial proceedings, when collaterally assailed." *Wright's Heirs v. Ware*, 50 Ala. 549, 557, 559.

In a later case, where the allegations of the petition were not in the exact language of the statute, this court (speaking through Manning, J.) said: "Public policy requires that all reasonable presumptions should be made in support of such sales," and, "if a different rule prevailed, purchasers would be timid and estates consequently be sold at diminished value." And further, after stating the rule as to presumptions, "we should understand the petition as it is reasonable to infer that the party who made it and the judge who acted upon it did understand it, and not as they were bound to understand it," and then quoted from *Wright's Case*, supra. *Bibb v. Bishop's Home*, 61 Ala. 326, 330, 331.

These cases are quoted in a subsequent case, where the petition alleged merely that C. and N. owned the "remaining undivided one-half interest" in the land, without stating what part each owned, and it is stated

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that though the petition would have been insufficient on demurrer, yet on collateral attack it is otherwise. *Whitlow v. Echols*, 78 Ala. 206.

In a case where the petition failed to state the *residences* of the persons interested in the property, this court said that "this would, no doubt, be a good ground of demurrer to the petition, and reversible error, on direct assaillment by appeal. Perhaps it might be regarded as jurisdictional if there was no appearance of the defendants in the court below, but this we do not positively decide," and held that the defect was not available on collateral attack. *Morgan v. Farned*, 83 Ala. 367, 369-370, 3 South. 798.

In the case now under consideration, the parties and the court evidently understood the failure to state whether Leath was a minor (as every one would), to mean that he was over twenty-one, and the evidence shows that he was. They also understood the request to have the citation served on him to mean that he was in the county, and it was in fact served on him, according to the record, and the decree shows that the condemnation money was paid.

Under these facts, it would seem to be the merest quibbling on words to hold that the court did not acquire jurisdiction in this case because the age and residence were not stated in the petition.

[5] The next insistence of the appellant is that the court should have received parol testimony to the effect that the proceedings were had in the probate court during the incumbency of Judge Appleton, that he rendered the final decree in writing, and as it was misplaced, wrote the decree on the record, after the termination of his term of office. The record shows that the decree was rendered and entered within the time prescribed by law, and on a date during the term of Judge Appleton.

It is one of the principles of our law that the records of our courts must import absolute verity and cannot be contradicted by parol proof. 23 Cyc. 855; 1 Black on Judgments (2d Ed.) § 245, p. 364; Id. § 246, p. 368; Id. § 276, pp. 421-423; Id. § 287, p. 439. See 2 Black on Judgments (2d Ed.) § 522, p. 786; *Deslonde & James v. Darrington's Heirs*, 29 Ala. 93, 96; *Whitlow v. Echols*, 78 Ala. 210; *Wilkinson et al. v. Lehman-Durr Co.*, 150 Ala. 464-468, 43 South. 857, 124 Am. St. Rep. 75; *Logan v. Central I. & C. Co.*, 139 Ala. 548, 555, 36 South. 729; *Ferguson v. Kumler*, 25 Minn. 184, 187; *Walker v. Armour*, 22 Ill. 658, 660; *Ofer v. State*, 168 Ala. 171, 52 South. 934.

In this collateral proceeding the judgment must stand, as it appears upon the record.

[6] The appellant insists, however, that the face of the proceedings show that they are void because the petition is to *establish* a dam, and it is shown that there was al-

ready a dam there, and the proceeding should have been to *raise* a dam.

The authority for proceedings to raise a dam applies only where the previous dam has been "erected under this article" (Code 1907, § 3904), and this court has held that a petition to raise a dam is fatally defective unless it shows that the first dam had been erected under the order of the court. *Botoms & Powell v. Brewer & Brown*, 54 Ala. 288.

It necessarily follows then that if a man has commenced the erection of a dam without authority of law, his only remedy is to proceed as though he had no dam (which in law is the fact) and submit to the court the entire matter of the building of the dam.

[7] Appellant also insists that the tenant could not defend under the title of the landlord because said tenant ceased to be a party to the proceeding, when he suggested the landlord, and she, the landlady, could not defend, because, during the pendency of the suit, she had conveyed the premises to said tenant.

Such is not the effect of the statute. Under sections 3840 and 3844, the landlord simply becomes a party, and not the sole party to the suit. The tenant also remains a party. This court has held that the tenant cannot have the landlord made the sole party. *McClendon et al. v. Equitable Mortgage Co.*, 122 Ala. 384, 25 South. 30.

The judgment of the court is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

GARCIA v. PARDO et al.

(Supreme Court of Florida. Feb. 20, 1912.)

(Syllabus by the Court.)

1. COURTS (§ 183*)—COUNTY JUDGE—JURISDICTION.

When a county court is duly organized in a county, the county judge as such has no trial jurisdiction in ordinary civil actions at law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 412, 437-468; Dec. Dig. § 183.*]

2. EXECUTION (§ 171*)—INJUNCTION—GRANTING.

The common-law remedies afford adequate redress for an illegal levy of an execution on personal property, and injunction will not be granted for this purpose where no irreparable injury or other equitable ground for relief appears.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 497-518; Dec. Dig. § 171.*]

Appeal from Circuit Court, Hillsborough County; J. B. Wall, Judge.

Bill by Ramon Alonzo Garcia against Joaquin Pardo and Robert A. Jackson. From a decree dismissing the bill, complainant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

T. M. Shackelford, Jr., and W. H. Jackson, for appellant. Dickenson & Dickenson, for appellees.

WHITFIELD, C. J. Garcia filed a bill in equity alleging in effect that an action against Garcia for \$100 damages was begun by Pardo before the county judge of Hillsborough county; that summons was served on Garcia; that a judgment by default was entered against Garcia for failure to appear; that final judgment for \$100 and costs consequent on the default was rendered by the county judge; that an execution was issued on the judgment by the county judge; and that R. A. Jackson, the sheriff of Hillsborough county, will, to the irreparable injury of Garcia, levy the execution on the goods, chattels, and effects of Garcia, with the greater part of which property Garcia makes his living operating a restaurant, if not restrained.

An injunction was prayed. A temporary restraining order was made. Subsequently the following order was made by the chancellor:

"While it seems to be an anomaly to have the courts of common law in the same county presided over by the same judge, with different jurisdictions, yet as the court is of the opinion that under the Constitution the civil jurisdiction of the county judge's court is not ousted by the creation of the county court, the motion to dissolve the temporary injunction is granted."

A demurrer to the bill of complaint on the grounds that there is no equity in the bill and that there is adequate remedy at law was sustained and the bill dismissed. On appeal from the decree dismissing the bill of complaint, the decree and the order dissolving the injunction are assigned and argued as error.

The questions presented for determination are whether, under the Constitution, upon the organization of a county court over which the county judge presides, the right of the county judge to exercise jurisdiction in cases at law in which the demand or value of property involved shall not exceed \$100 as county judge ceases, and whether there is equity for granting an injunction to restrain the levy of an execution on personal property.

In construing and applying provisions of a Constitution, the leading purpose should be to ascertain and effectuate the intent and the object designed to be accomplished. Proper effect should, if possible, be given to every word of a Constitution. The meaning of and effect to be given to words may be determined by a consideration of all the provisions of the instrument relating to the subject.

Where jurisdiction is expressly conferred upon a judicial tribunal by a Constitution, that jurisdiction may not be affected by the

subsequent establishment of another tribunal having the same jurisdiction, unless the jurisdiction of the latter tribunal is expressly or by fair implication made exclusive. But where a constitutional officer has designated judicial powers, and is by the Constitution given the same jurisdiction and more as the presiding officer of another judicial tribunal together with appellate jurisdiction and powers that are inconsistent with the exercise of the jurisdiction first conferred, the exercise of the jurisdiction in the latter capacity may be exclusive.

[1] The Constitution provides that "the county judge shall have original jurisdiction in all cases at law in which the demand or value of property involved shall not exceed one hundred dollars; of proceedings relating to forcible entry or unlawful detention of lands and tenements; and of such criminal cases as the Legislature may prescribe. The county judge shall have jurisdiction of the settlement of the estates of decedents and minors, to order the sale of real estate of decedents and minors, to take probate of wills, to grant letters testamentary and of administration and guardianship, and to discharge the duties usually pertaining to courts of probate." Section 17, art. 5. The Constitution also ordains that when a county court is organized by the Legislature "the county judge shall be the judge of said court," which county court when organized "shall have jurisdiction of all cases at law in which the demand or value of the property involved shall not exceed five hundred dollars; of proceedings relating to the forcible entry or unlawful detention of lands and tenements, and of misdemeanors, and final appellate jurisdiction in civil cases arising in the courts of justices of the peace." Section 18, art. 5.

The circuit courts "have final appellate jurisdiction in all civil and criminal cases arising in the county court, or before the county judge * * * and of all cases arising before justices of the peace in counties in which there is no county court; and supervision and appellate jurisdiction of matters arising before county judges pertaining to their probate jurisdiction, or to the estates and interests of minors." Section 11, art. 5.

It seems clear from these provisions of the organic law that the purpose was to have a county judge in every county, whose exercise of civil jurisdiction in ordinary civil actions at law and in forcible entry and unlawful detainer cases, should cease upon the establishment of a county court with the same jurisdiction, over which court the county judge shall preside. The provision giving to the circuit courts "supervision and appellate jurisdiction of matters before county judges pertaining to their probate jurisdiction or to the estates and interests of minors" indicates a purpose that the county judge as

such should continue to exercise these powers not conferred on any other tribunal; but there is nothing to indicate an intention that the county judge as such should continue to exercise civil jurisdiction in ordinary actions at law and in forcible entry and unlawful detainer cases after a county court is established having the same and also greater jurisdiction over which court the county judge presides. On the contrary, the provision giving to the county courts, when established, original civil jurisdiction, including that conferred upon the county judge, and also appellate jurisdiction in civil cases arising in the courts of justices of the peace, and giving the circuit courts "final appellate jurisdiction in all civil and criminal cases arising in the county court, or before the county judge," indicates that there will be no ordinary civil actions or forcible entry and detainer cases arising before the county judge as such when there is a county court in the county. It would be incongruous and inharmonious with the general scheme of the judiciary article of the Constitution to so construe the provisions conferring jurisdiction as to give to the county judge as such a right to exercise original jurisdiction that is also conferred upon him as judge of the county court when a county court is established in the county.

The purpose of the Constitution is to have a tribunal in every county with jurisdiction extending over the entire county in ordi-

nary civil actions at law for not more than \$100 and in forcible entry and unlawful detainer cases, until a tribunal is established in the county having similar and broader jurisdiction to be exercised by the same judicial officer.

When the facts alleged do not show irreparable injury or other equitable ground, an injunction will not be issued to enjoin the levy of an execution upon personal property; the remedy at law being complete and adequate. See *Metcalf Co. v. Martin*, 54 Fla. 531, 45 South. 463, 127 Am. St. Rep. 149; *Davidson v. Floyd*, 15 Fla. 667.

The judgment was rendered in the court of the county judge, when the jurisdiction of that court for the trial of ordinary civil actions at law had been suspended by the organization of a county court in that county as authorized by the Constitution. Therefore the judgment is void.

[2] The common-law remedies afford adequate redress for an alleged illegal levy of an execution upon personal property. Therefore an injunction is not the proper remedy; no irreparable injury or other equitable ground appearing from the facts alleged.

The decree is affirmed.

TAYLOR, COCKRELL, and HOCKER, JJ., concur.

SHACKLEFORD, J., takes no part.

RICHARDS v. CITY LUMBER CO.

(No. 15,420.)

(Supreme Court of Mississippi. March 25, 1912.)

1. MASTER AND SERVANT (§ 264*)—ACTIONS—PROOF—VARIANCE.

Where the declaration in an employe's action for personal injuries alleged that defendant failed to provide plaintiff with a reasonably safe place of work and to furnish safe appliances, and that he was injured by the breaking of a worn and defectively laced belt, plaintiff could not recover by showing that, when the superintendent saw plaintiff's machine choke, it was his duty to direct the manner of handling it, but that he failed to direct plaintiff how to handle the machine after it choked, and plaintiff was injured by the breaking of a defectively laced belt, since plaintiff must recover, if at all, on the case made by his pleadings.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

2. STATUTES (§ 267*)—RETROACTIVE OPERATION.

Laws 1910, c. 135, providing that, "in all actions hereafter brought" for personal injuries, contributory negligence shall not bar a recovery, is not retroactive.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 350-359; Dec. Dig. § 267.*]

3. STATUTES (§ 263*)—RETROACTIVE CONSTRUCTION.

Statutes will be given a prospective operation, unless a contrary intention is clearly and positively shown.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 344, 349; Dec. Dig. § 263.*]

4. CONSTITUTIONAL LAW (§ 48*)—STATUTORY CONSTRUCTION.

A statute should be construed so as to render it constitutional, if possible.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.* Statutes, Cent. Dig. § 56.]

5. CONSTITUTIONAL LAW (§ 105*)—VESTED RIGHTS.

The Legislature has no power to destroy vested rights, in order to create a cause of action out of an existing transaction, for which no remedy existed when it occurred; nor can it destroy a valid defense to a cause of action existing before the statute was enacted.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 228-235; Dec. Dig. § 105.*]

Appeal from Circuit Court, Pike County; D. M. Miller, Judge.

Action by Jake Richards against the City Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

G. Q. Whitfield, R. W. Cutrer, and Brady & Dean, for appellant. Price & Price, for appellee.

McLEAN, J. Appellant was in the employ of the appellee, in appellee's saw and planing mill, and while so employed was injured, and this suit is brought to recover for the injuries sustained. The count in the declaration is that it was the duty of the master to provide the plaintiff with a reasonably safe place in which to do the work assigned him, and to furnish the plaintiff

with suitable, safe, and sufficient machinery and appliances with which to do the work, but that the defendant did not perform its duty in this respect; and the declaration further alleges that the work enjoined upon plaintiff became, without the knowledge of plaintiff, perilous, dangerous, and hazardous, by reason of the fact that the plaintiff was put to work in the planing mill, which was worn, old, and so defective that, when a heavy piece of lumber was put in it to be planed, it put so much and unusual force upon the belting as made the belt to break, and that the belt by which the machine was run was old, worn, defective, and worthless, and defectively laced, and by its inherent weakness and lack of strength the belt could not bear the strain put upon it in operation of the machine, and that consequently, as a result of this defective condition of said machine and belting, plaintiff was injured in the following manner, to wit: He was placed at work feeding the machine, and was working around it with reasonable care in the regular discharge of his duties to his master, when the belting and the end of it flew back and struck him with great force in the face, and destroyed his left eye and its sight forever, and that, by reason of the negligence of the defendant in failing to furnish the plaintiff with reasonably safe appliances and machinery aforesaid, said plaintiff lost his left eyesight, etc.

We have been so particular in describing the cause of action as set out in the declaration, because the allegations of the declaration are material for the proper consideration of the question presented. There was some evidence to the effect that one Skean was the superintendent of the mill, and that in his absence one Lucius Magee was the vice principal of the defendant, and that at the time plaintiff was injured he (Magee) was in charge of the planing machine, performing the duties of the superintendent; that the machine choked; that Magee saw the said machine choke, or by the exercise of reasonable care could have seen it, and failed to direct plaintiff how to use the machine. The chief contention of the appellant is the refusal of the court below to grant for him instruction No. 4, which the court declined to do. That instruction is as follows: "The court instructs the jury, for the plaintiff, that if they believe from the evidence in this case that Lucius Magee, in the absence of Skean, was by the defendant authorized to perform the duties of superintendent, and that at the time the plaintiff was injured he was in charge of the planing mill, performing the duties of the superintendent, and saw the machine choke, or by the exercise of reasonable care could have seen it, then it was his duty as superintendent in charge to direct the manner of handling the machine; and if they believe from the evidence, with knowledge of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 57 SO.—62

able care and caution, and was injured by the breaking of the belt, which was defective, or defectively laced, then they will find a verdict for the plaintiff, although they may believe the lumber being passed through the machine was too large and choked the machine."

[1] Without passing upon the correctness or incorrectness of this instruction, a sufficient answer to the contention of appellant is that the principle invoked in the instruction is not the ground upon which the plaintiff sought to recover in his declaration. The declaration, as hereinbefore stated, simply charges that the defendant failed to provide the plaintiff with a reasonably safe place in which to work, and failed to furnish him with safe and sufficient machinery and appliances with which to work, and that the injury sustained was caused by the breaking of the belt, which was worn and defectively laced. A mere inspection of the declaration and of the instruction refused demonstrates the correctness of the court in declining to give the instruction. A party cannot make out one case in his pleading and a different one by his evidence. The case of *Bradford v. Taylor*, 85 Miss. 409, 37 South. 812, which appellant relies upon, is not in point, because the proposition upon which the plaintiff recovered was set forth in the declaration, and there was no variance in the evidence and the allegations in the declaration. The instant case was properly submitted to the jury, and the instructions directed the findings of the jury to the issues presented under the pleadings.

[2] It is urgently insisted that the court erred in giving an instruction to the defendant to the effect that contributory negligence was a defense; and appellant contends that contributory negligence is not a defense, under chapter 135 of the Laws of 1910. The facts in this case are that the injury occurred on the 30th day of March, 1910, and the suit was instituted on January 12, 1911, and chapter 135 of the Laws of 1910 was approved and took effect on April 16, 1910. In other words, the contention is that this act of the Legislature had a retroactive effect.

[3-5] The rule is fundamental, in the construction of statutes, that they will be construed to have a prospective operation, unless the contrary intention is manifested by the clearest and most positive expression, and, further, that such a construction should be placed upon the statute in order to preserve, if possible, its constitutionality; that the Legislature has no power to take away vested rights, in order to create a cause of action out of an existing transaction, for which there was at the time of its occurrence no remedy; nor can it destroy a valid

act. The act reads: "In all actions hereafter brought." It may be that this language is sufficiently broad to cover causes of action arising prior to the passage of the act; but our duty is to so construe the act to preserve, if possible, its constitutionality, and, since it is not manifest that the purpose of the Legislature was to embrace prior causes of action and thereby destroy vested rights, we must construe the act so as to limit its operation to causes of action arising subsequent to its passage. The law is: "Statutes not expressly made retrospective in terms are otherwise construed, if possible." 8 Cyc. 1022, and authorities cited.

We see no error in the record, and it is affirmed.

KELLY et al. v. BANK OF COMMERCE. (No. 15,303.)

(Supreme Court of Mississippi. Feb. 12, 1912.
Suggestion of Error Overruled
March 11, 1912.)

1. CORPORATIONS (§ 377*)—SALES OF STOCK.

In an action against one guaranteeing a note given for the price of corporate stock, proof that the stock was really purchased for another corporation is no defense, despite Code 1906, § 5005, providing that no corporation shall directly or indirectly purchase or own capital stock, or any part thereof, of another corporation, where the seller corporation had no knowledge of that fact.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1531-1534; Dec. Dig. § 377.*]

2. TRUSTS (§ 213*)—LIABILITY OF MAKER.

Where corporate stock is purchased by one as trustee, the purchaser giving a note signed by him as trustee, he is liable as a maker of the note, though the stock was purchased for the benefit of another corporation; the word "trustee" not altering his individual liability.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 298; Dec. Dig. § 213.*]

Appeal from Chancery Court, Harrison County; T. A. Wood, Chancellor.

Bill by the Bank of Commerce against A. L. Thornton and others. From a decree for complainant, but dismissing the bill as to the first-named defendant, Thornton, defendants Kelly appeal, and the complainant prosecutes a cross-appeal. Affirmed on defendants' appeal, and reversed and remanded on cross-appeal.

On July 26, 1905, A. L. Thornton purchased from the Bank of Commerce 80 shares of stock for the sum of \$10,000; certificates of stock being issued to "A. L. Thornton, trustee." In payment for said stock he gave a note to said bank for the sum of \$10,000, payable six months from date, with 6 per cent. interest, and deposited as collateral the certificate for said shares of stock. Said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

note was signed, "A. L. Thornton, Trustee." Thornton was the manager of the Union Bank & Trust Company, and it is the contention of the appellant Kelly that this stock in the Bank of Commerce was taken for the benefit of the Union Bank & Trust Company, in violation of the anti-trust statute of 1900, brought forward as section 5005, Code 1906.

Afterwards, on December 7, 1905, said note being still unpaid, an agreement was entered into whereby said note was canceled and the stock certificates delivered to the Union Bank & Trust Company, upon Thornton's executing another note for \$10,000, due six months from date, payment of which was to be guaranteed by J. R. Kelly, who indorsed the note. Contemporaneously with the execution of this note, the Union Bank & Trust Company, by A. L. Thornton, cashier, entered into an agreement with J. R. Kelly to sell Kelly certain described lands, "to be paid for in the following manner: \$1 cash and the payment of a certain note of date December 7, 1905, signed by A. L. Thornton, for the sum of \$10,000," etc. This agreement also provided that the title to the land should be vested in one Tippin, as trustee, to be held by him until said note was paid by Kelly, and, in event he did not pay same, said trustee was to sell the land and apply the proceeds to the payment of the note. The note was not paid at maturity, and Tippin, the trustee, sold the land for something less than \$4,000, and credited this amount on the note.

Thereafter the bank brought suit in the chancery court against Thornton and Kelly and the wife of the latter, to whom Kelly had conveyed certain lands in Harrison county. The bill prayed for a decree against Thornton and Kelly for the amount found to be due, and for a cancellation of the deed from Kelly to his wife, and that a lien should be fixed upon the land transferred by Kelly to his wife, and said land subjected to the payment of the balance on the note. The court found that Thornton was not liable on the note sued on, and dismissed the bill as to him, and entered judgment against Kelly and wife for the unpaid balance of the note, and canceled the conveyance from Kelly to his wife, and subjected the land attempted to be so conveyed to the payment of the amount adjudged against him, and granted Kelly and wife an appeal from this decree, and granted a cross-appeal to the Bank of Commerce against Thornton.

Kelly contended that the note sued upon represented an illegal transaction, void and unenforceable, because it was alleged to be made in violation of chapter 88, § 5, Laws of 1900 (section 5005, Code 1906), because Thornton purchased said stock for the Union Bank & Trust Company, and for the further reason that Kelly was not an absolute, but a

conditional, guarantor for the payment of the note; his guaranty being limited by his agreement entered into at the time he indorsed the note.

May & Sanders, for appellants. T. H. Barrett and J. L. Taylor, for appellee. Ford, White & Ford, for cross-appellee.

MAYES, C. J. We have given to this record most careful examination. It is our judgment that the trial court made but one error, and that consists in not giving judgment against Thornton also. [1] The trial court settled the facts, and was fully justified in the conclusion both that the Union Bank & Trust Company was not the purchaser of the stock, and that, if this is not the true state of facts, then the Bank of Commerce had no knowledge that the Union Bank & Trust Company was the purchaser, if in truth it was. This being the case, section 5005 of the Code of 1906, providing that "no corporation shall, directly or indirectly, purchase or own the capital stock, or any part thereof, of any other corporation, nor directly or indirectly purchase, or in any manner acquire, the franchise," etc., is not involved under the facts.

[2] The decree of the chancellor is correct in all save the dismissal of the suit against Thornton.

On direct appeal the case must be affirmed, and on cross-appeal reversed and remanded.

ROSAMOND v. CARROLL COUNTY et al. (No. 15,465.)

(Supreme Court of Mississippi. Feb. 12, 1912.)

1. ACTION (§ 53*)—DAMAGES—SUCCESSIVE RECOVERIES.

The throwing up of an embankment upon lands, causing damage to lands of another by overflow, is a continuing nuisance, for which successive recoveries may be had.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549-623; Dec. Dig. § 53.*]

2. JUDGMENT (§ 606*)—OPERATIVE AS BAR—NATURE OF FORMER RECOVERY — PROSPECTIVE DAMAGES.

Though a declaration, upon which a former recovery of damages for a nuisance caused by the throwing up of an embankment and the consequent flooding of plaintiff's lands, was had, alleged that the land was permanently damaged, it merely meant that the damage then accrued was permanent, and did not seek to recover prospective damage, so as to bar a later action for damages accruing from a later inundation.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1120; Dec. Dig. § 606; * Nuisance, Cent. Dig. § 100.]

3. PLEADING (§ 228*)—EXCEPTION.

The legal sufficiency of matter stated in an answer as an affirmative defense may not be raised by exceptions, which are proper only to raise the matter of an insufficient discovery, or of scandal and impertinence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 584-590; Dec. Dig. § 228.*]

Appeal from Chancery Court, Carroll County; J. F. McCool, Chancellor.

Action by J. W. Rosamond against Carroll County and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

This suit was begun in the chancery court by the appellant, who sought to recover damages of the county of Carroll and one Briscoe, who owned property adjacent to that of appellant. The bill alleged that defendant Briscoe, with the consent of the county and in utter disregard of complainant's rights, had thrown up an embankment on his own lands, thereby causing damage to plaintiff's lands by overflow. The bill itself shows that the embankment was erected about 1901, and that in 1902 appellant brought suit against the county in the circuit court and recovered a judgment for \$500 for damages at that time to the identical land caused by the building of this same embankment. The bill alleged, however, that the damage was a continuing one, and that complainant was entitled to recover for whatever damage was done to his crops by each and every overflow. The answer of the defendants is a general denial, and charges that the recovery in the circuit court in 1902 included all damages, both those which accrued before the rendition of the judgment and those to accrue thereafter. The plaintiff excepted to that portion of the answer which related to the judgment of the circuit court. The court overruled the exceptions, and the appellant prosecutes an appeal from this interlocutory decree.

Coleman & McClurg, for appellant. Jack Thompson, Asst. Atty. Gen., for appellees.

SMITH, J. [1] The nuisance complained of is a continuous one, for which successive recoveries may be had.

[2] It is unnecessary for us to decide whether a party can in one suit recover all damages, present, past, and prospective, sustained and to be sustained, from a nuisance of this character, for the reason that the declaration upon which appellant's former recovery was had did not seek to recover prospective damage. It is true that it alleged that the land was permanently damaged, but that simply meant that the damage then accrued was permanent—that the reduction in value of the land was permanent. The land might be permanently damaged by each successive inundation. Appellant's former recovery, therefore, is not a bar to the present action.

[3] This cause comes to us on an appeal from a decree of the chancellor overruling exceptions to affirmative matter set up in an answer as a bar to the relief prayed for. Exceptions to an answer lie only to an insufficient discovery, or to scandal and impertinence, and not to the legal sufficiency of mat-

ter set up therein as an affirmative defense to the relief prayed for. 1 Pleading & Practice, 898; 16 Cyc. 315; Puterbaugh's Chancery Pleading & Practice (5th Ed.) 143; Bower Barff Rustless Iron Co. v. Wells Rustless Iron Co. (C. C.) 43 Fed. 391. No objection on this point, however, has been made by counsel for the appellee, and we will not in this instance raise the point ourselves.

The decree of the court below is reversed, and the cause remanded.

ÆTNA INDEMNITY CO. v. STATE, to Use of GALLASPY et al. (No. 15,437.)

(Supreme Court of Mississippi. March 25, 1912.)

1. GUARDIAN AND WARD (§ 175*)—BOND—LIABILITIES COVERED.

An order releasing sureties on a guardian's bond from further liability thereon, and ordering that a new bond be recorded, gives the new bond no retrospective effect, in the absence of such intention indicated in the bond itself.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 600-606; Dec. Dig. § 175.*]

2. GUARDIAN AND WARD (§ 175*)—LIABILITIES ON BOND—CONVERSION.

Where a guardian's conversion of funds was made while acting under his first bond, the first bondsmen are liable for the conversion, and the "actual conversion" is not a liability against the sureties on the bond subsequently given.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 600-606; Dec. Dig. § 175.*]

3. GUARDIAN AND WARD (§ 175*)—LIABILITIES ON BOND—BOND GIVEN AFTER ACTUAL CONVERSION.

Where a guardian, while acting under his first bond, converted moneys of his ward, and after the discharge of the first bond, and the giving of a new bond, though then solvent and able to pay the amount converted, failed and neglected to pay such amount to himself as guardian for the use of the ward, there was a breach of the second bond, making the sureties thereon liable.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 600-606; Dec. Dig. § 175.*]

4. INFANTS (§ 77*)—ACTIONS—NEXT FRIEND.

Where a minor ward's interests are at stake, and the record shows that a person suing for his use is in reality acting as next friend, he will be treated as such, although he styles himself "guardian ad litem."

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 192-194, 231; Dec. Dig. § 77.*]

Appeal from Chancery Court, Newton County; Sam Whitman, Jr., Chancellor.

Action by the State, for the use of Eva May Gallaspy and others, against the Ætna Indemnity Company and others. Judgment for plaintiffs against the Ætna Indemnity Company, and suit dismissed as to the other defendants. The Ætna Indemnity Company appeals, and plaintiffs prosecute a cross-appeal. Affirmed on direct appeal, and reversed on cross-appeal, with directions.

W. I. Munn and Amis & Dunn, for appellant. J. R. Byrd and Byrd & Wilson, for appellees.

MAYES, C. J. On the 27th day of June, 1899, G. M. Gallaspy was appointed as guardian of his three minor children by the chancery court of Newton county. At the time of the appointment there seems to have been very little personal estate for him to take charge of, and the court required only a \$500 bond to be executed for each child. It appears that each of these bonds had the same sureties. It appears that, after the guardian assumed the duties as such, he paid little attention to his accounting with the court for a long while, and there seems not to have been much necessity for the same, since little money came into his hands which required accounting to the court, and the court itself seems to have made some orders excusing the guardian from accounting. None of these things become of importance in deciding this case, so we give this only passing notice.

In December, 1905, the guardian received for each of the wards \$1,712.13 as the proceeds of the sale of their interest in certain timber sold to a lumber company. The validity of this sale is not drawn in question. When this amount due each ward was received by the guardian, he was only under a bond of \$500 to each ward, and, although the guardian filed an inventory in the court on December 25, 1905, reporting the sale, and disclosing that on December 1, 1905, he had received for each of his wards the amount of \$1,712.13, the court did not at that time require any additional bond, although the guardian's report showed that he held three times as much money for his wards as his bonds covered. On May 13, 1907, nearly 18 months after the filing of the inventory showing the sale of the wards' property, and when this amount had been in possession of the guardian since December 1st under the \$500 bonds, it appears that an application was filed by the sureties on the first bonds, seeking to be released therefrom, and the court made an order that the sureties on the first bonds be relieved from further liability, and that a new bond be executed, which was accordingly done on the 13th day of May, 1907. This new bond was executed in the sum of \$6,000, and was given as a security for all three of the children. Accordingly, after the execution of the new bond, the guardian, without ever having made any settlement of his accounts up to this time under the old bonds, was continued as guardian under this bond until some time in 1910, when he died.

It indisputably appears that when the guardian sold the timber to the lumber company, in December, 1905, he received therefor the sum of \$12,400, one-seventh of which, or the sum of \$1,712.13, belonged to each of the wards. It further appears that the

whole amount, including the minors' interest, was deposited in the Bank of Decatur to the individual credit of G. M. Gallaspy, then engaged in a mercantile business, and all of said money was checked out to pay for the different indebtednesses and for investments in conducting the business in which Gallaspy was engaged at the time, and that this was done between December 1, 1905, and May 13, 1907, the date of the new bond. In other words, Gallaspy took this whole sum and treated it as his own, and converted it to his own use and disposed of it prior to the giving of the second bond, and that he had not only done this, but that he had overdrawn some \$4,000. While the record unquestionably shows that while acting under the first bonds he had converted to his own use the money belonging to his wards, it also appears that on May 13, 1907, when this bond was executed, Gallaspy was still solvent and worth several thousand dollars more than was due his wards. Therefore, when he executed this second bond, he was indebted to his wards for the amount of money which he had converted, and he was amply able to have paid their claim. It appears that in the latter part of the year 1909, and nearly two years after the giving of the second bond, and without ever having made any accounting to the court of the money of the wards previously converted by him, Gallaspy became insolvent, and in the early part of 1910 was put into bankruptcy, dying about May of the same year.

After his death a suit was instituted by J. R. Rowzee, in behalf of the wards and describing himself in the suit "as guardian ad litem." This suit is instituted in the chancery court against the bondsmen on both bonds, seeking to hold both sets of sureties liable. The case was heard, and the chancery court held that the second bond alone was liable for the indebtedness due by the guardian to the wards, and dismissed the suit as to the sureties on the first bonds. From this judgment the Indemnity Company prosecutes a direct appeal, and the so-called "guardian ad litem" prosecutes a cross-appeal. The bond company contends that the first bond is liable alone, and the "guardian ad litem" claims that both bonds are liable. The question is whether or not the first bond is liable to the exclusion of the second, or whether or not the second bond is liable to the exclusion of the first, or whether both bonds are liable. It appears that the total sum due all the wards is over \$8,000, more than the total amount of both bonds; the second bond being for \$6,000 and the first three bonds each being for the sum of \$500. We want to emphasize the fact that, although it appears that the actual conversion of the property by the guardian took place while he was acting as guardian under the first bonds, yet at the time the second bond was given, and for nearly two years after the guardian entered upon his duty as guard-

lian under the second bond, he was solvent, and the amount due the wards could have been made out of him at any time up to the latter part of 1906.

[1] It appears from the record that the sureties on the first bonds applied to the court, under the authority of section 2407 of the Code of 1906, authorizing the court, on petition of the sureties, to require the guardian to execute a new bond. It is practically conceded on both sides that this petition was filed, and that the court required the execution of a new bond. No question is raised as to the validity of the court's action in this regard. The order is made by the court on the 13th day of May, 1907, and recites that "It is ordered by the court that the sureties be relieved from further liability on said bond, and that the new bond be recorded." From the order made by the court it plainly appears that *a new bond, and not an additional bond*, was taken, and it is also plain that this new bond was intended to be a security for further and not past derelictions of duty on the part of the guardian. In the case of *State v. Shackelford*, 56 Miss. 648, this court held that a guardian's bond had no retrospective operation, unless such bond plainly indicates an intention that it should have a retrospective effect. To the same effect are the cases of *Lewenthal v. State*, 51 Miss. 645; *State v. Hull*, 53 Miss. 626; *McWilliams v. Norfleet*, 60 Miss. 987; *McWilliams v. Norfleet*, 63 Miss. 183.

[2] In view of the above decisions, and since it is plain that the guardian converted the funds of the wards to his own use while acting as guardian under the first bonds, it must follow that appellant is not liable on its bond for the actual conversion of the funds; but the first bondsmen are, and the court erred when it dismissed this suit as to them.

[3] This breach having occurred while the first bonds were current, those bonds are liable to all damages that accrue to the wards on account of that breach; but this conclusion does not result in releasing the sureties on the second bond. The amount of both bonds is not sufficient to make the wards whole, so there can arise in this case no conflicting rights as between the bondsmen themselves, or as to their liability between themselves. While the court held in the case of *McWilliams v. Norfleet*, 63 Miss. 183, when it was before the court for the second time, that the new bond of a guardian was prospective, and not retrospective, it also held that a guardian's bond "imports responsibility for losses occasioned by negligence or inattention, as well as for the corruption, of the guardian. It cannot be that a breach of the first bond confers any immunity upon the sureties on his second bond for an infraction of the latter. They are liable not only for money and assets of the wards' estate which 'actually came into his hands' after the second bond was executed, but also for such as

he might and could have collected and reduced to possession by a faithful administration of his office. Any other doctrine would be a novelty in the law in relation to guardians and trusts." And the court further holds that it is the duty of a guardian, whether acting under a first or a second bond, to "exercise reasonable care and diligence in the management of the ward's estate, to collect debts and securities belonging to the estate, and to administer the trust confided to him for the benefit of the wards, and not for the advantage of himself." In the *McWilliams Case*, 63 Miss. 183, after declaring the above rule of law, the court held the second bond of a guardian liable for the failure of the guardian to collect from himself and partners, while solvent, a note which was lost to the wards on account of this neglect and the subsequent insolvency of himself and partners, although it appeared that the improper dealings with the fund of the wards took place under a former bond. This rule was declared in the cases of *Crump v. Gerock*, 40 Miss. 765, *Banks v. Machen*, 40 Miss. 256, *Moffatt v. Loughbridge*, 51 Miss. 211, and in *Ames v. Williams*, 74 Miss. 404, 20 South. 877. The law announced by the above cases is the universal law, so far as we have been able to ascertain it.

When this second bond was given, although the actual conversion of these wards' property had taken place under the first bond, the guardian was solvent and fully able to pay the amount then due the wards. The amount was lost to them because the guardian failed and neglected to pay over the amount to them as he should have done, and it was because of this neglect that they lost their money. It is true that in this case it was a debt owing by the guardian to the wards and not the debt of a third party. It is also true that the neglect of the guardian was the failure to pay over for the wards, while he was solvent, and from himself, a sum of money which he had converted, and which belonged to them. But this fact cannot affect the legal principle. The duty imposed by law for him to protect his wards from loss by neglect to exercise reasonable diligence to collect debts owing to them rested more heavily upon him when he was their debtor by his own wrongful act than it would if he had merely failed to collect a debt from some third party. Under these circumstances the law would hold his bondsmen liable under a state of facts that might exculpate them under other circumstances. A rule of law that would exculpate a guardian for failing to collect from himself when he had wrongfully converted the funds of his ward, merely because the debt was owing by him and he as an individual would have to make the payment to himself as guardian, would be a perversion of the right, and we apprehend that no court will ever so hold. Of course, it must appear in every case that the guardian

was solvent and could have been made responsible during the currency of the second bond. In short, it must be shown that the wards have actually suffered loss by reason of the neglect. If it were shown that the guardian was insolvent, and that at no time during the life of the second bond could the amount have been collected, the second bond would not be liable for the neglect, because no damage was done by it.

In the case of *Johnson v. Hicks*, 97 Ky. 116, 30 S. W. 3, the court held that, "if one was solvent when he qualified as guardian, a note then due from him to the wards' estate will be treated as cash assets, rendering the sureties on his bond liable for the amount of the note," if he subsequently becomes insolvent without having paid the ward the amount due him, the bond is liable for this failure on the part of the guardian to do his duty and collect the debt, and, of course, it can make no difference whether the debt due the ward is a note or on open account. *The evidence* of the indebtedness does not affect, in any way, the liability of the bondsmen for same. So, also, in the case of *U. S. Fidelity & Guaranty Co. v. State*, 40 Ind. App. 136, 81 N. E. 226, it is held that "where one is appointed guardian of a minor's estate, who at the time of assuming the trust is personally indebted to the estate, the guardian must pay the debt, separate the amount of it from his own funds, and invest it for the benefit of the ward, if he be solvent at the time, and his failure to so invest it is a conversion of that amount of the ward's funds to his own use, and the bond is liable. See, also, *State v. Gregory*, 119 Ind. 503, 22 N. E. 1; *Sargent v. Wallis*, 67 Tex. 483, 3 S. W. 721; *Mattoon v. Cowing*, 13 Gray (Mass.) 387; *McGill v. O'Connell*, 33 N. J. Eq. 256; *Martin v. Davis*, 80 Wis. 376, 50 N. W. 171.

There was a breach of both bonds and the amount adjudged to be due the minors absorbs both bonds. Both having been breached during the currency of each, neither had a right to complain that both are made liable for the breach that occurred during the currency of each bond. Both are independently and separately liable in the full penalty, since the damage done to the wards exceeds the penalty of both. The burden that either bond is made to bear is neither lessened nor increased by the fact that the other is also liable for a different breach of faith in regard to the preservation of the same fund. Both bonds were given to make secure the fund, and, if it takes them both to do that for which they were given, neither has any ground of complaint. If no second bond had been given, the first would have been liable, because the actual conversion had taken place during its currency. If the money had simply been owing the guardian from a third person, and had been lost to the wards by the neglect of the guardian, the second bond would have been liable; and this is just what

occurred, except that the debtor was the guardian himself.

[4] But it is further argued that this suit cannot be maintained, because brought by Rowzee as "guardian ad litem," and not as next friend. In answer to this argument we have only to say that where a minor's interests are at stake, and when the record shows that a person instituting a suit is in reality acting as the "next friend" of the minor, this court will not look with critical eyes on the characterization which the next friend chooses to give himself in the pleadings. We shall treat him as in truth what he is, the friend of the minor, and trust to the sound judgment of the infant's court to require of him the full discharge of his duty to the minor, by whatever name such person chooses to designate his representative character.

It follows that this case is affirmed on direct appeal, and reversed on cross-appeal, with direction to enter judgment here on cross-appeal against the sureties on the first bond for the full penalty of the bond.

So ordered.

W. L. ROBINSON CO. v. WEATHERSBY
et al. (No. 15,439.)

(Supreme Court of Mississippi. March 25, 1912.)

1. LANDLORD AND TENANT (§ 9*)—EXISTENCE OF RELATION—CONTRACT—BOND FOR TITLE.

The vendor of land executed a bond for title and gave the vendee possession; the bond providing that the conveyance should be made upon payment of certain notes and annual interest, which interest was to be considered as rent, unless each note was paid at maturity. The vendee failed to pay the notes, and also failed to pay the interest. *Held* that, the vendor being entitled to possession, the parties occupied the relation of landlord and tenant, the vendor being entitled to the amount of the interest on the notes as rent, the interest merely fixing the amount of the rent.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 23-29; Dec. Dig. § 9.*]

2. LANDLORD AND TENANT (§ 252*)—RIGHTS OF LANDLORD—LIEN ON CROPS.

A landlord can enforce a lien for rent and supplies against a bona fide purchaser for value of the crops raised by the tenant on the land.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1002, 1022-1026, 1029; Dec. Dig. § 252.*]

3. LANDLORD AND TENANT (§ 254*)—LIEN FOR RENT—EQUITABLE ESTOPPEL.

Where a vendor of land executed a bond for title and admitted the tenant into possession, the contract providing that the payment of interest on the unpaid purchase money should, in event of a failure to pay installments when due, be taken as rent, a failure of the vendor to notify one extending credit to the tenant in reliance on his crops did not estop the vendor from subjecting the crops to his lien as a landlord, though the bond for title was not recorded, for the possession of the tenant was notice of its contents, and there was no duty on the part of the vendor

Appeal from Circuit Court, Amite County; M. H. Wilkinson, Judge.

Action by R. L. Weathersby and another against the W. L. Robinson Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

On December 2, 1907, Weathersby Bros., who were the owners of land in Amite county, Miss., agreed to sell and executed bond for title to T. S. McGehee. The instrument recites that the obligors bind themselves for a consideration of \$2,500, to be paid in five equal annual installments, beginning January 1, 1909, for which notes are given, to convey the land in question to McGehee, and further provides that the said notes shall bear interest at the rate of 6 per cent. from January 1, 1908, "interest to be paid annually, said interest to be considered as rent, unless each note is paid as above specified." The instrument contains the further provision: "The consideration of this obligation is that if said T. S. McGehee shall pay said notes at maturity, and shall pay all taxes on said land and the interest thereon, as stipulated, the said Weathersby Bros. shall, on the completion of the payment of said notes, execute or cause to be made and delivered to said McGehee a sale of said land in a warranty deed in good and sufficient form, in the meantime they shall permit said T. S. McGehee to occupy and use for his own benefit said land, then this obligation to be in full force; otherwise to be null and void."

McGehee went into possession of the property, and lived on it during the years 1908 and 1909, and raised crops thereon. During these years he traded with Robinson & Co., who bought his crop in 1908, except certain cotton delivered to Weathersby, which amount was credited on the bond for title, and which amount was not quite enough to equal 6 per cent. interest on the purchase price. In 1909, McGehee again traded with Robinson & Co., who bought his cotton, and at the end of 1909 surrendered the contract and moved from the place. Appellees thereupon demanded of Robinson & Co. the balance due for the year 1908 to bring the amount up to \$150, or 6 per cent. interest on the purchase price, and the further sum of \$150 rent for the year 1909. Upon the refusal of appellants to pay these amounts, appellees brought suit in the circuit court, setting up the fact that McGehee was their tenant for the years 1908 and 1909, and that they had a prior lien as landlord upon the agricultural products. Appellees contend that the relation of landlord and tenant did not exist under the contract.

On the trial, both sides asked a perempto-

casey & Butler, for appellant. Price & Price and Jackson & Gordon, for appellees.

McLEAN, J. [1] Appellant fails to discriminate between the well-marked and well-defined distinction of the relations existing between vendor and vendee, where an absolute conveyance is made, and where only a bond for title, an executory contract, an agreement to convey upon the payment of the purchase money, is entered into. In the former instance—that is, where the land is conveyed by deed—the vendee becomes the actual owner of the land; and, being the owner, he is entitled to the possession, and the vendor has no longer any title or estate in the land. All that he has is merely a lien upon the land for the payment of the purchase price, and can subject the land to the payment; but in the case of an executory contract the vendor retains the title and the estate, and the vendor, having the title and the estate, also has the right to remain in possession. Being entitled to the use and occupation of the land, the vendor can himself occupy, or rent the land to whomsoever he pleases. This being the status of the parties, it must follow, under the terms of the contract in the instant case, that the vendor also became landlord. There is nothing inconsistent, not less unlawful, in the contract as to paying the purchase price and also the rent. Of course, calling interest rent does not make it rent; but the word "interest" here is used so as to make the amount of the rent definite and certain. Suppose, instead of saying, "Said interest to be considered as rent unless each note is paid as above specified," it had read, "If the note is not paid the said McGehee is to pay \$150 rent," would there be, in legal contemplation, any difference? These principles are set at rest in *Bacon v. Howell*, 60 Miss. 362; *Nobles v. McCarty*, 61 Miss. 456; *Maynard v. Cocke*, 71 Miss. 493, 15 South. 788; *Flowers Carruth Company v. Moyse*, 95 Miss. 174, 48 South. 523.

The fact that the bond for title was not recorded makes no difference. Possession of land under an unrecorded contract, whether executed or executory, is equivalent, so far as notice to third persons is concerned, to the recording of the instrument; but the possession is notice of just exactly what the rights and obligations of the parties are as shown by the instrument—no more, no less. It therefore follows that the Robinson Company had notice of the terms of the contract between the vendor and vendee, and therefore extended the credit to McGehee, with the notice that the plaintiff had a lien on the products grown upon the land for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

payment of the \$150, each, for the years 1908 and 1909.

[2] In addition to this, the law is too well settled in this state to require the citation of authorities that the landlord can enforce his lien for rent and supplies against a bona fide purchaser for value of the agricultural produce without notice of the landlord's claim.

[3] The lower court ruled correctly in sustaining the objection of the plaintiff, to the effect that the plaintiff knew that the defendant was furnishing supplies to the tenant, for two reasons: First, as hereinbefore stated, the defendant was charged with the notice of the actual relations existing between the plaintiff and the tenant McGehee; but, in addition to that, there was surely no duty upon the part of the plaintiff to notify the defendant that the defendant was crediting McGehee at his (the defendant's) own risk. The proposed evidence did not show that plaintiff intended, or that his conduct was reasonably calculated, to mislead defendant, or that defendant was misled by the action of plaintiff.

We see no error in the record, and the case is affirmed.

FULLER v. STATE. (No. 15,800.)

(Supreme Court of Mississippi. March 18, 1912.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.

Nancy Fuller was convicted of crime, and appeals. Dismissed.

See, also, 57 South. 921.

PER CURIAM. Appeal dismissed.

COOPER v. ROTHMAN et al.

(Supreme Court of Florida. Feb. 20, 1912.)

(Syllabus by the Court.)

1. USURY (§ 52*)—WHAT CONSTITUTES.

Where C. loaned to R. and four others \$5,000 at 8 per cent. interest evidenced by a note for that amount due 90 days after the date of said note (viz., on the 1st of July, 1907), secured by a mortgage on real estate, which money was borrowed from C. for the purpose of going into a real estate speculation, and it was agreed at the time of said loan that C., in addition to the 8 per cent. interest, should have one-third interest in the profits, and where it appears that on the 1st of October, 1907, when said note fell due, R. and his associates were unable to pay the note, and as a consideration for a 90-day extension they gave C. three notes aggregating \$1,500, payable in 6, 9, and 12 months, and it was agreed that these three notes were to satisfy C.'s claim for profits, when at that time there were no profits, the transaction is usurious under the statute of Florida.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 109-113; Dec. Dig. § 52.*]

2. USURY (§ 100*)—APPLICATION OF PAYMENTS.

Where there is a note for \$5,000, bearing 8 per cent. interest, and three \$500 notes

which represent a usurious consideration, all involved in the same foreclosure proceedings, there is no error committed by the circuit judge in applying payments which were made on the \$5,000 note, and in refusing to allow interest on the principal debt of \$5,000.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 219-234; Dec. Dig. § 100.*]

Appeal from Circuit Court, Hillsborough County; F. M. Robles, Judge.

Bills by L. J. Cooper against J. Rothman and others. Bills were consolidated. Decree for defendants, and complainant appeals. Affirmed.

J. W. Frazier, J. C. Reynolds, Parkhill & Jackson, and J. T. G. Crawford, for appellant. F. M. Simonton, for appellees.

HOCKER, J. On the 14th day of February, 1910, appellant filed two bills in the circuit court of Hillsborough county to foreclose two mortgages on real estate executed by appellees to him. One to foreclose a mortgage dated October 1, 1907, to secure the payment of three notes for \$500, each dated the same day of the mortgage and due, respectively, 6, 9, and 12 months after date. The second bill, which was an amended one, to foreclose a mortgage on real estate given to secure the payment of a promissory note for \$5,000, due 90 days after date. The note and mortgage are dated the 1st day of July, 1907. The two suits were consolidated by consent and were heard and disposed of by one decree.

The answer to the bills set up, in substance, the defendants in the suits borrowed \$5,000 from the complainant on July 1, 1907, for the purpose of buying on speculation a certain tract of land, and that it was agreed that if appellant would lend them \$5,000 to make a cash payment on the land they would give him 8 per cent. interest on the \$5,000 and one-third of the profits they expected to make from the speculation, and that he would extend the time of payment of the \$5,000 note in furtherance of the speculation. That when the \$5,000 note matured, appellees were not able to pay it, and appellant exacted of them, as a condition of extension of the time of payment, that his expected profits should be fixed at \$1,500 evidenced by the three notes referred to. That this was the sole consideration of the said three notes and the mortgage given to secure it, and that the whole transaction was thereby rendered usurious. Replications were filed or waived by consent, and the cases were referred to a master to take the testimony. Upon the hearing the circuit judge decreed that the transaction was usurious under our statute; that the three \$500 notes and the mortgage to secure the same were void; and that complainant recover only the principal of the \$5,000, less the payments which had been made to complain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

time previous to the 1st day of July, 1907, J. Rothman, Samuel Borchardt, D. M. Woodward, and C. C. Woodward had undertaken to buy for speculative purposes from A. P. Stuckey a tract of land containing a little over 200 hundred acres, situated in Hillsborough county, Fla. The price demanded was \$15,000, to be paid in installments. The first payment was to be \$5,000. C. C. Woodward, representing himself and his associates, approached the appellant for a \$5,000 loan to make the cash payment.

There was a boom in real estate at the time, and C. C. Woodward and his associates were confident they could dispose of the land if they could secure it in a very short time at a large profit. The whole scheme was laid before appellant, and a loan of \$5,000 was solicited of him. Appellant agreed to lend them the \$5,000 at 8 per cent. interest, and in addition he was to receive one-third of the profits of the venture. The money was loaned, and the note for \$5,000 dated July 1, 1907, due 90 days from date with 8 per cent. interest and the mortgage which is sought to be foreclosed were executed and delivered. When the 90-day note fell due, the rosy expectations of the speculators had not been realized on the land they had contracted to buy from Stuckey, paying him the \$5,000 borrowed from appellant. The latter insisted on the payment of the note. The makers were unable to pay. In this situation, the following agreement was made between the parties:

"This agreement made and entered into on this the first day of July, A. D. 1907, by and between J. Rothman, D. M. Woodward, C. C. Woodward and Samuel Borchardt, parties of the first part, and L. J. Cooper, party of the second part, witnesseth that:

"Whereas the parties of the first part have obtained from one A. P. Stuckey, a contract of sale to the hereinafter described real estate whereby the said parties of the first part are to pay for said real estate the sum of fifteen thousand dollars (\$15,000.00), five thousand dollars (\$5,000.00) of which has been paid and

"Whereas the party of the second part advanced to the parties of the first part the said sum of five thousand dollars (\$5,000.00), to be repaid in ninety days from the date hereof with interest at the rate of eight per cent. (8%) per annum, and whereas the said L. J. Cooper was to have an undivided one-third interest in all profits accruing to the parties hereto from the purchase and sale of the said hereinafter described real estate, and whereas it is agreed between the parties hereto that said L. J. Cooper's profits shall be estimated at fifteen hundred dollars (\$1,500.00), the parties of the first part agree-

two months respectively from the date thereof and to bear no interest and,

"Whereas the said L. J. Cooper agrees in consideration of the payment of the said fifteen hundred dollars (\$1,500.00) to release all his interest in and to the profits arising from the purchase and sale of the hereinafter described real estate; in order to further secure the payment of the said five thousand dollars (\$5,000.00) advanced by the said L. J. Cooper and the fifteen hundred dollars (\$1,500.00) as liquidated profits, the parties of the first part hereby assign and set over unto the party of the second part, the said L. J. Cooper, his heirs and assigns all the right, title and interest in and to the said agreement or contract of sale made and entered into on the 29th day of June, A. D. 1907, between A. P. Stuckey, party of the first part, and the parties of the first part hereto, as parties of the second part, it being understood that the party of the second part hereto is not to assign or transfer said contract unless it becomes necessary to assign or transfer the same in default of payment by the parties of the first part of the sums hereinbefore mentioned together with the interest thereon.

"It is further agreed that any extension of the time of payment of any of the said obligations shall be within the discretion of the party of the second part.

"It is further understood and agreed that the party of the second part upon the full payment of the said five thousand dollars (\$5,000.00) and fifteen hundred dollars (\$1,500.00) together with interest on said five thousand dollars (\$5,000.00) shall reassign to the parties of the first part of the contract hereby assigned and return to said parties of the first part any other collateral held by the party of the second part to secure the payment of the said sums hereinbefore mentioned and interest thereon, said lands being situate in the county of Hillsborough and state of Florida and more particularly described as follows: Lot three (3) of Hunt's subdivision of the northeast quarter of the northeast quarter of section fifteen (15), township twenty-nine (29), south, range nineteen (19) east, containing twelve and $\frac{1}{100}$ acres more or less, according to plat recorded in Plat Book One (1) on page ninety-three (93) of the Public Records of said county; the east half of the southwest quarter of the southeast quarter of section ten (10) township twenty-nine (29) south, range nineteen (19) east; the west half of the southwest quarter of the southeast quarter of section ten (10) township twenty-nine (29) south of range nineteen (19) east, S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ and N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ Sec. ten (10) township twenty-nine (29) south range fifteen (15) east.

"In witness whereof the parties hereto have subscribed their names and affixed their seals the date aforesaid.

"J. Rothman. [Seal.]
"D. M. Woodward. [Seal.]
"Samuel Borchardt. [Seal.]
"C. C. Woodward. [Seal.]
"_____ [Seal.]"

This agreement bears date July 1, 1907; but it is clear from the evidence, and from the wording of the instrument itself, it was not in fact executed until 1st of October, 1907, when the 90-day note fell due. No profits had been made at that time. It is asserted by the appellees in their testimony that this agreement and the three \$500 notes, with the mortgage to secure the same, were all made in order to secure from appellant an extension of time on the 90-day note, and that this was the sole consideration for the same. It is testified by C. C. Woodward, who was the principal negotiator for the loan, that when the \$5,000 was loaned, it was agreed with appellee that he was to get 8 per cent. interest, and one-third interest in the profits of the speculation, which was to be not less than \$1,500, the amount stated in the written agreement to which we have referred. Appellant admits he was to get one-third of the profits, and does not specifically deny C. C. Woodward's statement that it was agreed when the loan was made his one-third interest in the profits should not be less than \$1,500. C. C. Woodward's statement is supported by the terms of the written agreement, which fixes appellant's alleged profits, for there was then no profits, at \$1,500, the total amount of the three \$500 notes. Appellant's explanation of the circumstances under which the three \$500 notes were given does not impair the force of C. C. Woodward's statement. Appellant says that when his \$5,000 note fell due he demanded payment. Appellees wanted an extension, and that they themselves fixed the amount of his profits at \$1,500, gave notes and a mortgage for the same, and thereby got a short extension of time on the \$5,000 note. Granting that appellees fixed the profits of appellant at \$1,500, when there were in fact no profits, in order to get an extension on the principal debt, this is entirely consistent with the statement of C. C. Woodward that appellant was entitled under the original agreement to at least that much. They would scarcely have ventured to fix a smaller sum when they were endeavoring to get an extension on a \$5,000 loan. Moreover, the fact that the agreement copied herein was not executed until October 1, 1907, but dated back to July 1, 1907, shows an effort to make it appear that this agreement was in fact a part of the original transaction. This agreement was drawn by the attorney for appellant, who also dated the notes and mortgages.

With reference to the execution of the

three \$500 notes and the mortgage to secure the same, appellant testifies at considerable length. In response to questions by his own solicitor, he stated that when he made the \$5,000 loan there was no specific agreement that he would extend the time of payment after its maturity; that extensions were to be at his option; that when the original (\$5,000) mortgage fell due, he did extend it 90 days. His exact language is as follows: "At the expiration of the original mortgage, they asked me for an extension, and I granted 90 days beyond the time specified in the original note for \$5,000. Q. And at that time the mortgage and the interest up to that time was due, was it? A. Yes, it was due. Q. Now, was that the time at which your interest in the profits was determined at \$1,500? A. It was. Q. And they simply gave you notes for \$1,500 and a second mortgage in consideration—what, of your extending the note and mortgage? A. Yes, in consideration of my extending the paper for 90 days longer. Q. And in carrying out their original agreement referred to? Yes, I suppose so."

The contention is made here by appellant in argument that the transaction between appellant and appellees was a partnership one, and the usury laws do not apply to it. This contention finds no support in the evidence of the appellant. In answer to the question, "Wasn't it understood between you all that this property was to be subdivided before it was sold? A. It wasn't understood between me at all. I had nothing to do with it. That was nothing to me. They made the plans and were handling the proposition, and I had absolutely nothing to do with it." Again, he says: "Q. Mr. Cooper, did you know what these folks were going to do with the land, or of whom they were buying it from, or anything about it other than what they told you? A. Absolutely nothing, only in a general way from their conversation. Mr. Woodward came to me and made application for the loan, and being a personal friend of mine, and I being friendly to all the parties interested in this deal, I granted it, and of course this other matter of any interest to me in the profits came up incidentally." Again, he says: "Q. As to whether they were to sell this out at a profit or sell it at all or not, did you have anything at all to do with that or not, except the loan of that money? A. Not at all." There is nowhere in Mr. Cooper's testimony any intimation of a partnership between himself and the appellees in this land venture. He did loan the \$5,000 which was the first cash payment made by appellees; but he took no risk of its return with interest, and had no control or management of the venture. The authorities cited by appellant on this point do not apply to the facts of this case. The case of *Orvis v. Curtiss*, 12 Misc. Rep. 434, 33 N. Y. Supp.

589, cited by appellant in this connection, seems to be an authority against his contention, for it is stated in the second headnote that "an agreement whereby one party is to furnish the capital necessary to carry on the business, is to share equally in the profits, and in case of loss is guaranteed the return of his investment, and a sum in excess of the legal rate of interest, is usurious." Says the court in the opinion: "The plaintiff took none of the risks of a partner, as distinguished from those of a lender of money. He stood in no danger of losing the capital he furnished, because he was to recover that back in any event. He did not even stand in any danger of losing the use of his money, because he was to recover at least \$5,000 profits in excess of 6 per cent. interest however disastrously the venture might result. He was not exposed to any liability as a partner for the acts of his copartner, because the transaction was such that the copartner could obtain no ostensible authority, and the agreement was such that he had no authority in fact to bind the plaintiff." This case seems to have been reversed by the following one on the facts:

The case of *Orvis v. Curtiss*, 157 N. Y. 657, 52 N. E. 690, 68 Am. St. Rep. 810, is also relied on by the appellant. We have examined it carefully, but the facts in that case were unlike those in the case at bar. This is indicated in the second headnote, which is as follows: "An agreement between two parties which imports the formation of a partnership, such as a joint venture in the purchase and sale of stocks, is not converted from a contract in the nature of partnership, into a loan of money by the fact that one party guarantees the other against loss on the capital advanced by him, and that his profits shall amount to a certain sum; and the defense of usury is not applicable thereto." It is sufficient to say, in regard to the applicability of this case to the case at bar, that in the latter there is not the slightest proof there was a joint venture in the purchase and sale of the lands by the respective parties. The appellant positively states he had nothing to do with the lands contracted for by appellees. We have examined the other cases cited and find no one of them applicable to the case at bar. The only reference to a partnership in the testimony is contained in the cross-examination of D. M. Woodward. It is as follows: "Q. When you borrowed the \$5,000, as a matter of fact you took Mr. Cooper into the partnership with you and your associates, didn't you, in the profits of this venture? A. In the profits, yes, to the extent of \$1,500; you might put it that way. Q. You took Mr. Cooper into partnership with you in the profits. A. To the extent of \$1,500. Q. Well, he was to be a partner in the profits? A. To the extent of not less than \$1,500, if you want to call it partnership;

that's all." But the witness did not conduct the negotiations with Mr. Cooper, but these were conducted by his brother C. C. Woodward, and neither one of them states any facts which indicate a partnership. These statements of D. M. Woodward seem to be nothing more than a complacent acquiescence in the suggestions of his questioner containing no facts which would warrant the conclusion that a partnership existed.

The contention is also made by appellant that he received the three \$500 notes and the mortgage to secure it as a bonus or gift from appellees. This contention is not sustained by the testimony of Mr. Cooper, who says they were given in pursuance of the original agreement to give him one-third of the profits, and also as a consideration for the 90-day extension of the \$5,000 note.

[1] It is unnecessary to burden this opinion with an examination of the numerous authorities cited in the briefs on the question of what constitutes usury. Our statute on the subject in force when these contracts were made is section 3105, General Statutes of 1906 (substantially re-enacted by section 2, c. 5960, Laws of 1909, the provisos in neither having any relation to the matter in hand), and is as follows:

"3105. Rate higher than ten per cent. unlawful.—It shall not be lawful for any person, company or corporation, to reserve, charge or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, a rate of interest greater than ten per cent. per annum, either directly or indirectly, by way of commissions for advances, discount, exchange, or by any contract, contrivance or device whatever, whereby the debtor is required or obliged to pay a greater sum than the actual principal sum received, together with interest at the rate of ten per centum per annum as aforesaid."

See *Bettis v. Tampa Real Estate Ex. & L. Ass'n*, 62 Fla. —, 56 South. 499.

We think that there was ample evidence before the chancellor to justify him in holding that this transaction was usurious under the statute, either on the ground that usurious interest was originally contracted for, or on the ground that usurious interest was provided for in consideration of forbearance for 90 days to collect after its maturity the principal debt.

[2] The decree is attacked on the further ground that the circuit judge erred in placing the credits on the original principal sum of \$5,000, and in not placing them on the three \$500 notes, where it seems Mr. Cooper placed them, or desired them to be placed. We do not think the circuit judge erred in placing the credits on the principal debt, and the following authorities sustain his action: *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786; *Crane, Adm'r. v. Goodwin*, 77 Ga. 362; *Payne v. Newcomb*.

100 Ill. 611, 39 Am. Rep. 69; Burrows v. Cook, 17 Iowa, 436.

The decree appealed from is affirmed.

WHITFIELD, C. J., and TAYLOR, SHACKLEFORD, and COCKRELL, JJ., concur.

(130 La.)

No. 19,270.

COGUENHAM v. AVOCA DRAINAGE DIST.
et al.

(Supreme Court of Louisiana. Feb. 26, 1912.)

(Syllabus by Editorial Staff.)

1. INJUNCTION (§ 118*)—ISSUANCE OF DRAINAGE BONDS—PETITION.

A petition to enjoin the issuance of bonds of a drainage district, which alleges in general terms without specifications that the forms prescribed by law were not observed in the formation of the district and in the proceedings for the issuance of the bonds, is insufficient.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 118.*]

2. STATUTES (§ 123*)—TITLE—SUFFICIENCY.

The title of Act No. 317 of 1910, being an act to amend Act No. 159 of 1902, authorizing commissioners of drainage districts to levy taxes, when authorized by a vote of the taxpayers, so as to further enlarge the powers of drainage commissioners, and authorizing the drainage of lands by leveeing and pumping, and the maintaining of such drainage system by the levying of an acreage tax, is sufficiently broad to include a provision authorizing the levy of a tax without a previous election.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 130-132, 176-183; Dec. Dig. § 123.*]

3. CONSTITUTIONAL LAW (§ 24*) — TAXATION—STATUTES—VALIDITY.

Act No. 317 of 1910, §§ 9, 23, 27, authorizing the levy of any tax "which is now or may hereafter be authorized by the Constitution," etc., is valid as anticipatory legislation with a view of an amendment of the Constitution, article 281 of which limits the tax per annum to 25 cents per acre, and on the adoption of the amendment in 1910, authorizing the issuance of drainage bonds and acreage taxes not exceeding \$3.50 per acre per annum, which is self-executing, the commissioners of a drainage district may issue bonds and levy an acreage tax of \$1.15 per acre for the first year's interest.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 21-29; Dec. Dig. § 24.*]

4. CONSTITUTIONAL LAW (§ 29*)—SELF-EXECUTING PROVISIONS.

A constitutional provision which is complete in itself is self-executing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 32; Dec. Dig. § 29.*]

5. CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS OF LAW—LEVYING OF TAXES.

Under the rule that due process of law in the imposition of local taxes is satisfied where the property owner is afforded an opportunity to be heard before the tax becomes a final charge on his property, Act No. 317 of 1910, authorizing drainage taxes and giving any property owner the right to appeal within a specified time to the courts to test the validity of the proceedings, is not invalid as denying

due process of law, since the levy remains in suspense during the specified period to afford an owner an opportunity to be heard.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290.*]

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Charles A. O'Neill, Judge.

Action by Manuel Coguenham against the Avoca Drainage District and another. From a judgment for defendants, plaintiff appeals. Affirmed.

C. J. Boatner, for appellant. Foster, Milling, Brian & Saal, for appellees.

PROVOSTY, J. Manuel Coguenham, the plaintiff, owns lands situated within the limits of subdrainage district No. 1 of the Avoca drainage district. He brings this suit against the commissioners of the said drainage district and the sheriff of the parish of St. Mary, where said drainage district is situated, to enjoin the issuance by said commissioners of \$300,000 of bonds for said subdrainage district, and the collection by the sheriff of an acreage tax of \$1.15 per acre levied by said commissioners upon the lands of said subdrainage district to pay the first year's interest upon the said bonds.

[1] The petition contains a number of allegations to the effect that the forms prescribed by law were not observed in the formation of said district and in the proceedings for the issuance of the said bonds and the levy of said tax; but these allegations are couched in general terms, without specification of the respects wherein the forms of law were not observed, and nothing is better settled than that such vague and general allegations add nothing to a petition. Moreover, in this court, plaintiff has expressly waived them, and admitted that they were entirely without foundation.

[2] No election was held to authorize the levy of said tax, but same is proposed to be levied under the provisions of Acts Nos. 256 and 317 of 1910, which authorize the commissioners of drainage districts to levy such a tax for the district, or for a subdistrict, whenever petitioned by the owners of two-thirds of the area of the district or subdistrict; that is to say, without an election being held to authorize same. And the plaintiff contends that said provisions of said acts thus authorizing such tax to be levied without a previous election are unconstitutional and null because the intention of enacting same is not expressed in the titles of the acts. The title of Act No. 317 is a full synopsis of the act and is very long. The pertinent part reads:

"An act to amend Act No. 159 of 1902, entitled:

"An act to * * * authorize them" (the commissioners of drainage districts) "to levy taxes conformably to the provisions of Act No. 5 of 1899 and to article 281 of the Constitution"

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

(i. e., when authorized to do so by a vote of the taxpayers); "so as to further enlarge the duties and powers of drainage commissioners; * * * authorizing the draining of lands by leveeing and pumping, and the maintaining of such drainage system by the levying of an acreage tax or forced contribution."

It will be noted that the intention is expressed "to further enlarge the powers of drainage commissioners," and that one of the respects in which it is announced that the powers are to be enlarged is that of levying an acreage tax or forced contribution; that is to say, of the tax in question. Under Act No. 159 of 1902 they had the power to levy taxes, and the intention is expressed of amending that act by enlarging their powers in that respect. And the enlargement consists in doing away with the necessity of holding an election. Under Act No. 159 the commissioners could levy taxes "whenever authorized to do so by a vote of the taxpayers." They were, now, by the amendment, to be authorized to do so "for the maintaining of such drainage system," with nothing said about a vote of taxpayers. Under Act No. 159, they had the qualified power to levy taxes; the qualification being a previous vote of the taxpayers. Their powers were now to be so enlarged as to be unhampered and untrammelled by any qualification, but be measured solely by the needs of the district. The intention is expressed of conferring upon the commissioners the flat authority to levy taxes, or local contributions, "for maintaining such drainage system." The objection that the intention to authorize the said levy is not expressed in the title of the act is therefore unfounded.

[3] The next contention is that sections 9, 23, and 27 of said Act No. 317 of 1910 are unconstitutional because inconsistent with article 281 of the Constitution as said article stood before the amendment proposed by Act No. 197 of 1910 and adopted at the congressional election of that year.

The said article then stood as modified by the amendments proposed by Acts Nos. 186 of 1904 and 122 of 1906. It limited to 25 cents per acre per annum the acreage tax which drainage districts can be authorized to levy.

The said sections 9, 23, and 27 of Act No. 317 of 1910 read as follows:

"Sec. 9. Be it further enacted, etc., that in order to carry out the provisions of this act relative to the drainage of lands situated in said drainage or subdrainage districts as herein provided, the commissioners appointed or selected as aforesaid shall have the power to provide the funds necessary therefor by levying any tax or forced contribution which is now or may hereafter be authorized by the Constitution and laws of this state."

"Sec. 23. Be it further enacted, etc., that it is especially made the duty of the drainage commissioners, not only to reclaim unreclaimed lands of their district, but when such lands are reclaimed by artificial means, such as pumping, then they must at all times maintain the necessary pumping stations to insure the continuous drainage of the said lands, and to this

end they are authorized to levy such acreage tax or forced contribution as is authorized by the Constitution and laws in force at that time, and by complying with the provisions of section 9 of this act, or to use for said purpose any other funds raised in any other manner in said district."

"Sec. 27. Be it further enacted, etc., that whenever upon petition as provided for by section 9 of this act, it is decided by a board of drainage commissioners to drain certain lands by levying a forced contribution or acreage tax thereon, the said drainage commissioners shall act in said matter by resolution or motion, fully setting forth and giving in detail the number of acres in said district to be drained, as shown by the survey; the amount that the report of the engineer shows it will cost per acre to drain the lands, and proceed to provide the funds with which to drain the said lands as authorized by the Constitution and laws of this state in force at that time; which resolution when thus passed by the board of commissioners shall be notified to the assessor of the parish, by forwarding him a copy thereof in order that he may extend the acreage tax or forced contribution thus levied, upon the assessment rolls for the parish in which the property is situated, and they shall record the original in the mortgage records of the parish, and also publish same in the official journal of the parish."

It will be noted that these sections only authorize the levy of such taxes as may be authorized by the Constitution. In this there can certainly be nothing opposed to the Constitution. The only question would have to be, therefore, whether such anticipatory legislation was valid. No reason is suggested why it should not be, and that legislation may be validly enacted with a view to a future amendment of the Constitution, upon which it is to depend for its constitutionality, has been held by the Supreme Courts of Texas and Connecticut. *Galveston, B. & C. Narrow Gauge Ry. Co. v. Gross*, 47 Tex. 428; *Pratt v. Allen*, 13 Conn. 119.

The tax in question is expressly authorized by the amendment which was proposed to said article 281 by Act No. 197 of 1910 and adopted at the congressional election of that year, the relevant part of which is as follows:

"When the character of any land is such that it must be leveed and pumped in order to be drained and reclaimed, the board of drainage commissioners of the district in which the land is situated, shall, upon the petition of not less than a majority in acreage of the property taxpayers, resident and nonresident, in the area to be affected, ascertain, the cost of drainage and reclaiming said land and incur debt against said land for an amount sufficient to drain and reclaim it, and issue for said debt negotiable bonds running not longer than forty (40) years from their date and bearing interest at a rate not exceeding five (5) per centum per annum, payable annually or semiannually, which bonds shall not be sold for less than par; and said board of drainage commissioners shall levy annually upon said land forced contributions or acreage taxes in an amount sufficient to maintain the drainage of said land and to pay the interest annually or semiannually, and the principal falling due each year, or such amount as may be required for any sinking fund provided for the payment of said bonds at maturity; provided, that such forced contributions or acreage taxes, for all purposes shall never exceed three dollars and fifty cents (\$3.50) per acre per annum."

[4] At the time the tax in question in this case was levied, the said amendment had already been adopted and gone into operation, and it, of itself, in the absence of any legislative act, would clearly be sufficient to authorize said tax. It reads plainly to that effect. Moreover, it expressly provides that it is to go into effect immediately, which can have no other meaning than that an enabling act is not to be necessary for it to go into effect. On the point of when constitutional provisions are self-executing, and have no need of an enabling act to carry them into effect, the following authorities are apposite and conclusive:

"It is not always easy to determine what are or what are not self-executing provisions, nor are the authorities reconcilable. Where the provision provides the rule for enforcement and fixes a penalty for violations, there can be no doubt as to its character. It is not only self-executing but prohibitive, and renders void all statutes in conflict therewith. But a provision may be both prohibitive and mandatory and not self-executing. The question in such cases is always one of intention, and to determine the intent the general rule is the courts will consider the language used, the object to be accomplished by the provision, and the surrounding circumstances, and to determine these questions from which the intention is to be gathered the court will resort to extrinsic matters when this is necessary." 8 Cyc. pp. 753, 754.

"The question in every case is whether the language of a constitutional provision is addressed to the court or the Legislature. Does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject referred to the Legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts." Willis v. Mabon, 48 Minn. 150, 50 N. W. 1111, 16 L. R. A. 281, 31 Am. St. Rep. 626.

"Where it is apparent that a particular provision of the organic law shall go into effect immediately without ancillary legislation, and this can be determined by giving full force and effect to all its clauses relating to the same subject, and the language is free from ambiguity, then it becomes the imperative duty of the judicial tribunals to declare it self-executing; and where the provision is unambiguous and the purpose of the provision would be frustrated unless it be given immediate effect, it will be held self-executing." Tuttle v. National Bank of Republic, 161 Ill. 502, 44 N. E. 985, 34 L. R. A. 750; 6 Am. & Eng. Enc. p. 912, note 2.

"Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given or the enforcement of a duty imposed." 6 Am. & Eng. Enc. p. 912.

A constitutional provision which is complete in itself needs no further legislation to put it in force, but is self-executing. Davis v. Burke, 179 U. S. 339, 21 Sup. Ct. 210, 45 L. Ed. 249.

[5] The next contention is that, in order that there should be due process of law in the imposition of local assessments of this kind, the property owner must be notified by publication or otherwise in time to afford him an opportunity for a hearing before the levy is made; or, at any rate, in time to have recourse to the courts before the levy is made or becomes a charge upon his property; that an opportunity to have recourse to the courts after the levy is made or becomes a charge upon his property is not sufficient.

We are not aware that due process of law requires anything more than that the property owner should be afforded an opportunity to be heard before the imposition becomes a fixed and final or unquestionable charge upon his property. 8 Cyc. 1095, 1108. In Hagar v. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, the court said:

"In some states, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law."

Act No. 317 provides as follows:

"Any property owner having property situated within the limits of the area proposed to be drained, shall have the right during the sixty days next following the date of publication of the resolution required by the preceding section, to appeal to the courts for the purpose of testing the validity of such proceedings, after which time the right to resort to the courts shall be forever barred."

As an effect of this provision, the levy remains in abeyance or suspense for 60 days after notice by publication, in order to afford the tax owner an opportunity to be heard. This, we think, clearly satisfies the requirement of due process of law. Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. Ed. 419.

The judgment appealed from dismissed the suit of plaintiff and affirmed the regularity of all the proceedings by which the said drainage district and subdrainage district were organized and the said bonds authorized to be issued, and the said tax was levied, and affirmed the validity of said bonds and tax.

Judgment affirmed.

(130 La.)

No. 19,258.

ST. CHARLES MUNICIPAL DRAINAGE
DIST. v. COUSIN.

(Supreme Court of Louisiana. Feb. 26, 1912.)

(Syllabus by the Court.)

1. DRAINS (§ 66*) — ASSESSMENT — CONSTITUTIONAL PROVISIONS.

The power of the majority, in acreage, of the taxpayers, and of the board of commissioners of a drainage district, acting at the instance of such majority, to impose a burden upon the minority, or their lands, without the consent of such minority, is conferred and defined by the Constitution, and where the majority submit to the board a proposition upon that subject which the Constitution does not authorize, the board has no power to accept or act on it, and, a fortiori, has no power to take action which it would be unauthorized to take upon a proposition which conformed to the requirements of the Constitution.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 72; Dec. Dig. § 66.*]

2. DRAINS (§ 14*) — ASSESSMENT — CONSTITUTIONAL PROVISIONS.

A petition by property taxpayers, for the establishment of a drainage district, which specifies the amount of the acreage tax, or forced contribution, to be levied, is unauthorized, as the Constitution fixes the limit, and the law provides that the tax may be increased or diminished, within the limit, as the needs of the district may require; and the board of commissioners is without power to act upon such petition.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.*]

3. DRAINS (§ 75*) — ASSESSMENT — CONSTITUTIONAL PROVISIONS.

The board of commissioners of a drainage district is without power to levy an acreage tax or forced contribution for an indefinite period, or for a term of, say, 40 years, since the Constitution and the law require that such tax shall be levied annually, and may be increased or diminished as the needs of the district may require.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 72; Dec. Dig. § 75.*]

4. DRAINS (§ 13*) — SUBDRAINAGE DISTRICT — CONSTITUTIONAL AND STATUTORY PROVISIONS.

The Constitution and the statute provide for the establishment of subdrainage districts, and make them autonomous, and there is no more authority, or reason, for confusing their interests and averaging the cost of the work to be done in them than for confusing the affairs of drainage districts or school districts.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 4; Dec. Dig. § 13.*]

5. DRAINS (§ 82*) — PROCEEDINGS AGAINST DRAINAGE DISTRICT — PRESCRIPTION.

The prescription, of 60 days, established by section 28 of Act No. 317 of 1910, has no application to proceedings which are not only unauthorized by, but in contravention of, the law, constitutional and statutory.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 81, 83-87; Dec. Dig. § 82.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by the St. Charles Municipal Drainage District against Edward P. Cousin.

From a judgment for defendant, plaintiff appeals. Affirmed.

H. L. Favrot, for appellant. McCloskey & Benedict, for appellee.

MONROE, J. Plaintiff alleges that defendant agreed to buy, at the par value, \$50,000 of bonds issued by it, and that, without sufficient reason, he now refuses so to do, and it brings this suit to compel specific performance of the alleged contract. Defendant admits that he agreed to buy bonds to the amount stated, but alleges that it was upon the express condition that they should be valid obligations, based upon legal proceedings and binding upon plaintiff and the taxpayers, and he alleges that the bonds tendered are invalid and are predicated upon proceedings which were illegal and in contravention of the Constitutions of the United States and of the state of Louisiana, all as set forth in the answer and supplemental answer. We learn from the record that on or before May 2, 1911, there was presented to the police jury of the parish of St. Charles a petition reading as follows:

"We, the undersigned owners of land in the St. Charles municipal drainage district, hereby petition the honorable board of commissioners of the said drainage district to levy a tax on our lands of \$2 per acre, per year, in order to accomplish the work of drainage and reclamation in said district, and we bind ourselves to the payment of said tax, when levied. We further petition said drainage board to issue bonds, secured by said tax, to the extent of \$350,000, in such manner as they may deem advisable, and to sell said bonds according to law, applying the proceeds of sale of said bonds to the drainage and reclamation of lands in said drainage district."

The petition bears the signatures of 35 individuals and corporations, to whom are assessed 14,055.39, of the 15,791.11, acres of land included in the proposed drainage district (of which 14,055.39 acres, a single individual, Mr. Julius F. Funk, appears to be the owner of 13,486.18 acres), and, in compliance with their request, the police jury adopted an ordinance establishing and delimiting the St. Charles municipal drainage district and creating, for its governance, a board of commissioners, the members of which met and organized on July 12th, and on July 24th, in their corporate capacity, adopted a plan for the drainage of the district, which had been prepared by the John A. Kruse Engineering Company (a firm employed, apparently, by the board) and approved by the board of state engineers, after which the board of commissioners proceeded to levy a forced contribution, or acreage tax, and to authorize the issuance of bonds, predicated thereon for the carrying of said plan into execution. As to the levying of the contribution and issuance of the bonds, the resolu-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion of the board, after a preamble reciting the steps previously taken, reads, in part, as follows:

"Therefore, be it resolved: That, complying with the petition of property holders, filed with the secretary of this board, and the cost of the work having been duly and properly ascertained in accordance with law, the board of commissioners of the St. Charles municipal drainage district do hereby levy, annually, an acreage tax, or forced contribution, of not less than one dollar and fifty cents per year upon every acre of land in this drainage district, the said levy to begin with the year 1911, and continue for a period not longer than forty years, consecutively, or until any bond issue secured by the tax here levied shall have been completely paid, redeemed and retired, in principal and interest. Be it further resolved: That, in order to carry out, immediately, the work of reclamation, leveeing and pumping, contemplated by the report of the engineers made herein, this board authorizes the capitalization of the said tax hereinabove referred to, to incur an indebtedness of \$22.10 per acre, on every acre of land in said district, aggregating \$350,000, to be represented by 450 negotiable bonds, of \$500 and \$1,000 each, payable within forty years from their date and bearing 5 per cent. interest, per annum, from their date until paid, the first two hundred of said bonds to be of \$500 denomination," etc. (And then follow a number of details in regard to the form of the bonds, the manner of their issuance and sale, the sinking fund to be provided, etc.)

Other preambles and resolutions, passed, apparently, at the same session of the board, are as follows, to wit:

"Whereas, by resolution of this board, passed this day, on a petition of more than two-thirds, in acreage, of the property taxpayers owning lands in this district, a tax of \$1.50 per acre, beginning with the year 1911, and for 40 years, consecutively, being the years 1911 to 1950 inclusive, was levied, in accordance with the Constitution and laws of this state: Therefore, be it resolved that this board levies and orders the levy and collection of said tax of \$1.50 per acre, for 40 years, consecutively, being the years 1911 to 1950, inclusive, and it is further resolved that the president of this board should, and he is hereby instructed to, do and cause to be done whatever is required by law to make effective the levy of said taxes and to collect the same. Be it further resolved that a certified copy of this resolution be forwarded to the assessor and a certified copy to the sheriff of the parish of St. Charles, to evidence their authority to assess and collect the said tax. Be it further resolved that the resolution levying said taxes, with the original petition of the property holders calling for said levy, be also sent to the clerk of the court of the parish of St. Charles to record the same in mortgage records in said parish and that they also be published in the official journal of the parish of St. Charles and that a copy of these proceedings be forwarded to the Secretary of State."

"Whereas, it will become necessary to provide for the expenses of maintenance and operation and for the legitimate running expenses of this board: Therefore, be it resolved that a committee on budget is hereby appointed, composed of three members of this board, whose duty it shall be to make a budget of the expenses to be incurred by this board for its operation, and that this budget committee be also instructed to ascertain what will be necessary for maintenance, in order that this board may provide, by taxation, whatever may be necessary to this end. Be it further resolved that, as soon as

the figures are ascertainable, this board will then, by resolution, fix an acreage tax sufficient for maintenance, operation and expenses."

The petition of the taxpayers and the resolutions above quoted were published in the official organ of the parish on July 29, 1911, and, so far as the record shows, no opposition to the plan thus proposed and adopted has been made by any owner of property in the district, nor has any such owner appeared in this suit.

The law upon which plaintiff relies is to be found in the amendment to article 281 of the Constitution, proposed by means of Act No. 197 of 1910, and adopted in November of that year, and in the Acts Nos. 256 and 317 of the session of 1910. Defendant attacks the amendment to the Constitution and the Act No. 317, as contravening the fifth and fourteenth amendments to the Constitution of the United States, and further attacks the Act No. 317 and the Act No. 256, upon other grounds. We premit the consideration of the constitutional questions thus presented, however, and shall confine our attention to other questions which appear to us to be decisive of the case.

Assuming article 281 of the Constitution, as amended pursuant to Act No. 197 of 1910, to be proof against defendant's attacks, that part of it which bears upon the questions here at issue reads:

"When the character of any land is such that it must be levied and pumped in order to be drained and reclaimed, the board of drainage commissioners of the district in which the land is situated shall, upon the petition of not less than a majority, in acreage, of the property taxpayers, resident and nonresident, in the area to be affected, ascertain the cost of drainage and reclaiming said land and incur debt against said land for an amount sufficient to drain and reclaim it and issue for said debt negotiable bonds running not longer than forty years from their date and bearing interest at a rate not exceeding 5 per cent. per annum, payable annually or semiannually, which bonds shall not be sold for less than par; and said board of drainage commissioners shall levy annually upon said land forced contributions or acreage taxes in an amount sufficient to pay the interest, annually or semiannually, and the principal falling due each year or such amount as may be required for any sinking fund provided for the payment of said bonds at maturity; provided, that such forced contributions, or acreage taxes, for all purposes, shall never exceed \$3.50 per acre, per annum."

It will thus be seen that a majority, in acreage, of the property taxpayers (two-thirds, by the act No. 317) are granted the right to require the board to ascertain the cost of the proposed drainage, incur a debt against the land, sufficient to defray that cost, issue negotiable bonds to an amount sufficient to pay the debt, and levy an acreage tax sufficient to pay the bonds; and that, in order to accomplish those results, the board may levy an acreage tax within a limit of \$3.50 per acre per annum.

[2] In this instance, the petitioners have

undertaken, in the beginning, to impose upon the board the condition, which they had no right to impose, and which the board had no right to accept, to wit, that the limit of taxation should be \$2, instead of \$3.50, an acre, as fixed by the Constitution. It may be said, by way of answer to this objection, that the taxpayers, having petitioned for the drainage, would be obliged to submit to the \$3.50 limit if conditions, in the future, should require it; but it is not so clear that their proposition could be thus divided against them, or that the minority taxpayers, as to whom the proceeding is in invitum, could be held otherwise than according to the strict letter of the law. It may also be said that the board, having adopted the \$2 limit, as proposed, the matter stands as though that limit had been adopted by it without suggestion. Quoad the holders of the bonds, however, the limit must be \$3.50, as fixed by the Constitution, and the board cannot disable itself from levying the tax up to that limit, should it become necessary so to do in order to pay the debt. It is to be remembered, in that connection, that the debt is to be incurred against the land, and not against the owners, and, though land is, as a rule, to be found where one leaves it, it is sometimes carried out to sea by the current of a great river, and is sometimes so deeply submerged as to amount to the same thing. The concluding sentence of section 21 of the Act 317 reads:

"The acreage tax thus levied may be increased or diminished as the needs of the district may require."

But, if the petitioning taxpayers have the right to stand upon their proposition, and the buyers of the bonds have the right to hold them to it, there can be neither increase nor diminution in the tax; but it must remain at \$2 per acre per year, neither less nor more, at least, until the bonds are paid, if not for the 40 years for which the resolutions of the board purport to levy it.

[3] Plaintiff has, not only disregarded, but directly contravened, the law, constitutional and statutory, upon which it now relies, in another particular, to wit: The Constitution, as amended, provides that:

"Said board * * * shall levy, *annually*, upon said land, forced contributions," etc.

And Act 317 of 1910, § 21, reads:

"They (the boards) shall have power, and it is hereby made their duty, acting within the authority of the Constitution and law that may be, then, in force, to levy, *annually*, an acreage tax, or forced contribution," etc.

And no power is conferred by either Constitution or statute to levy such acreage tax or forced contribution in any other way. The plaintiff board has, however, assumed

to levy an acreage tax of \$2 per year, for 40 years, and it passed a second resolution for the apparent purpose of being more explicit to that effect.

[4] The record discloses still another instance in which the plaintiff board appears to have ignored the language and meaning of the law which it invokes, to wit, in the levying of a *uniform* acreage tax upon the whole of the land included within the district, without regard to the fact that, according to the report and plan adopted by it, the district had been divided into subdistricts, the cost of draining which will not be uniform. The law referred to, both constitutional and statutory, makes special provision for subdrainage districts, and makes them autonomous, and we can find no more authority, or reason, for confusing their interests and averaging the cost of the work to be done in them than for confusing the affairs of drainage districts or school districts.

[1] The power of the majority, in acreage, of the taxpayers, and of the board, acting at their instance, to impose a burden upon the minority of taxpayers, or their lands, without the consent of such minority, is conferred and defined by the Constitution, and, where the majority submits to the board a proposition, upon that subject, which the Constitution does not authorize, the board has no power to accept or act on it, and, a fortiori, has no power to take action affecting the minority which it would be unauthorized to take upon a proposition which conformed to the requirements of the Constitution.

[5] To the suggestion that the objections urged by defendant are barred by the prescription of 60 days, established by section 28 of Act 317 of 1910, and running from the publication of the petition of the taxpayers and of the resolutions adopted by the board in connection therewith, the answer is that the prescription invoked has no application to proceedings which are, not only unauthorized by, but in contravention of, the Constitution and of the law whereby it is established.

The judgment appealed from, which rejects plaintiff's demand, is, accordingly, affirmed.

(130 La.)

No. 19,145.

STATE v. POMERANKY.

(Supreme Court of Louisiana. Feb. 26, 1912.
Rehearing Denied March 25, 1912.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 148*)—OFFENSES—
SALES BY WHOLESALER.

As there can be no lawful retailers of intoxicating liquors in a prohibition parish, local sales by a wholesaler to illicit vendors of liquor will be treated as unlawful sales to indi-

viduals. *State v. Spence*, 127 La. 336, 53 South. 596, reaffirmed.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 148.*]

Breaux, C. J., and Provosty, J., dissenting.

Appeal from First Judicial District Court, Parish of Caddo; Thomas F. Bell, Judge.

John Pomeranky was convicted of violating the liquor law, and appeals. Affirmed.

Blanchard & Barret & Smith, for appellant. Walter Guion, Atty. Gen., and J. M. Foster, Dist. Atty. (G. A. Gondran, of counsel), for the State.

LAND, J. The information charged that the accused "unlawfully did keep a grog or tipping shop, and did retail spirituous and intoxicating liquors, without previously obtaining a license from the police jury of the parish of Caddo, or the municipal authorities of the city of Shreveport."

The accused moved for a bill of particulars, as to kind and quantity of liquor sold. The district attorney in response stated that intoxicating beer was sold, and "that he elects to make this presentation for retailing spirituous and intoxicating liquors."

On the trial of the case, the prosecution offered evidence to prove that the accused had sold a case of 11 dozen bottles of beer, containing more than 5 gallons, to the Peerless saloon, an establishment operated by Warren and Parker, secret detectives, who were doing a retail liquor business under the sanction of the superintendent of public safety of the city of Shreveport, for the purpose of apprehending violators of the prohibition law. This evidence was objected to by the accused for the reason that he was charged with *retailing* intoxicating liquors, both in the information and bill of particulars, and for the further reason that the accused was a wholesaler, selling in wholesale and unbroken packages to a retailer, who was permitted by the authorities to carry on a retail business in the city of Shreveport. These objections were overruled by the trial judge for the following reasons, to wit:

"That the parish of Caddo is prohibition territory, and there can be no lawful retailers of liquors or dealers for resale of intoxicating liquors within our borders."

In *State v. Spence*, 127 La. 336, 53 South. 596, this court held that a "wholesaler" of liquor is one who sells to dealers for resale, in original, unbroken packages or barrels; and that a dealer, who sold intoxicants in quantities of five gallons or more to individuals for personal use and consumption, was a "retailer." As there can be no lawful retailers or dealers for resale in a prohibition parish, the question is whether persons who retail intoxicating liquors in a prohibition district can be considered as occupying the legal status of dealers for resale. In common parlance, such persons are called keep-

ers of "blind tigers," and are not retailers in the sense of the revenue laws of this state, which refer only to licensed dealers. The illicit seller of intoxicating liquors is no more a retail merchant than a smuggler is an importer. In short, illicit venders cannot be recognized as merchants or dealers, and must be treated as individual violators of the criminal laws of the state. If a wholesaler, in a prohibition parish, cannot lawfully make local sales of intoxicants to individuals for consumption, for a much stronger reason he cannot lawfully sell to illicit venders of intoxicants in the same parish. In the latter case, the wholesaler becomes a kind of accessory to a criminal offense.

We therefore conclude that the ruling complained of by the appellant is a correct exposition of the law applicable to the case.

Sentence affirmed.

BREAUX, C. J. (dissenting). The retail liquor dealer's occupation within the limit of prohibition territory is at end. The law upon the subject is quite plain and admits of no discussion. No one now can reasonably contend to the contrary.

But I am not convinced that the acts relating to prohibition are directed against the vender of liquor at wholesale in prohibition territory, in so far as he carries on the legitimate business of the wholesaler.

The "purpose" heretofore has been to reach the retail liquor dealer, and the purpose has been accomplished, wherever the majority under local option has declared against the sale at retail. The acts are silent as relates to the wholesaler. But it is contended that under the following provisions the wholesale dealer becomes a retail dealer; "provided, that no person or persons shall be deemed wholesale dealers unless he or they sell by the original or unbroken package or barrel." To this point there can be no difference of opinion; the wholesale dealer who falls within that definition is a merchant at wholesale.

The next proviso of the act (171 of 1898) gives rise to discussion and argument:

"That no person or persons shall be deemed wholesale dealers unless he or they sell to dealers for resale."

"Wholesale" and "retail" apply to different categories or classes in business. If a wholesaler in good faith sells to an unlicensed retail dealer, is he to be considered as a criminal, and to be punished? The want of a license constitutes the wrong. The wholesale dealer has a license to sell at wholesale.

The case of *Gorsuth v. Butterfield*, 2 Wis. 237, states:

"This term (wholesale) implies the selling in unbroken pieces, or parcels, as by the barrel. * * * Retail implies * * * selling to customers in small quantities. The wholesaler, we have noted, sells in unbroken pieces and in larger quantity. Where he sells to the first

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

owner without notice where he resides or whether he has a license, is he guilty of violating the criminal laws? I do not think he is."

See Cyc. 571, 572. The courts in other jurisdictions have decided mere knowledge of the seller of goods of the use the buyer intends to make of them is no defense for the price of the goods; this by analogy applying in the present case.

A different question presents itself where he aids and abets those who violate the law. That presents another feature, separate and apart from the question which has also engaged my attention. It does not seem that a different view in regard to wholesalers and retailers gives rise to an incongruous state or condition of things.

A sale by the wholesaler in prohibition territory is a crime, while a sale by him across the line is a legitimate sale; that "purpose of the purchase" should not be charged to the wholesale merchant unless, as before stated, he makes himself the aider or abettor, and even principal, in breaking the local option law. To say the least, the question is not free from difficulty. In the *United States v. Sheldon*, 2 Wheat. 119, 4 L. Ed. 199, the Supreme Court of the United States said:

"Any doubt as to the application of a penal statute will be resolved in favor of the accused."

This court has expressed views heretofore leading to a different conclusion than that handed down by the majority, as I read them. There are numerous decisions in other jurisdictions, also.

I therefore dissent.

PROVOSTY, J. (dissenting). I agree entirely with the proposition that Warren and Parker were not dealers for resale within the meaning of the statute licensing wholesalers to sell to dealers for resale. The commissioner of public safety was entirely without power to authorize them to sell liquors at retail; in other words, he was without authority to suspend in their favor the prohibition law. Their selling was consequently in violation of law. Their every sale was a violation of law, or, in other words, a crime. In legal intentment it is no more possible to be a retail liquor dealer in prohibition territory than it is possible to be a dealer in slaves, or in infants, or to commit murder, perjury, burglary, or other crimes, in ordinary territory. In legal intentment such a so-called "dealer" is not a dealer, but simply a criminal.

Further consideration has convinced me, however, that the decision of this court in the Spence Case, upon which the majority opinion is founded, was wrong. In that case the accused had had only a wholesale dealer's license, and had sold by the original unbroken package in a quantity greater than five gallons, to a purchaser buying for his own use, not for resale. The court held that the sale had been at retail; and in viola-

tion of section 910, R. S., against the selling of liquors at retail without a license.

The decision is founded upon the first proviso of section 6 of the General License Law (Act 171, p. 387, of 1898), reading:

"Provided, that no person or persons shall be deemed wholesale dealers unless he or they sell by the original or unbroken package or barrel only; and provided, further, that no person or persons shall be deemed wholesale dealers unless he or they sell * * * to dealers for resale. If they sell in less quantities than original or unbroken packages or barrels, they shall be considered retail dealers, and pay licenses as such. That for every business of selling at retail, whether as principal, agent on commission or otherwise, the license shall be based on the gross annual amount of sales, as follows," etc.

The court took the view that under this proviso the wholesaler was he who sold only by the original and unbroken package, and only to dealers for resale, and that all other dealers were retailers.

According to this decision, sales of original and unbroken packages, barrels, casks, boxes, sacks, hogsheds, and bales, even in boat load or cargo lots, would be at retail, if for individual use, not for resale.

This is not in accord with the generally accepted notion of what is meant by selling at retail. It adopts as a criterion for determining whether a mercantile transaction is at wholesale or at retail, not the quantity of the goods sold, but the character of the purchaser, or the use to which the goods are to be put. The Legislature can hardly have intended to express that idea, and that it did not so intend appears from the second sentence of the said proviso, reading:

"If they sell in less quantities than the original and unbroken packages or barrels, they shall be considered retail dealers, and pay licenses as such"—showing clearly that the criterion intended to be adopted was the usual one of the quantity of the merchandise sold.

If the wholesaler can only sell to dealers for resale, who is to sell by the original, unbroken package to the ordinary person buying for his own use? Certainly, not the retailer, for the statute expressly restricts him to selling in less quantities than the original and unbroken package.

The said proviso does not say that the wholesaler is not to be deemed such unless he sells only to dealers for resale. It does say that he is not to be deemed such unless he sells only in original and unbroken packages, but does not say that he is not to be deemed such unless he sells only to dealers for resale. The word "only" is not in the latter clause, which is merely to the effect that the wholesaler is not such unless he sells to dealers for resale; that is to say, make it his principal business to sell to them, not that he must confine his sales to them. To require him to do so would impose upon him the impractical, not to say absurd, necessity of investigating the character of his customers, even those offering to buy for cash; in

fact, it would drive him out of business, for no business concern thus hampered in the choice of its customers could long subsist. The court has added the adverb "only" to the statute. This cannot be done. The statute must be read as written. The word "only" must have been left out advisedly, since it was evidently added advisedly to the clause requiring the sales to be by the original unbroken package, only, and therefore can hardly have been left out accidentally from this clause as to selling to dealers for resale, which immediately follows the other clause in the same sentence and in the case grammatical construction.

Be all this, however, as it may, the truth of the matter is that the said first proviso of section 6 is a general statute, intended to apply to the mercantile business in general; whereas, the retail liquor traffic has always been governed by special statutes. The special statutes in this case were the second proviso of this same section 6, of the General License Law (Act 171 of 1898) and the section 13 of the same act, up to the adoption of Act 176 (page 236, of 1908), popularly known as the Gay-Shattuck Act, which has superseded them. That the said first proviso of section 6 has no application to retail liquor dealers is evident from the fact that the license which the retail dealers to which it has reference are required to pay does not authorize the licensee to retail liquors. If the licensee under the license which it provides for desires to sell liquors in connection with his business, he must take out another license, namely, a retail liquor license. To that effect, in express terms, is the said second proviso of said section 6, which provides specially for the license to be paid by retail liquor dealers. It reads:

"Provided, that if any distilled, vinous, malt or other kind or mixed liquors be sold in connection with the business of retail merchant, grocer, oyster house, confectionery, or in less quantities than five gallons, the license for such additional business shall be as hereinafter provided for in section 13, of this act; provided further that no license shall issue to sell liquors in less quantities than five gallons for less than one hundred dollars, \$100."

It is here said that if liquors are sold in connection with the business of retail merchant—that is to say, in connection with the business to which the first proviso of said section 6 has reference—an additional license must be taken out, namely, the license provided for in section 13 of the act, which is the barroom license.

It must be admitted that this second proviso is not very artistically drawn. It says that if "any" liquors are sold, i. e., any at all, and then adds, or "in quantities less than five gallons." "Any" necessarily includes "quantities less than five gallons," so that the reader is left to conjecture what is meant by the clause "or in quantities less than five gallons." Read literally as written, this proviso says to the retail merchant, confection-

ery, grocer, etc.: If you sell any liquors, i. e., any at all, in connection with your business, you must pay the barroom license. And then it adds: Or if you sell liquors in quantities less than five gallons you must pay the barroom license. According to this literal reading, the clause "or in quantities less than five gallons" adds nothing to the sentence—is meaningless and useless. And yet, as certain as anything can be in this world, it was intended to have some meaning by the person who drafted this proviso; and the question must be: What was this intended meaning?

It is safe to say that the meaning intended is the same that has now been incorporated in the said Gay-Shattuck Act, which has superseded all former laws regulating the licensing of the retail liquor traffic; and that meaning is that the barroom license must be paid by all dealers selling liquors in less quantities than five gallons.

The conjunction "or," in the clause "or in less quantities than five gallons," is not used disjunctively, in the sense of or else; but alternatively, in the sense of in other words. If we give it the meaning of or else, the clause it introduces becomes meaningless and useless. The proviso is made to say that the retail merchant owes this additional license if he sells any liquors at all in connection with his business, and that he also owes it if he sells liquors in quantities less than five gallons. If we conclude, however, that the word "or" is used alternatively, in the sense of "in other words," then full effect is given to the clause "or in quantities less than five gallons." The meaning then is that if the retail merchant, or grocer, or confectioner, etc., sells, in connection with his said business, liquors at retail (in other words, in quantities less than five gallons), he must pay for such additional business the barroom license. And the Gay-Shattuck Act, superseding the said former statutes providing for the licensing of the retail liquor business, provides in express terms that all places selling liquors in quantities less than five gallons must pay the same license as barrooms. That this Gay-Shattuck Act was intended to regulate the entire traffic of the retailing of liquors is a well-known fact. True, it does not mention retail liquor dealers *eo nomine*, but it is an elaborate and comprehensive statute designed not only to prescribe what amount of license shall be paid by retail liquor dealers, but to regulate the entire retail liquor business. There are not two classes of retail liquor dealers; one taking out a license under the General License Law (Act 171 of 1898), and another taking out a license under the Gay-Shattuck Act. Such a thing has never been heard of. But there is only one class—that taking out a license under, and regulated by, the Gay-Shattuck Act.

According to these special laws for the regulation of the retail liquor traffic, which, being special laws, prevail of course over the

between the two the line of demarcation between the wholesaler and the retailer is the less than five gallons quantity. Less than five gallons is retail, and five gallons or more is wholesale, and, if in the original unbroken package, may be sold like ordinary merchandise under the wholesale dealer's license.

This point was expressly adjudicated by this court in the case of *State v. Morris*, 123 La. 545, 49 South. 170, where a wholesaler who had sold liquors by the original and unbroken package of five gallons in Shreveport was held not to have violated the prohibition law.

Any other reading of the said second proviso of section 6 than that adopted hereinabove would subject the dealer who sold liquors by the barrel or by the 10 or 100 barrels to the payment of the barroom license. It is safe to say that no such thing was ever intended by the Legislature.

The less than five gallon quantity as dividing line between wholesale and retail has been adopted advisedly in order to make our license law conform with that of the federal government. Until the decision in the *Spence Case* said measure had always been recognized as constituting the criterion, and the sole criterion, between wholesale and retail liquor traffic.

In reply to the argument that the *Gay-Shattuck Act* had repealed the *General License Law* in so far as bearing upon retail liquor dealers, and had established the quantitative test of five gallons or less as the criterion between wholesale and retail, this court said in the *Spence* decision that this *Gay-Shattuck Act* had no application to prohibition territory. That is, in a sense, true, since said act relates to the licensing and regulating of retail liquor dealers, and there can be no retail liquor dealers in prohibition territory; but the Legislature might well, while passing this act, have provided who should be considered retail, and who wholesale, liquor dealers. There was nothing to stand in the way of its doing so, and the question is whether it has done so. The contention that it has done so is not answered by saying that the act has no application to prohibition territory. If, as contended, this act has prescribed the rule for determining the question of wholesale and retail, this court has but to apply that rule, in this and all other cases involving the question of what constitutes selling at wholesale. That question is not peculiar to prohibition territory, but is a question arising under the general laws of this state, and is the same in all prosecutions under section 910, R. S., whether arising in or out of prohibition territory; and the proof of this lies in the fact that the decision in this case will be as that in the

I therefore dissent.

(130 La.)

No. 18,886.

BENDER et al. v. BAILEY.

(Supreme Court of Louisiana. Feb. 26, 1912.
Rehearing Denied March 25, 1912.)

(Syllabus by Editorial Staff.)

1. HUSBAND AND WIFE (§ 246*)—COMMUNITY PROPERTY—CONVEYANCE—LAWS GOVERNING.

Land located in Louisiana, but owned in community by a husband and wife living in Texas, is governed by the laws of Louisiana as affecting validity of a conveyance made by the wife individually and as executrix on death of the husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 878; Dec. Dig. § 246.*]

2. EXECUTORS AND ADMINISTRATORS (§ 137*)—SALES BY EXECUTRIX—POWER.

In Louisiana an executrix cannot sell at private sale the property of the succession she represents.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 557-559, 606½; Dec. Dig. § 137.*]

3. TAXATION (§ 530*)—TAX SALES—VALIDITY—WHO MAY PAY TAXES.

After payment of taxes, a collector is without power to sell the property, regardless of who made the payment.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 985, 988; Dec. Dig. § 530.*]

4. TAXATION (§ 810*)—TAX SALES—PAYMENT OF TAXES—EVIDENCE—SUFFICIENCY.

In an action wherein plaintiffs sought to defeat a tax sale, evidence held insufficient to show that the taxes were paid before the sale, as claimed by plaintiffs.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1605-1608; Dec. Dig. § 810.*]

Appeal from First Judicial District Court, Parish of Caddo; Thomas F. Bell, Judge.

Action by C. M. Bender and others against Mrs. M. E. Bailey. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

Alexander & Wilkinson, for appellants.
Blanchard, Barret & Smith, for warrantor.

PROVOSTY, J. Gus Bender, a resident of Texas, died in Texas, leaving a will, by which he gave all his property to his wife and four children, and appointed his wife executrix with power to sell all his property at private sale. This will was duly probated, and the widow duly qualified as executrix, in Texas. The decedent owned one-half, undivided, of 160 acres of land in this state, described as S. ½ of section 17, township 22, range 15, parish of Caddo. The widow, as survivor in community, owned the other half interest. In 1903, she, individually and as executrix, sold the property to I. A. Thomason at private sale. Thomason did not record the sale until 1905; and the property, continuing to stand of record in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

name of Gus Bender, was assessed to him in 1904, and sold at tax sale in 1905 to H. Hunsicker. Thomason recorded his sale on November 15, 1905, and on that same day acquired from Hunsicker the title which the latter had acquired at tax sale. The two titles thus acquired by Thomason have passed to defendant, and this suit is brought by the four children and heirs of Gus Bender to recover as heirs of their father four-fifths of the undivided half of the property.

[1, 2] Though the sale made by the executrix would have been valid in Texas, it was not valid in this state. The property must be dealt with as constituting a separate succession from that in Texas, and be governed exclusively by the laws of this state (*Burbank v. Payne & Harrison*, 17 La. Ann. 15, 87 Am. Dec. 513; *Mason v. Executors of Nutt*, 19 La. Ann. 42; *Whart. Conf. L.* 289; 22 A. & E. E. of L. 1373), and in this state an executrix cannot sell at private sale the property of the succession she represents.

Defendant relies upon the tax sale to Hunsicker as an additional title; and plaintiffs reply that this tax sale was invalid because the taxes of 1904 in satisfaction of which it purports to have been made had been paid, and that, moreover, the purported transfer of this tax title by Hunsicker to Thomason was not in reality a sale, though in that form, but a mere redemption, as appears from the fact that the price was exactly equal to the amount paid by Hunsicker at the tax sale plus interest.

For showing that the taxes of 1904, for which the tax sale was made, had been paid, plaintiffs rely upon the fact that in 1904 Thomason paid taxes in the parish of Caddo on property described, as follows: "No. of acres, 160. \$200." This 160 acres, say plaintiffs, was the same 160 in suit; and in support of this they have produced one witness who testified as follows:

"I examined the records of this parish very carefully to ascertain what property L. A. Thomason had title to or owned in the year 1904, and he had title only to the property in dispute, the early part of that year, which he later conveyed to other parties."

[3, 4] No doubt, if this was the same property, the tax sale was null; for, after the taxes have been paid, no matter by whom, the tax collector is without authority to sell the property for taxes. *Kellogg v. McFatter*, 111 La. 1037, 36 South. 112; *Bernstein v. Leeper*, 118 La. 1098, 43 South. 889; *Page v. Kidd*, 121 La. 2, 46 South. 35. But this testimony is unsatisfactory, for the reason that the witness does not say that Thomason had no other property, but that the records did not show that he had any. This would ordinarily be sufficient evidence, but it is not so in this case for the reason that the same records did not show at that time that Thomason had even the property now in dispute, his title not having then been recorded; and, in

the same way that he failed to record his title to the present property, he may have failed to record his title to some other 160 acres of land. We think justice requires that this case should be remanded for more satisfactory evidence on this point.

It may be well for this court to pass at this time upon another issue in the case, which is, as to the necessity, *vel non*, of the plaintiffs reimbursing defendant the price paid by Thomason to Mrs. Bender in the acquisition of the property now sued for. The sale by the executrix is likened by defendant to one of succession property whereof the price has gone towards paying the debts of the succession, but which, for some reason or other, is invalid. In such a case the heirs are not allowed to recover the property without reimbursing the price. Suffice it to say that nothing shows that the price of the sale in question went towards liberating the plaintiffs from any debt.

Judgment set aside, and case remanded for further evidence as stated in opinion. Plaintiffs and appellants to pay costs of appeal, and costs of lower court to abide final judgment.

(130 La.)

No. 18,701.

BOUDREAUX v. FIRST NAT. BANK OF JEANERETTE et al.

(Supreme Court of Louisiana. Feb. 26, 1912.
Rehearing Denied March 25, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1011*) — REVIEW—
QUESTIONS OF FACT—CONFLICTING EVIDENCE.

Where the evidence is conflicting, the findings of the trial judge on issues of fact are entitled to great weight, and will not be disturbed unless clearly against the preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Appeal from Nineteenth Judicial District Court, Parish of Iberia; James Simon, Judge.

Action by E. A. Boudreaux against the First National Bank of Jeanerette and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Foster, Milling, Brian & Saal, for appellant. Burke & Burke and V. J. Smith, for appellee First Nat. Bank of Jeanerette. Emmet Alpha, for appellee McGowen.

LAND, J. Plaintiff, a retail merchant of the village of Sorrel, parish of St. Mary, sued the First National Bank of Jeanerette, of the parish of Iberia, to recover \$3,000 damages, alleged to have been occasioned by the wrongful protest, at the instance of defendant bank, of plaintiff's note for \$104.50 executed in favor of the Fairbanks Company,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

children, four of whom were minors when this suit was instituted.

Plaintiffs in their petition admitted the life usufruct of Mrs. Marinovich, and represented that the lands could only be sold subject to said usufruct. The two major heirs of Mrs. Jones answered and joined the plaintiffs in the prayer for a partition by licitation. The special tutor of the four minor heirs of Mrs. Jones made no appearance. The usufructuary was not made a party to the suit.

Mrs. Wilson excepted that no partition could be legally made of the property during the existence of the usufruct, and for answer averred that the property could be divided in kind, and that her co-owners were indebted to her in their respective proportions of the sum of \$1,600 for useful improvements made by her on a part of the lands sought to be partitioned.

The case was tried, and there was judgment for a partition by licitation, and ordering a sale of the property for cash, subject to the usufruct of Mrs. Marie Marinovich; and further ordering that, out of the gross proceeds, Mrs. Alice Wilson be paid the sum of \$200 for her improvements, and the remainder, less costs, be distributed among the co-owners in proportion to their respective interests. Mrs. Alice Wilson appealed from the judgment, but, failing to give a suspensive appeal bond in due time, the decree of the court was executed by the sale of the property to plaintiffs for \$19,000 in cash. This proceeding was subsequent to the rendition of the judgment below, and forms no part of the record of appeal, and therefore cannot be considered.

[1] In Succession of Glancey, 112 La. 430, 36 South. 483, it was proposed to sell all the community property for the purpose of effecting a partition. The court (with one member dissenting) held that the statute conferring the usufruct on the surviving spouse was mandatory that the widow's usufruct should continue on the whole property during her natural life, or until she remarried. The reasoning of the case does not apply to a partition in kind, *subject to the usufruct*. In the case at bar, the property belonged to the separate estate of the husband, and the widow's usufruct is *conventional*. The usufructuary has made no objection to the partition by sale or in kind, subject to her usufruct. In *Smith v. Nelson*, 121 La. 170, 46 South. 200, the plaintiffs prayed for a partition by sale, regardless of the testamentary usufruct of the surviving spouse. The court held that this could not be done, citing *Aubry & Rau*, as follows:

"If the universality of the property is burdened with a usufruct, the existence of the usufruct will not prevent the heirs from provoking between themselves a partition as concerns the naked property. But they cannot compel the usufructuary to participate in the partition, and consent to a sale of the immovables, acknowledged indivisible, reserving his right to the proceeds."

In *Smith v. Nelson*, *supra*, it was conceded that the property was not divisible in kind.

We do not perceive any legal impediment to a partition in kind, of the naked property, subject to the rights of enjoyment of the usufructuary. As the naked property may be mortgaged, sold, or alienated (C. C. art. 605), it may be partitioned in kind, subject to the usufruct. In such a case the usufructuary has no cause of complaint.

[2] Plaintiff offered no evidence to prove that the property could not be conveniently divided in kind, except a map, showing that the tracts of land to be partitioned are irregular in shape, and that some of them are not contiguous. The petition alleged that there were six tracts of land, containing respectively 1,800, 472, 327, 259, 75, and 75 acres, making a total of 3,008 acres, and two town lots, to be partitioned. The contention of the plaintiff that this property could not be divided in kind was based on the theory that it was necessary to apportion $\frac{1}{60}$ to each of the six heirs of Mrs. Jones, $\frac{1}{10}$ to Mrs. Wilson, $\frac{4}{10}$ to A. Kaffie, and $\frac{2}{10}$ each to Phanor and D. W. Breazeale. This theory was adopted by the trial judge. This was error. As the heirs of Mrs. Jones inherited her share by representation, the partition should have been made by roots. C. C. 898. As there were 10 roots, the property should have been divided into 10 lots of equal value as far as practicable.

[3] Several witnesses testified that they knew the location and value of the tracts, and that the same could be divided into 10 equal portions. Even if the lots should prove unequal in value, the inequality may be compensated by a return of money. C. C. art. 1366. In the formation of the lots, the small tracts and the town lots might be used in equalizing values. Every partition should be made in kind, unless the property be indivisible by nature, or its division would cause a diminution of its value, or loss or inconvenience to one of the co-owners. C. C. arts. 1337, 1340. The record discloses no good reason why the property should not be divided in kind. The fact that each of the plaintiffs owns more than one-tenth of the whole is no obstacle to the partition by roots, since each may draw the number of lots to which he is entitled.

We see no good reasons for amending the judgment in favor of the appellant on her claim for improvements. The amount allowed was the enhanced value as estimated by one of appellant's best witnesses.

It is therefore ordered that the judgment below be affirmed as to the demand of appellant for improvements, and as to her exception to a partition, and it is further ordered that said judgment be reversed in all other respects; and it is now ordered that the case be remanded for a partition in kind according to law; costs of appeal to be paid by the appellees.

(130 La.)

No. 18,716.

CHICAGO-TEXAS LAND & LUMBER CO.
v. SABINE RIVER LUMBER CO. et al.
(Supreme Court of Louisiana. Feb. 26, 1912.
Rehearing Denied March 25, 1912.)

(Syllabus by Editorial Staff.)

APPEAL AND ERROR (§ 327*) — DISMISSAL —
GROUNDS—DEFECT IN PARTIES.

Where there have been successive conveyances of property by warranty deed, and action is brought against the several vendors and the last vendee to recover the property, an appeal taken by plaintiff by petition citing the last vendee only will be dismissed for want of proper parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1814-1820, 1822-1835; Dec. Dig. § 327.*]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Action by the Chicago-Texas Land & Lumber Company against the Sabine River Lumber Company and others. From a judgment for defendants, plaintiff appeals. Dismissed.

Hubert M. Ansley, for appellant. Geo. W. Wall and Pujo, Moss & Miller, for appellee Sabine River Lumber Co.

PROVOSTY, J. The petition in this case alleges that in September, 1905, the petitioner transferred certain lands to its attorney in trust for certain purposes specified in the deed of trust, and that the said attorney fraudulently altered said deed by changing its date and including additional property of petitioner and leaving out the words "in trust," and, in pursuance of a conspiracy to defraud petitioner, deeded said lands in November, 1906, to M. W. Greesom, and that, in December, 1906, said Greesom, in pursuance of the said conspiracy, deeded said lands to W. S. Matthews, and that thereafter said Matthews deeded said lands to the Sabine River Lumber Company, composed of the said Matthews and his friends. And the petition concludes with a prayer that all the parties above named be cited and that said conveyances be annulled and the said lands decreed to belong to the petitioner.

The persons thus made defendants answered, admitting the transfers, but otherwise contesting the allegations of the petition. On the trial the several deeds were offered in evidence, and all of them appear to have been made with full warranty.

There was judgment for the defendants, and plaintiff appealed. The appeal was by petition. The only defendant asked to be cited on the appeal was the Sabine River Lumber Company. This sole appellee has moved to dismiss the appeal on the ground of want of proper parties.

In the case of Balrd v. Russ, 33 La. Ann. 920, where there had been successive sales of the property which the suit was brought to

recover, and the several vendors had been made defendants in the suit, and the plaintiff, in appealing from an adverse judgment, had cited on the appeal only the last vendee—all as in the instant case—this court said:

"The present appeal was taken by petition, which prayed a citation of Russ alone, and his codefendants were neither cited nor asked to be cited.

"The several deeds of sale, in evidence, show that the authors of Russ' title assumed all the obligations of warrantors. They are therefore directly interested in the maintenance of the judgment appealed from, in all of its parts; and, in fact, the judgment in favor of Russ could not be disturbed without practically annulling the judgment in favor of his codefendants.

"It has passed into an axiom of our jurisprudence, too trite to justify even the citation of authorities of its support, that all parties to the record, interested in maintaining the judgment appealed from, must be made parties to the appeal, or otherwise it will be dismissed."

Again, in the analogous case of Williams v. Courtney, 9 La. Ann. 98, this court said:

"The warrantors are the parties upon whom the loss is to fall in case the judgment should be reversed; they have a direct interest that it should remain undisturbed, and under the settled jurisprudence of this court the appeal cannot be sustained."

Also, see Hutchinson v. Johnson, 19 La. Ann. 141; Avegno v. Johnson, 22 La. Ann. 400; Robert v. Ride, 11 La. Ann. 409; Miltenberger v. Estate, 23 La. Ann. 267; Succession of Perret, 17 La. Ann. 302; Lallande v. McRae, 18 La. Ann. 177; Gay v. Marionneaux, 20 La. Ann. 358; Sittig v. Littell, 21 La. Ann. 646.

Appeal dismissed.

(130 La.)

No. 19,249.

STATE v. NELSON.

(Supreme Court of Louisiana. Feb. 26, 1912.
On Application for Rehearing, March 25,
1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 872½*) — CAPITAL OFFENSE—VERDICT.

Capital cases must be tried by juries of 12, all of whom must concur to render verdicts; hence where in such case the jury returns a verdict of guilty, but, when polled, one of the jurors answers "that it was not his verdict," there has been no conviction, and can be no sentence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 872½.*]

Appeal from First Judicial District Court, Parish of Caddo; Thomas F. Bell, Judge.

H. F. Nelson was convicted of arson, and appeals. Reversed, and defendant discharged.

Scheen & Blanchard, for appellant. Walter Guion, Atty. Gen., and J. M. Foster, Dist. Atty. (G. A. Gondran, of counsel), for the State.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

MONROE, J. Defendant was charged with having, in the nighttime, feloniously, willfully, and maliciously set fire to and burned a house in which there was, at the time, a certain human being; and, having been tried by a jury of 12, a verdict of "guilty as charged" was returned; but, when the jury was polled, one of the jurors answered "that it was not his verdict." Defendant was, however, sentenced to imprisonment at hard labor, and he has appealed.

Under the statute (R. S. 841), the crime charged is punishable with death; and, under the Constitution (article 116), a capital offense must be tried by a jury of 12, "all of whom must concur to render a verdict."

It is therefore ordered, adjudged, and decreed that the sentence appealed from be set aside and annulled, and the defendant discharged, without day.

On Application for Rehearing.

It is ordered that the decree heretofore handed down be amended and recast so as to read as follows:

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be set aside and annulled, and that this case be remanded to the district court to be there proceeded with according to law.

Rehearing refused.

(130 La.)

No. 19,220.

BRUNNER MERCANTILE CO. v. RODGIN.

In re **NATIONAL CASH REGISTER CO.**

(Supreme Court of Louisiana. Jan. 29, 1912.

Rehearing Denied March 25, 1912.)

(*Syllabus by the Court.*)

1. LANDLORD AND TENANT (§ 246*)—RENT—LIEN OF LANDLORD.

When an unexpired lease of a judgment debtor has been seized and sold, the lessor has no privilege on the proceeds resulting from the sale of the lease. His privilege extends only to the movable property on the premises at the time of the seizure.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 991-1002; Dec. Dig. § 246.*]

(*Additional Syllabus by Editorial Staff.*)

2. COURTS (§ 204*)—APPELLATE COURTS—SUPERVISORY JURISDICTION.

The purpose of Const. art. 94, conferring on the Supreme Court control and general supervision over all inferior courts, was to authorize the Supreme Court, whenever it deemed proper, to examine any question which it deemed of sufficient importance for examination and decision.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 499, 504, 619, 758½, 791; Dec. Dig. § 204.*]

Action by the Brunner Mercantile Company against Levy Rodgin. After an adverse judgment on its claims, the National Cash Register Company applied for writ of certiorari. Judgment reversed, and cause remanded.

Lazarus, Michel & Lazarus and David Sessler, for plaintiff Brunner Mercantile Co. **Dinkelspiel, Hart & Davey**, for relator National Cash Register Co.

BREAUX, C. J. Relator complains of the decision of the lower court in holding that the lessor's claim was secured by privilege on the rent of the property leased.

The lessor, it seems, claims payment of the rent and the amount for which the occupancy of the unexpired lease sold at public auction.

The relator is a judgment creditor of the respondent, his lessor.

The judgment rendered in the case is not appealable to this court nor to the circuit court of appeal.

[2] The first question presented by respondent is that this court has no authority to review the decision under its supervisory jurisdiction.

The purpose of article 94 of the Constitution, conferring "control and general supervision over all inferior courts," was to authorize this court whenever it deemed proper to examine any question which it deemed of sufficient importance for examination and decision.

It should not be inferred that the court will order an examination into all cases, for this never was the intention, and, in addition, the court would be overwhelmed with cases. Whenever a new question presents itself of sufficient importance in jurisprudence, the court exerts its jurisdiction to examine into and decide the question.

We will not cite decisions to sustain this view. It is the general trend of our jurisprudence.

Learned respondent and counsel do not refer us to any decision except decisions of a date prior to the Constitution of 1898, for the obvious reason that there was no decision subsequent to that date.

They have cited the decisions of *Borde v. Michel & Lazarus*, 127 La. 122, 53 South. 465. It is not in the least pertinent to the issues here. The question was not brought up in the cited case under our supervisory jurisdiction, but was brought up on appeal. Our jurisprudence being more restricted on appeal, we decided that we had no jurisdiction. It would have been different under our supervisory jurisdiction.

[1] This brings us to the question of law, which, after consideration, we determine to review. It is whether the lessor has the privilege on the amount realized from the sale of the term of the unexpired lease. In other words, on the price obtained for the occupancy of the unexpired portion of the lease. We are not of the opinion that he has.

The privilege claimed by the lessor (if there was no movable property such as referred to in the statute authorizing a provisional seizure) does not exist, and, therefore, possibility of a provisional seizure does not lie.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

A debt to the lessee cannot be provisionally seized. *Edwards v. Fairbanks*, Man. Unrep. Cas. 53.

Provisional seizure may be issued when the lessor has a privilege on the furniture used in the house or on property or attached to the real estate which he has leased. See Civil Code, 285.

There was nothing of the kind on the property leased in so far as the record discloses.

It is therefore ordered, adjudged, and decreed that the writ of certiorari is granted and affirmed, and the judgment of the district court, vacating the judgment of the city court, is avoided, annulled, and reversed. It is further ordered, adjudged, and decreed that this case be remanded to the civil district court in order that the claim may be made absolute in due course.

PROVOSTY, J., concurs, on the ground that the lessor's privilege extends only to the tangible property found on the leased premises.

(130 La.)

No. 18,774.

KINDER v. TROTTI et al.

(Supreme Court of Louisiana. Feb. 26, 1912.
On Application for Rehearing, March 25, 1912.)

(Syllabus by Editorial Staff.)

BANKRUPTCY (§ 399*)—HOMESTEAD—CONVEYANCE BY BANKRUPT.

One who about two months before the filing of his petition in bankruptcy divested himself of title to real estate to protect it against the children of his first marriage in the interest of the children of the present marriage could not claim the property as his homestead and not subject to the claims of his creditors.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 657-669; Dec. Dig. § 399.*]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Action by James A. Kinder, trustee in bankruptcy, against T. J. Trotti and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

Mitchell & Young, for appellant. McCoy, Moss & Knox, for appellee.

PROVOSTY, J. Defendant Trotti went into voluntary bankruptcy. He mentioned in his schedule of assets a house and lot, but at the same time declared same to be his homestead, which he was not required to give up to his creditors. The present suit is by his trustee in bankruptcy to recover the property for the bankruptcy. Some two months before the filing of his petition in bankruptcy, defendant made a sale of this property to a Mrs. Tonges, and about 20 days after the adjudication in bankruptcy Mrs. Tonges made a sale of the property to

defendant's wife. Mrs. Tonges and Mrs. Trotti are made defendants, and the said sales are asked to be annulled as simulations. The admission is now made that said sales were simulations, and there is now no contest in that connection; the only question being as to whether the property is defendant's homestead.

Plaintiff adduces three reasons why it is not: First, that defendant is not owner of the property, the title being in his wife; second, that at the time defendant went into bankruptcy he had not been occupying the property for two years; and, third, that the defendant's wife is in the actual enjoyment of property worth more than \$2,000.

For disposing of the latter two grounds, a statement and analysis of the evidence would be necessary. This we will spare ourselves the trouble of, as our opinion can be rested on the first ground which only involves an application of plain law to undisputed facts. We may add, however, that the other two grounds are fully supported by the evidence, and are each of them as fatal as the first to the defendant's case.

Defendant testified that he divested himself of the title to the property in order to protect it against the children of his first marriage in the interest of the children of the present marriage. Whatever was the defendant's motive, he divested himself of the title; and the property was from that time no longer (in the language of the Constitution) "bona fide owned" by him. In attempting to place the property beyond the reach of his children, he placed it beyond his own. True, his wife makes no defense to this suit, but, even if the present suit were dismissed, the defendant could not recover the property from her.

In support of the proposition that a debtor can no longer claim the homestead when he has, by a fraudulent conveyance, divested himself of title, the learned counsel for plaintiff cite *McDowell v. McMurria*, 107 Ga. 812, 33 S. E. 709, 73 Am. St. Rep. 155; *Cassel v. Williams*, 12 Ill. 387; *Sumner v. Sawtelle*, 8 Minn. 309 (Gil. 272); *Huey's Appeal*, 29 Pa. 219; but the proposition appears to us to be a plain one hardly needing the support of authority.

Judgment affirmed.

On Application for Rehearing.

MONROE, J. Fred. A. Hart, who has made himself party plaintiff herein, vice James A. Kinder, trustee, deceased, prays that a rehearing be granted and the decree heretofore handed down amended, in accordance with the prayer contained in the answer to the appeal, so as to award \$15 per month for the use and occupancy of the premises until they shall have been surrendered, instead of (as in the judgment appealed from and the decree affirming said judgment) up to the date of the trial in the district court. We

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

think plaintiff is entitled to the amendment (Scott v. W. H. Scott, 42 La. Ann. 769, 7 South. 716) and that it may be made without granting a rehearing.

It is therefore ordered and adjudged that the decree heretofore handed down in this case be recast and amended so as to read as follows:

It is ordered, adjudged, and decreed that the judgment appealed from be so amended as to condemn the defendant, T. J. Trotti, in the sum of \$225 as the amount due for the use and occupancy of the premises claimed from November 1, 1909, to February 1, 1911, with interest thereon at the rate of 5 per cent. per annum from February 9, 1911, until paid, and in the further sums of \$15 per month, with like interest on such sums, respectively, from March 1, 1911, and each succeeding month, until said property shall have been surrendered to the plaintiff. It is further decreed that, in all others respects, said judgment (appealed from) be affirmed, the appellants to pay the costs of the appeal.

Rehearing refused.

(130 La.)

No. 18,862.

DILL et al. v. C. L. SMITH LUMBER CO.

(Supreme Court of Louisiana. Feb. 28, 1912.
Rehearing Denied March 25, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—APPLIANCES—CARE REQUIRED.

A master is not required to furnish the best and safest appliances, but his obligation is met when he provides appliances that are reasonably safe and suitable for the purpose had in view.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178, 179, 180-184, 192; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 233*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where the deceased, loading foreman of defendant, improperly loaded logs on a skeleton car, and one of them fell in transit and penetrated the caboose in which the foreman was riding, causing his death, *held*, that the foreman was guilty of such contributory negligence as to preclude recovery of damages by his widow and minor children.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 684-686, 701-742; Dec. Dig. § 233.*]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Action by Mrs. Harriet E. Dill and others against the C. L. Smith Lumber Company. From a judgment for plaintiffs, defendant appeals. Reversed, and suit dismissed.

Pujo & Moss, for appellant. Gayle & Porter, for appellees.

LAND, J. James A. Dill, employed by the defendant as foreman of a loading crew, while riding in a caboose at the rear end of

a log train, was killed by the crushing in of the front end of the caboose by a saw log which fell from the nearest skeleton car. The widow and minor children of the deceased sued for \$25,000 damages. On the first trial, the jury awarded plaintiffs \$15,000 damages. This verdict was set aside, and, on the second trial, the jury awarded plaintiffs \$4,000 damages. The defendant appealed, and the plaintiffs have answered and joined in the appeal, praying that the amount of the judgment be increased to \$15,000.

The petition charges that the defendant was negligent in not furnishing two toggle chains, or other suitable appliance, to bind the logs on the cars, and automatic couplers and brakes; and was also negligent in hauling the caboose full of men behind a loaded train of logs insecurely fastened.

Defendant filed an exception of no right or cause of action, which was overruled, and then answered with a general denial, pleading in the alternative contributory negligence, assumption of risk, and the negligence of fellow servants.

[1] After a careful review and consideration of the evidence, we find that the defendant was not negligent in using only one toggle chain to bind the saw logs. Many sawmill companies use only one toggle chain, some use two, and others use none. We also find that the defendant company was not negligent in failing to provide automatic couplers and brakes, which it seems are never used on skeleton log cars. A master is not required to furnish the best and safest appliances, but his obligation is met when he provides appliances that are reasonably safe and suitable for the purpose had in view. See Simon v. Black Lake Lumber Co., 127 La. 1071, 54 South. 354.

[2] We find that a caboose attached immediately to the rear end of a loaded skeleton car in a moving log train is not a reasonably safe provision for the transportation of the employees of a sawmill company. The correctness of this conclusion is demonstrated by the accident which caused the death of James A. Dill. We find, however, that it is clearly established by a preponderance of the evidence that the proximate cause of the accident was the improper loading of the skeleton car, for which the deceased, as foreman of the loading crew, was responsible, and that the deceased, advised that some of the logs on the car might fall off during transit to the mill, assumed the risk of riding in the caboose on the occasion in question.

The car in question was loaded under the eye and direction of James A. Dill, as foreman. There was something unusual in the position of the logs. Meadows, one of Dill's helpers, testified that the load did not look good to him when it got to the corral, but that he, in reply to a question, told Dill that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

he thought it would go. The locomotive engineer testified that there was talk at the corral about the car not being properly loaded; that the load did not look good to him; that he asked the men at the caboose if they thought that the load would go to town; and that Dill replied that Meadows said it would. The engineer further testified that he saw the log supposed to have fallen off lying out of the notch on the top; and that the bad condition of the load was not due to the operation of the train. These two witnesses were called by the plaintiffs.

Dubose, foreman of the log cutters, testified that he called Dill's attention to the log, and that the latter replied that it would go to town if the toggle chain did not break. Pippen, track foreman, testified that the top log under the toggle chain and two others were leaning to one side. Smith, woods foreman, testified that Dill had been superintendent of loading for more than two years; that he saw one log hanging out of its notch on the side of the car, and asked Dill if he thought the load was safe to go in, and Dill said he thought it was.

We do not think it would be just to mulct the defendant in damages for the fault or mistake of its foreman, which, at least, contributed directly to the accident which caused his untimely death.

It is therefore ordered that the verdict and judgment below be reversed, and it is now ordered that plaintiff's suit be dismissed, with costs in both courts.

(130 La.)

No. 19,318.

ROUSSEL v. DORNIER et al.

In re ROUSSEL.

(Supreme Court of Louisiana. March 11, 1912.)

(Syllabus by the Court.)

1. ELECTIONS (§ 152*)—POWERS OF POLITICAL COMMITTEES—ELIGIBILITY OF CANDIDATES.

A Democratic parish committee has no power to pass upon the eligibility of candidates for public office as they are not charged with judicial functions nor clothed with judicial power.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 134; Dec. Dig. § 152.*]

2. ELECTIONS (§ 154*)—ELIGIBILITY OF CANDIDATES.

If one who is ineligible has received the majority of votes in a primary election, his right to hold office cannot be tested in a suit brought by an unsuccessful candidate, seeking to be declared entitled to the office, but the question of his eligibility must be tested in a suit brought in the name of the state.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 136; Dec. Dig. § 154.*]

3. ELECTIONS (§ 154*)—SUPREME COURT—ELIGIBILITY OF CANDIDATES AT PRIMARY.

As the Democratic parish committee is without legislative authority to decide questions of eligibility, this court cannot order it

to do so, and under the law regulating primaries this court is without authority to decide the question of eligibility of any candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 136; Dec. Dig. § 154.*]

Application by Christopher Roussel for writs of mandamus and certiorari against Joseph B. Dornier and others. Petition dismissed.

See, also, 57 South. 272.

B. R. Forman, for relator.

BREAUX, C. J. Relator and three other citizens were candidates for the Democratic nomination for the office of sheriff of the parish of St. James.

Two of the candidates, Emile Dickey and Louis Le Bourgeois, withdrew as candidates for the office prior to the 23d day of January last. There remained two candidates—relator, Christopher Roussel, and Joseph B. Dornier.

The relator, Roussel, timely objected to the candidacy of the latter on the ground that he (Dornier) was a deputy registrar of voters in the actual exercise of the duties of that office, and as such officer was in control of the registration of the parish of St. James; that he issued certificates of registration within three months previous to his becoming a candidate for the Democratic nomination of sheriff; that as Emile Dickey and Louis Le Bourgeois had withdrawn their candidacy before the 23d day of January, and as Dornier was ineligible for reason stated, he (Roussel) was the only eligible candidate.

Relator protested against the refusal of the Democratic committee to recognize him as the only candidate. Notwithstanding his protest, the committee permitted Joseph B. Dornier to become a candidate and his name was accordingly printed on the official ballot, is substantially the statement of the relator for a writ of mandamus and certiorari; and, further, the complaint of relator is that, as Dornier was ineligible, he (Roussel) should have been declared the nominee by the committee, as he was the only eligible candidate, and that the refusal of the committee to grant his application to be thus declared was an illegal act on the part of the Democratic committee. He (Roussel) sought to have the alleged illegality corrected by applying to the district court for St. James parish.

Joseph B. Dornier filed an exception to the jurisdiction of the court; this exception was sustained, and relator Roussel's suit dismissed on the 29th day of February, 1912.

On the 2d day of March, 1912, this court on relator's motion ordered the papers to be forwarded in order to examine into the legality and validity of the proceedings. Whether the courts have jurisdiction to decide the question now at issue is now before us for decision.

As relates to form, relator has complied

court to require him to strike a cause from the docket of said court. Writ granted.

The facts made by the petition are that one A. J. Edwards filed suit in the justice court of Hon. T. J. Carlisle against petitioners, that summons and complaint was served, that petitioners appeared, and after the trial of said cause by said justice a judgment was rendered in favor of petitioners, discharging them, and recovering cost against the plaintiff in said cause; that afterwards, on, to wit, the 21st day of May, 1910, Edwards executed a bond for the appeal of said cause to the circuit court of Coffee county, for the Enterprise division thereof; that the bond was approved by the justice, and he certified to said circuit court a full and complete transcript, which is asked to be treated as part of the petition; that at the fall term of the circuit court, to which the appeal was returnable, and before the cause was called for trial, and before any plea was filed in said cause, or issue joined thereon, petitioners filed their motion in said cause to dismiss the appeal, because the circuit court had no jurisdiction to entertain it, and because the appeal should have been returned to the county court of Coffee county. The suit referred to was begun on the 7th day of May, 1910. The appeal was taken on the 21st day of May, 1910. The petition for mandamus was filed in this court February 10, 1911, after the judge had declined to grant petition or motion to dismiss the cause from the docket, which motion seems to have been filed August 25, 1910. By an act approved February 28, 1911, to take effect July 15, 1911 (Local Acts 1911, p. 30), the county court of Coffee county was abolished; hence the opinion in this case in no way affects appeals taken from judgments of justices of the peace to the circuit court of Coffee county, where the appeals have been taken since the 15th day of July, 1911.

W. W. & J. F. Sanders, for petitioners. C. W. Simmons, for respondent.

DE GRAFFENRIED, J. Under the provisions of section 2 of an act entitled "An act to amend an act to establish the county court of Coffee county," approved September 29, 1903 (Local Acts 1903, p. 398), "all appeals from judgments of any justice of the peace in said county in civil suits shall be taken and made returnable to" said county court. There is therefore no machinery provided by law by which a case taken on appeal, in civil matters, from the judgment of a justice of the peace in Coffee county, can be rightfully placed upon the docket of the circuit court of Coffee county. "All appeals," says the above act, "from judgments of any justice of the peace in said county in civil suits shall be made returnable to" said county court.

The Legislature, by an act entitled "An act to provide for holding separate terms of the circuit court for Coffee county at Enter-

prise," approved February 28, 1907 (Local Acts 1907, p. 279), divided Coffee county into two separate, distinct judicial divisions. It is evident that, in adopting the act, the Legislature simply intended to declare that when the circuit court is held for the division of the county in which Enterprise is located it shall possess the identical authority over the territory over which it then has jurisdiction, no more and no less, that it possessed when sitting for the other division of the same county. *Shell v. State*, 56 South. 39.

Section 15 of the above act, approved February 28, 1907, provides that the circuit court held at Enterprise shall have jurisdiction over all causes and proceedings within said district conferred by law upon the circuit courts in this state; but we do not think that this, or any other provision of the act, affects the provision of said local act, approved September 29, 1903, which requires that all appeals in civil suits from judgments of justices of the peace shall be made returnable to the county court of Coffee county. The Legislature, when it passed the above act, approved February 28, 1907, the effect of which was to divide Coffee county into two judicial districts, did not create a *new court*. It simply, for the convenience of the citizens of that county, required the holding of separate terms of the same court in two distinct judicial districts. Under the general law of the state, but for the local act conferring exclusive jurisdiction on the county court to try all appeals in civil matters taken from judgments of justices of the peace, the circuit court of Coffee county, when sitting at Elba, would have jurisdiction of such appeals when taken from judgments rendered in that division of the county; and but for the same local act the circuit court of said county, when sitting at Enterprise, would, under the terms of the act authorizing the holding of such court at Enterprise, have jurisdiction of such appeals when taken from judgments rendered in that division of the county.

One of the cardinal rules for the interpretation of a statute is that it shall, if possible, be so construed as to give effect to the intention of the Legislature in passing it. Where the intention is not apparent for that purpose, the general words of a later statute do not repeal a former. *Montgomery v. Building & Loan Ass'n*, 108 Ala. 343, 19 South. 816; *Iverson v. State*, 52 Ala. 170. In adopting the act conferring exclusive jurisdiction of appeals from judgments of justices of the peace in civil suits upon the county court of Coffee county, the Legislature evidently intended to relieve the circuit court of that county from the burden of trying such cases, in order that it might have more time to devote to the trial of causes of greater dignity and importance; and there is nothing in the general language of section 15 of the said act, approved February 28,

1907, indicating a purpose to repeal the above-mentioned provision of the act, approved September 29, 1903, in so far as the Enterprise division is concerned. There is certainly nothing in the title of the act creating the Enterprise division indicating such purpose; and it has always been the declared rule in this state that the repeal of a former statute by a later statute by implication merely is not favored, and the courts will not declare a prior statute to have been repealed by a subsequent one, in the absence of express words, unless the provisions of the two are directly repugnant. *Roberts v. Pippen*, 75 Ala. 103.

If two statutes on the same subject are mutually repugnant, the later act, without a repealing clause, operates to repeal the earlier act; but, as laws "are presumed to be passed with deliberation and with full knowledge of existing laws on the subject, it is but reasonable to conclude that in passing a statute it was not intended to interfere with or abrogate any former law relating to the same matter, unless the latter act is either repugnant to the former one, or fully embraces the subject-matter thereof, or unless the reason for the earlier act is beyond peradventure removed." *Amer. & Eng. Ency. Law*, vol. 26, pp. 721-723.

We are therefore of the opinion that under the local act, above referred to, approved September 29, 1903 (Local Acts 1903, p. 398), appeals from the judgments of justices of the peace in civil cases in Coffee county, in both divisions of the county, must be taken and made returnable to the county court of Coffee county, and that the circuit court of said county, whether held at Elba or at Enterprise, has no jurisdiction over such appeals.

The alternative writ of mandamus prayed for is therefore hereby ordered to issue.

Petition for mandamus granted.

HENDLEY v. STATE.

(Court of Appeals of Alabama. Feb. 8, 1912.
Rehearing Denied Feb. 22, 1912.)

1. WITNESSES (§ 236*) — QUESTIONS — EVIDENCE — OBJECTIONS.

Questions asked the prosecuting witness, on a trial for trespass after warning, as to what accused was doing, and as to what prosecutor then did, were properly allowed as capable of eliciting legal evidence, as against a general objection.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 817-826; Dec. Dig. § 236.*]

2. TRESPASS (§ 81*)—TRESPASS AFTER WARNING—CRIMINAL RESPONSIBILITY.

Where accused acquired actual possession of a strip of land under a claim of ownership before notice by an adjacent owner not to trespass thereon, his subsequent entry on the strip, though a trespass, was a continuing trespass under the possession previously acquired, and not a re-entry after warning not to

trespass, essential to support a conviction for trespass after warning.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 171; Dec. Dig. § 81.*]

3. TRESPASS (§ 81*)—TRESPASS AFTER WARNING—CRIMINAL RESPONSIBILITY.

Where, on a trial for trespass after warning, the prosecutor testified that accused made no claim to possession of the strip trespassed on before the warning, but at that time recognized prosecutor's possession, and that he was in possession of the strip trespassed on, a conviction was warranted, though accused showed an actual possession of the strip before the warning.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 171; Dec. Dig. § 81.*]

4. CRIMINAL LAW (§ 809*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

A requested charge which is unintelligible because of the use of the word "defendant" instead of some other person, probably the prosecutor, is properly refused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1961-1967; Dec. Dig. § 809.*]

5. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

A charge, on a trial for trespass after warning, that, if the jury believed the evidence, the prosecutor has not shown title at the time of the warning and entry on the premises by accused is properly refused as invading the province of the jury to determine the weight of the evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.*]

6. TRESPASS (§ 89*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

An instruction, on a trial for trespass after warning, that if, at the time of the warning, accused was in possession, cutting and removing timber from the land, he must be acquitted, though he was a trespasser, was properly refused as leading the jury to believe that the act of defendant in cutting and removing timber constituted an actual possession, asserted in good faith.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 183; Dec. Dig. § 89.*]

Appeal from City Court of Andalusia; R. H. Jones, Judge.

Andrew Hendley was convicted of trespass after warning, and he appeals. Affirmed.

The facts sufficiently appear in the opinion of the court. The following charges were refused to the defendant: (3) "In no event can you find the defendant guilty, unless he had actual possession of the land involved in this case at the time of the alleged notices, and at the time of the alleged entry by the defendant." (A-2) "If you believe the evidence, there is no title shown to the property in question on the part of the prosecuting witness at the time of the alleged warning and entry on the premises as shown." (A-3) "If you believe the evidence, the state has not shown any legal title in the prosecuting witness, Mancill, to the land in question." (A-5) "If you believe the evidence, the defendant was in possession of the land in question on the 5th and 6th day of July, 1909." (G) "If you be-

lieve the evidence in this case, the prosecuting witness in this case was not in possession of the land in question at the time of the giving of the alleged notice by the prosecutor to the defendant." (D) "If, from all the evidence in this case, you are reasonably satisfied that, at the time of the giving of the alleged notice to the defendant, the defendant was in possession of the land in question, cutting and removing the timber therefrom, then you cannot find the defendant guilty as charged, although he may have been a trespasser upon the lands at the time." (E) "If, from all the evidence in this case, you are reasonably satisfied that at the time of the giving of the notice to the defendant, as insisted by the state, the defendant was then engaged in cutting or removing timber or logs from the land in question, then you will find the defendant not guilty."

A. Whaley, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. The appellant was tried and convicted for trespass after warning. The case was tried in the city court, before a jury, on an affidavit made before the clerk of the court by Lawson Mancil, charging the defendant with having trespassed on the premises of the affiant after having been warned within six months preceding not to do so.

Mancil and the defendant were in possession of and owned adjoining lands; the defendant's land lying west of Mancil's. An "old line" had been recognized as the dividing line; but the defendant, Hendley, had the county surveyor make another survey, and by this survey the "new line" was located some 40 yards east of the "old line." The alleged trespass was committed by Hendley going on a strip of woodland between the two lines and cutting timber. The evidence was in conflict about the establishment of the new line. Mancil testified that he received no notice of the survey, and did not know of it until afterwards. The evidence was also in conflict as to who was in possession of the strip of land in question, and as to the notice having been given. The evidence for the state tended to show that the old line had been recognized by both of the parties; that Mancil was in possession of the premises in question; and that the requisite warning was given the defendant, who did not at the time claim to own or be in possession of the strip of land, but that on the next day after receiving notice the defendant went upon the strip of land and cut and removed timber from it. The defendant introduced testimony tending to show ownership and possession of the strip of land on which the alleged trespass was committed.

[1] The court's rulings on the evidence are

free from error. The question asked the prosecuting witness, Mancil, about the land he owned and where it was located was preliminary to the question leading up to the proof by the witness of his possession of the premises on which the alleged trespass was committed. The questions asked this witness, having reference to the occasion of the alleged trespass: "What was the defendant doing?" "What did you do then?" were capable of eliciting legal evidence, and were properly admitted, as against the general objection interposed by the defendant. *Washington v. State*, 106 Ala. 58, 17 South. 546; *Gunter v. State*, 111 Ala. 23, 28, 20 South. 632, 56 Am. St. Rep. 17.

[2, 3] The defendant's motion to exclude the evidence was properly refused, as also the general charge requested in writing by defendant. It is true that, if the defendant had acquired actual possession of the strip under claim of ownership before the notice not to trespass was given, his subsequent entry, even though a trespass, would be deemed a continuing trespass under the possession previously acquired, and not a re-entry after warning not to trespass, making him subject to this prosecution for a trespass *after* warning. *Brunson v. State*, 140 Ala. 201, 37 South. 197. The evidence, however, on this point was in conflict, if, indeed, the testimony offered in behalf of defendant can be said to have shown an actual possession by him of the strip in controversy before the notice was given. The prosecuting witness, Mancil, testified that the defendant made no claim to possession of the strip between the two lines before he gave him the notice; but, on the contrary, that the defendant at that time recognized the old line and his (Mancil's) possession up to that line. This witness further testified that he was in possession of the premises in controversy, having a fence on the old line, both above and below the strip alleged to have been trespassed upon.

[4] Charge No. 3 is confused and faulty in language. It uses the word "defendant" where some other person is intended—prosecuting witness, probably, it would seem; but, as written, the charge is not intelligible.

[5] Charges A—2, A—3, A—5, and G are charges on the weight of the evidence, and invade the province of the jury.

[6] Charge D does not predicate an *actual* possession of the premises by the defendant at the time notice was given, or possession under bona fide claim of ownership, claiming against Mancil, from whom the notice proceeded. As written, the charge is calculated to impress the jury with the belief that the defendant merely being on the land, cutting timber, would constitute a sufficient possession. *Watson v. State*, 63 Ala. 23; *Brunson v. State*, 140 Ala. 201, 37 South. 197.

Charge E is faulty for the same reasons as pointed out in discussing charge D. Given charge A—1, as applicable to the evi-

dence, substantially covers charges D and E, and is probably more favorable to the defendant than justifiable under the correct rules of law.

There being no error show by the record, the case will be affirmed.

Affirmed.

BOYD v. STATE.

(Court of Appeals of Alabama. Feb. 6, 1912.)

1. CRIMINAL LAW (§ 59*)—ACCESSORIES—MISDEMEANOR CASES.

At common law all persons engaged in the commission of a misdemeanor are indictable as principals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71, 73, 74, 76–81; Dec. Dig. § 59.*]

2. INTOXICATING LIQUORS (§ 167*)—OFFENSES—VIOLATION OF PROHIBITION LAW—GUILTY AS PRINCIPAL.

Gen. Acts 1907, p. 366, makes any person acting as agent or assisting friend of the seller or purchaser in effecting a sale of intoxicants guilty of a misdemeanor and indictable for retailing intoxicants without a license contrary to law, and Acts Sp. Sess. 1909, p. 94, § 33, provides that the agent or assisting friend in procuring an unlawful sale of prohibited liquors shall be punishable as if he had sold said liquors, and conviction may be had of such assisting friend upon an indictment for selling prohibited liquors contrary to law. *Held*, that section 33 made an "assisting friend" guilty as a principal of the offense of selling prohibited liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 182, 183; Dec. Dig. § 167.*]

3. INDICTMENT AND INFORMATION (§ 63*)—ALLEGATIONS—CONCLUSIONS OF LAW.

Indictments are statements of legal conclusions, rather than allegations of fact.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 185; Dec. Dig. § 63.*]

Appeal from Circuit Court, Limestone County; D. W. Speake, Judge.

Andrew Boyd was convicted of violating the prohibition law, and he appeals. Affirmed.

The original affidavit was made before the judge of the county court, and complained that, before the filing of the complaint, Andrew Boyd sold, offered for sale, bartered, exchanged, or otherwise disposed of spirituous, vinous, or malt liquors. Pending the trial, at the request of the solicitor, the court permitted the affidavit to be amended, so as to charge that Boyd aided or abetted or counseled or procured an unlawful sale or other disposition of spirituous, vinous, or malt liquors, or acted as agent or assisting friend of the purchaser or seller, etc.

W. R. Walker, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. [1] At common law there were no accessories in cases of

misdemeanor. All persons concerned in the commission of a misdemeanor were, at common law, principals, and, of course, indictable as principals. *English v. State*, 35 Ala. 428; *Scott v. State*, 30 Ala. 503; 1 Mayfield's Dig. p. 4, § 9.

[2] The defendant was tried upon an affidavit charging him with a misdemeanor, in that, in violation of law, he sold spirituous, vinous, or malt liquors. The evidence, without dispute, showed that the defendant bought, as an "assisting friend" for Gaston Collier, some whisky from a negro, who sold the whisky in Limestone county in violation of law. The negro who sold the whisky to the defendant as the "assisting friend" of Collier violated the law, and was indictable for selling liquor contrary to law. Prior to the passage of the act approved March 12, 1907 (Gen. Acts 1907, p. 366), it was not a criminal offense for any person to act as the agent or assisting friend of the purchaser of prohibited liquors. *Bond's Case*, 130 Ala. 117, 30 South. 427; *Maple's Case*, 130 Ala. 121, 30 South. 428. By the above-mentioned act it is provided that "any person who shall act as agent or assisting friend of the seller or of the purchaser in procuring or effecting the unlawful sale or purchase of any such liquors shall be guilty of a misdemeanor," etc., "and a conviction may be had for a violation of this act under an indictment for retailing spirituous, vinous, or malt liquors without a license and contrary to law." Subsequent to the passage of the above act the Legislature, by an act approved August 25, 1909 (Gen. & Loc. Acts Sp. Sess. 1909, pp. 63–96, inclusive), provided, among other things, that the "agent or assisting friend of the seller or buyer in procuring an unlawful sale of any prohibited liquors," etc., "shall be punishable as if he had sold said prohibited liquors and beverages and conviction may be had of such agent or assisting friend upon an indictment, affidavit, or complaint against him for selling prohibited liquors and beverages contrary to law." The language last quoted is taken from section 33 of the above act approved August 25, 1909, and simply makes the "go-between" of the buyer and the seller of prohibited liquors a principal in the criminal act of sale. As all persons who are criminally concerned in the commission of a misdemeanor are principals, and indictable as such, this act declares that the assisting friend in the transaction, whether acting for the buyer or the seller—the "go-between"—shall be guilty of *that misdemeanor* in the commission of which he participated, viz., an illegal sale of prohibited liquors.

[3] It has been truthfully said that under our system of pleading "indictments are rather a statement of legal conclusions than of facts," and the affidavit upon which the defendant was convicted was sufficient. *Rivers v. State*, 97 Ala. 73, 12 South. 434; *Dar-*

ington v. State, 162 Ala. 60, 50 South. 396; Rayfield v. State, 167 Ala. 94, 52 South. 833; Johnson v. State, 55 South. 226. The numerous decisions of our Supreme Court, from the case of Noles v. State, 24 Ala. 672, quoted by appellant's counsel in his able brief, to the present day, in which the general forms of indictment prescribed by our Code—"statements of legal conclusions rather than of facts"—have been upheld, render it unnecessary for us to refer to the constitutional questions discussed by him. Those questions have been determined adversely to his contention, and our present Constitution was adopted by our people in the light of the construction which had been placed by our courts of last resort upon its various provisions.

It is evident, from what we have above said, that we are of opinion that, under the evidence, the defendant could have been legally convicted under the original affidavit, and that the court committed no error prejudicial to the defendant in permitting the affidavit to be amended.

The judgment of the court below is affirmed.

Affirmed.

PEACOCK v. STATE.

(Court of Appeals of Alabama. Feb. 8, 1912.)

CRIMINAL LAW (§ 627*)—SERVICE OF COPY—INDICTMENT—NECESSITY.

Jury Law (Acts Sp. Sess. 1909, p. 817) § 32, providing for special venire in capital cases, and requiring the service of a copy of the indictment with a list of the jurors specially drawn, does not require the service of a copy of the indictment where the special venire has been waived, as authorized by Code 1907, § 7264.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1399-1408, 1412; Dec. Dig. § 627.*]

Appeal from Circuit Court, Coffee County; H. A. Pearce, Judge.

Frank Peacock was convicted of murder in the second degree, and appeals. **Affirmed.**

When the defendant was arraigned, the record shows that he filed the following in writing: "I, Frank Peacock, charged with murder in the first degree, do hereby waive a special venire for my trial. [Signed] Frank Peacock, per His Attorney." This waiver having been filed, the court made no order for a service upon the defendant of a copy of the indictment and venire for the trial of the cause.

J. A. Carnley, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. It is not claimed in behalf of the appellant that the judgment appealed from is subject to reversal upon any

other ground than the absence from the record of any order by the court for the service upon the defendant of a copy of the indictment. The claim is that the performance by the court of the duty of making such an order was not dispensed with by the act of the defendant in waiving in writing a special venire for the trial of the case. This claim cannot be sustained, under the construction given by the Supreme Court, in the case of McSwean v. State, 57 South. 732, of the provision of section 32 of the present jury law (Acts Sp. Sess. 1909, pp. 305, 317-320), which embodies the only existing requirement of law for the making of such an order by the court. The requirement of that statute of the making of such an order, as was in effect held in the case referred to, is now merely a part of the procedure to be followed by the court in the performance of the duty of making special provision for a jury for the trial of a capital felony; and when the performance of that duty is dispensed with in the mode authorized by the statute (Code, § 7264), the entire procedure, not merely a part of it, which it would have been incumbent upon the court to pursue, but for such waiver, is thereby dispensed with. The incident goes with the principal thing, of which it formed a part. A special venire having been waived by the defendant, the failure of the court to make an order for the service upon him of a copy of the indictment does not constitute a ground of reversal.

Affirmed.

LINTON v. STATE.

(Court of Appeals of Alabama. Feb. 1, 1912.)

MASTER AND SERVANT (§ 345*)—ENTICING AWAY SERVANT—CRIMINAL PROSECUTION—INDICTMENT.

An affidavit made May 2, 1911, in a prosecution under Code 1907, § 6850, making it a misdemeanor to interfere with or entice away any laborer or servant who has contracted in writing to serve another "for any given time, not to exceed one year," which avers that defendant, within 12 months before the affidavit, knowingly interfered with or enticed away from the service of affiant a laborer or servant who had "contracted in writing to serve * * * affiant until the 29th day of July, 1911, before the expiration of the time contracted for," is defective, for not showing that the contract did not exceed one year, and hence alleges no offense.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1289; Dec. Dig. § 345.*]

Appeal from Law Court, Pike County; T. L. Borum, Judge.

Buster Linton was convicted of a misdemeanor, and he appeals. **Reversed and remanded.**

E. R. Brannen, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

DE GRAFFENRIED, J. Section 6850 of the Code provides that any person who knowingly interferes with, hires, employs, entices away, or induces to leave the service of another, or attempts to hire, employ, entice away, or induce to leave the service of another, any laborer or servant, renter or share cropper, who has contracted in writing to serve such other person for any given time, *not to exceed one year*, before the expiration of the time so contracted for, shall be guilty of a misdemeanor.

The affidavit in this case charges that the affiant "has probable cause for believing that, in Pike county, within *twelve* months before making this affidavit, Buster Linton knowingly interfered with, hired, engaged, enticed away, or induced or attempted to hire, employ, entice away or induce to leave the service of T. V. Folmar, Henry Cade, a laborer or servant who had stipulated or contracted, in writing, to serve T. V. Folmar, the affiant, until the *29th day of July, 1911*, before the expiration of the time contracted for." When the contract referred to in the affidavit was made, the affidavit, which was made on May 2, 1911, fails to disclose. It may be, so far as the affidavit discloses, that the contract referred to in the affidavit was made by Henry Cade, the laborer, with T. V. Folmar, the employer, at some time prior to May, 1910, and that, by its terms, it provided for a *term of service greater than one year*. It may be, so far as the affidavit discloses, that Cade, the laborer, was in the service of Folmar, the employer, under that contract and in obedience to its terms on May 1, 1910, and that the act of the defendant made the basis of this prosecution was done on May 3, 1910. However this may be, the defendant, specifically by his demurrer, pointed out this fatal defect in the affidavit, and the court, in overruling the demurrer, committed an error for which the judgment in this case must be reversed.

Reversed and remanded.

RHODES v. STATE.

(Court of Appeals of Alabama. Feb. 1, 1912.
Rehearing Denied Feb. 22, 1912.)

1. CRIMINAL LAW (§ 55*)—DEFENSES—VOLUNTARY INTOXICATION.

Voluntary intoxication is not a defense to a crime, unless it results in insanity, or makes accused incapable of entertaining the specific intent essential to the commission of the offense, and hence is not a defense, where no specific intent is essential.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 67; Dec. Dig. § 55.*]

2. CRIMINAL LAW (§ 55*)—DEFENSES—VOLUNTARY INTOXICATION.

Voluntary intoxication when the liquor was sold is not a defense to a charge of unlawfully

selling intoxicants, since a specific intent is not essential to the commission of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 67; Dec. Dig. § 55.*]

Appeal from Circuit Court, Henry County; M. Solle, Judge.

Joe Rhodes was convicted of unlawfully selling intoxicants, and he appeals. Affirmed.

H. L. Martin, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. While the proposition is presented in several ways, as by the court's rulings on the admissibility of evidence set up in one of the defendant's showings for an absent witness, and by differently worded written charges requested by the defendant, the only question presented for our consideration is whether voluntary drunkenness can be set up as a defense to the crime of selling liquor in violation of the prohibition laws.

The defendant was charged with having sold spirituous, vinous, or malt liquors contrary to law, and on the trial the state proved by a witness that the defendant sold him a quart of whisky, for which he paid the defendant \$1.50. The defendant testified that he was drunk on the occasion testified to by the state's witness, and did not remember anything about it; that he had been drinking heavily prior to the time in question, and did not remember and would not say whether he sold the whisky or not, as he had no recollection of what happened during the time he was drunk, and did not even remember having seen the state's witness on the occasion testified to by him. The state's witness testified that the sale took place on a certain Sunday morning at the defendant's house, and that the defendant appeared to have been drinking. "He looked like he had drank two or three drinks." One of the written charges, requested by the defendant and refused by the court, directly presents the question, and is as follows: "(2) The presumption in this case is that the defendant is innocent until the state has proven beyond all reasonable doubt that he is guilty; and if the jury has a reasonable doubt, growing out of all the evidence, as to whether he was sufficiently sober to make a contract of sale of the whisky, then the jury cannot convict the defendant for the unlawful selling of whisky."

[1] It is a well-settled general rule of law that voluntary drunkenness at the time of the commission of a crime is no defense. If a person through his voluntary act drinks to intoxication, and while in that condition commits an act which would be a crime were he sober, he is held legally responsible, unless his drunkenness had resulted in insanity, or rendered him incapable of entertaining the specific intent which is the essential ingredient of the crime. That this is the es-

established rule in this state, and that voluntary drunkenness as a defense has not been extended beyond the limitations expressed, is made irresistible by a consideration of a long line of decisions by the Supreme Court. *State v. Bullock*, 13 Ala. 413; *Mooney v. State*, 33 Ala. 419; *Beasley v. State*, 50 Ala. 149, 20 Am. Rep. 292; *Hill v. State*, 62 Ala. 168; *Ross v. State*, 62 Ala. 224; *Tidwell v. State*, 70 Ala. 33; *Ford v. State*, 71 Ala. 385; *Williams v. State*, 81 Ala. 1, 1 South. 179, 60 Am. Rep. 133; *Parsons v. State*, 81 Ala. 594, 2 South. 854, 60 Am. Rep. 193; *Gunter v. State*, 83 Ala. 96, 3 South. 600; *Morrison v. State*, 84 Ala. 405, 4 South. 402; *Walker v. State*, 85 Ala. 7, 4 South. 686, 7 Am. St. Rep. 17; *Cleveland v. State*, 86 Ala. 1, 5 South. 426; *Carter v. State*, 87 Ala. 113, 6 South. 356; *Engelhardt v. State*, 88 Ala. 100, 7 South. 154; *King v. State*, 90 Ala. 616, 8 South. 856; *Fonville v. State*, 91 Ala. 39, 8 South. 688; *Walker v. State*, 91 Ala. 82, 9 South. 87; *Chatham v. State*, 92 Ala. 47, 9 South. 607; *Springfield v. State*, 96 Ala. 81, 11 South. 250, 38 Am. St. Rep. 85; *White v. State*, 103 Ala. 72, 16 South. 63; *Whitten v. State*, 115 Ala. 72, 22 South. 483; *McLeroy v. State*, 120 Ala. 274, 25 South. 247; *Felding v. State*, 135 Ala. 56, 33 South. 677; *Gatter v. State*, 141 Ala. 10, 37 South. 692; *Brown v. State*, 142 Ala. 287, 38 South. 268; *Laws v. State*, 144 Ala. 118, 42 South. 40; *Heninburg v. State*, 151 Ala. 26, 43 South. 959; *Heninburg v. State*, 153 Ala. 13, 45 South. 246.

[2] Voluntary drunkenness is no defense to a prosecution for crime not requiring proof of specific intent as a necessary ingredient of the offense. *Felding v. State*, 135 Ala. 56, 33 South. 677; *Whitten v. State*, 115 Ala. 72, 22 South. 483; *Springfield v. State*, 96 Ala. 81-86, 11 South. 250, 38 Am. St. Rep. 85; *Chatham v. State*, 92 Ala. 47, 9 South. 607; *Cleveland v. State*, 86 Ala. 1, 5 South. 426; *Ford v. State*, 71 Ala. 385. The offense for which the defendant was indicted and on trial did not involve specific intent as an essence of the crime or necessary ingredient of the charge, and as voluntary drunkenness or intoxication has never been recognized by our Supreme Court as an excuse, palliation, or defense for the commission of any crime, but only that it may sometimes operate to rebut the existence of malice, so as to reduce the grade of the homicide or other crime, or to negative the specific intent requisite to make out certain offenses, we are unwilling to extend the rule to a case where the offense, although requiring proof of a sale, which in a sense embraces proof of a contract, does not include proof of specific intent as an element of the offense.

The case cited by appellant (*Whitten v. State*, 115 Ala. 72, 22 South. 483), from which the refused charges were "substantially copied" is not inharmonious with the other authorities cited, or the general rule as stated

by us, but, on the contrary, strictly in line with the other cases. The charge in *Whitten's Case*, supra, is limited to the sobriety of the defendant at the time of the alleged assault "to form the specific intent to ravish." The court in that case holds that the charge should have been given, because it was necessary in that case (assault with intent to ravish) to prove that the defendant entertained the specific intent charged. And the court say in the opinion in that case: "Mere drunkenness does not excuse or palliate the offense, but it may produce a state of mind which incapacitates the party from forming or entertaining a specific intent." (Italics ours.)

The rulings of the trial court in refusing to allow proof of the defendant's drunkenness as an excuse or defense to the charge of selling whisky in violation of law, and in refusing written charges instructing the jury to acquit based on that defense, are free from error, and the case will be affirmed.

Affirmed.

CARTER v. STATE.

(Court of Appeals of Alabama. Feb. 1, 1912.)

1. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICING WITHOUT LICENSE—AFFIDAVIT FOR ARREST—SUFFICIENCY.

An affidavit charging that in a specified county, within 12 months before the making of the affidavit, accused did practice medicine or surgery without a license, and contrary to law, is sufficient, since it follows the form prescribed by Code 1907, § 7161, form 84, and section 7564.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 6-11; Dec. Dig. § 6.*]

2. CRIMINAL LAW (§ 741*)—AFFIRMATIVE CHARGE FOR STATE—WHEN PROPER.

The general affirmative charge in favor of the state should not be given, where the evidence as a whole does not necessarily show guilt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1138, 1221, 1705, 1713, 1716, 1717, 1727, 1728; Dec. Dig. § 741.*]

3. PHYSICIANS AND SURGEONS (§ 6*)—AFFIRMATIVE CHARGE FOR STATE—WHEN IMPROPER.

In a trial for practicing medicine without a license, the general affirmative charge in favor of the state was improperly given, where accused's testimony tended to show that he had not treated or offered to treat any disease of any human being, but had merely made medicine or tea from roots and herbs, gathered from nearby woods, and had sold to people who came to him for it.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 6-11; Dec. Dig. § 6.*]

Appeal from Law Court, Pike County; T. L. Borum, Judge.

Charlie C. Carter was convicted of practicing medicine without a license, and he appeals. Reversed and remanded.

The affidavit is as follows, omitting formal charging part: "That in Pike county, within twelve months before making this affidavit

Charlie C. Carter did practice medicine or surgery without a license and contrary to law."

Cull Walker and W. E. Griffin, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. [1] The charge in this case was made in the form prescribed for the offense provided for by section 7564 of the Code. Code, § 7161, form 84. Its sufficiency was not open to question by demurrer or otherwise. *Coleman v. State*, 150 Ala. 64, 43 South. 715; *Jones v. State*, 136 Ala. 118, 34 South. 236; *Noles v. State*, 24 Ala. 72.

[2, 3] The evidence on the trial was not such as to warrant the giving of the general affirmative charge in favor of the state. Such a charge should not be given, where the evidence as a whole does not necessarily show guilt. *King v. State*, 151 Ala. 12, 44 South. 200. The testimony of the defendant, examined as a witness in his own behalf, tended to show that he had not treated or offered to treat any disease of any human being in any way whatever, "but that he merely made his medicine or tea from roots and herbs gathered from woods near by, and sold to people who came to his tent for it." This testimony tended to rebut the incriminating evidence that had been offered by the state, and made the question of guilt vel non one for the jury. The court was in error in giving the charge referred to.

Reversed and remanded.

WRIGHT v. STATE.

(Court of Appeals of Alabama. Feb. 1, 1912.)

1. HABEAS CORPUS (§ 82*)—PROCEEDINGS—DISOBEDIENCE.

At common law, one who refuses to obey a writ of habeas corpus was liable in damages to the one aggrieved, and also guilty of contempt of the court issuing the writ.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 74; Dec. Dig. § 82.*]

2. INDICTMENT AND INFORMATION (§ 110*)—SUFFICIENCY OF INDICTMENT—STATUTORY OFFENSES.

Where a statute creates a new offense, unknown to the common law, and describes its elements, the offense may be charged in the words of the statute.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

3. INDICTMENT AND INFORMATION (§§ 110, 111*)—HABEAS CORPUS—PROCEEDINGS—DISOBEDIENCE—AFFIDAVIT.

An affidavit, stating that the informant had probable cause for believing that a writ of habeas corpus was issued by the judge of probate and directed to accused, commanding her to produce the bodies of two named persons before said judge on a day named, and was served on accused, who neglected to obey and execute it, is, under Code 1907, § 7038, providing that any person to whom a writ of habeas corpus is directed, and who refuses or

neglects to obey and execute it, is guilty of a misdemeanor, unless sufficient excuse is shown for such refusal or neglect, sufficient to charge the commission of a criminal offense, because in the language of the statute, and the exception being matter of defense which need not be negatived.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 289-298; Dec. Dig. §§ 110, 111.*]

Appeal from Law Court, Pike County; T. L. Borum, Judge.

Eva Wright was convicted of crime, and appeals. Affirmed.

D. A. Baker, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. [1] Under the common law, as we received it from England, a person to whom a writ of habeas corpus was directed, and who refused to obey the writ, was liable in damages to the party aggrieved, and was also guilty of a contempt of the court issuing the writ. *Am. & Eng. Ency. Law*, p. 129, note 6.

[2] To add to the efficiency of the writ, the Legislature passed the act now forming section 7038 of the Code, which provides, among other things, that any person to whom a writ of habeas corpus is directed, and who refuses to receive the same, or neglects to obey and execute it according to the provisions of the chapter relating to the subject of habeas corpus, being chapter 227 of the Code of 1907, shall be guilty of a misdemeanor.

The prosecution in the present case was commenced by an affidavit made by W. C. Carroll, in which he states that "he has probable cause for believing and does believe that, in Pike county, within twelve months before making this affidavit, a writ of habeas corpus issued by E. C. Edmonson, judge of probate of Pike county, Ala., and directed to Eva alias Evie Wright and said Will Thomas, directing them to have the body of Henry and Robert Wright before said judge on a day named, which writ was served on Eva alias Evie Wright and Will Thomas, and said Eva alias Evie Wright and Will Thomas neglected to obey and execute it according to its provisions." The affidavit was demurred to upon only two grounds, viz.: (1) That it did not charge the commission of a criminal offense, because it failed to show wherein the defendants neglected to obey said writ; and (2) because it charged no offense known to the law.

Section 7038 of the Code, under the provisions of which the above affidavit was made, does not require that, in an affidavit or indictment charging a violation of its provisions, it shall be stated that the defendant, *without sufficient excuse*, neglected to obey and execute the writ. If a person is prosecuted criminally for a violation of

the provisions of said section, he may, as a defense thereto, show by evidence that he had a *sufficient excuse* for so doing; but, as above stated, under the express language of the statute, the state is not required to allege, in its pleadings, that no such excuse existed.

[3] There seems to be no conflict in the authorities upon the proposition that, when a statute creates a new offense, unknown to the common law, and describes its constituents, it may be charged in the words of the statute. 1 Mayfield's Dig. p. 431, § 187. It seems to us that the affidavit in this case charges the defendant with a violation of all the material ingredients of the offense as defined in the statute creating it. We are therefore of the opinion that the affidavit was not subject to the grounds of demurrer assigned to it.

Affirmed.

CLARK v. STATE.

(Court of Appeals of Alabama. Jan. 30, 1912.)

JURY (§ 80*)—CAPITAL CASE—ILLEGALITY IN VENIRE.

Under Acts Sp. Sess. 1909, p. 319, § 32, which provides that the venire for the trial of a capital cause shall be inclusive of those, "drawn and summoned on the regular juries for the week set for the trial," where two of the persons drawn for regular jury service on the week of court in which a person was tried for murder in the first degree, and convicted for manslaughter, were not summoned, the venire from which the jury was drawn did not contain the legal number of names, and a reversal is entitled.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 360-366; Dec. Dig. § 80*.]

Appeal from Circuit Court, Coffee County; H. A. Pearce, Judge.

Ida Clark was indicted for murder in the first degree, but convicted of second degree manslaughter, and appeals. Reversed and remanded.

J. A. Carnley, Claude Riley, and H. L. Martin, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. The appellant was indicted for murder in the first degree. She was tried by a jury, was convicted of manslaughter in the second degree, and appeals.

The record shows that, after the appellant had been arraigned and had pleaded to the indictment, the trial court made an order directing the sheriff to summon 61 persons to constitute the venire from which the jury to try the appellant was to be selected, "being the 25 persons whose names have just been drawn, and the 36 persons drawn and summoned for regular jurors for the second week of court." The record further

shows that, while the names of 36 persons had been *drawn* as jurors for the second week of court, only 34 of the persons whose names had been so drawn *had been or were summoned* by the sheriff as jurors for said week. The requirements of the statute (Acts Sp. Sess. 1909, p. 319, § 32) are that the venire, for the trial of a capital case, shall be inclusive of those "*drawn and summoned* on the regular juries for the week set for the trial," and, only 34 of the 36 jurors drawn for the second week having been *summoned* by the sheriff, the venire from which the jury was drawn to try this defendant did not contain the legal number of names as fixed by the order of the court. Instead of having a venire composed of 61 persons, as fixed by the order of the court, the appellant's venire consisted of only 59 persons. Her jury, therefore, was drawn from an illegal venire, and, under the uniform decisions of this court and of the Supreme Court, the judgment in this case must be reversed. *Elijah Jackson v. State*, 171 Ala. 5, 55 South. 118; *Reynolds v. State*, 1 Ala. App. 24, 55 South. 1016; *Russell v. State*, 1 Ala. App. 67, 55 South. 1023; *Odom v. State*, 1 Ala. App. 68, 55 South. 546; *Jobe v. State*, 1 Ala. App. 112, 55 South. 430; *Smith v. State*, 1 Ala. App. 140, 55 South. 449; *Mills v. State*, 1 Ala. App. 76, 55 South. 331; *Welch v. State*, 1 Ala. App. 144, 56 South. 11. Reversed and remanded.

BYNUM v. STATE.

(Court of Appeals of Alabama. Feb. 8, 1912.)
HIGHWAYS (§ 151*)—FAILURE TO WORK—OFFENSE—INDICTMENT.

An indictment charging that defendant was liable to do road duty, but that he willfully failed or refused, after legal notice, to work the public road, either in person or by substitute, without sufficient excuse, against the peace, etc., was not defective for failure to allege the particular road that defendant failed to work.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 407-416; Dec. Dig. § 151*.]

Appeal from Law and Equity Court, Madison County; J. H. Ballentine, Judge.

Will Bynum was convicted of refusing to do road work, and he appeals. Affirmed.

Douglass Taylor, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. The indictment in this case charged that the defendant, "a person liable to road duty, willfully failed or refused, after legal notice, to work the public road, either in person or by substitute, without a sufficient excuse therefor, against the peace," etc. The allegation of the commission of the offense substantially followed the terms of the statute creating it. The indictment sufficiently designated the offense,

without specifying what road the defendant failed to work. *Brown v. State*, 63 Ala. 97. The demurrer to it was properly overruled.

The record presents no other question for review.

Affirmed.

BARRENTINE v. STATE.

(Court of Appeals of Alabama. Jan. 30, 1912.)

1. CRIMINAL LAW (§ 1182*)—APPEAL AND ERROR—AFFIRMANCE—INSUFFICIENT PRESENTATION OF CASE OR QUESTIONS.

Where the record on appeal contains no bill of exceptions, and the clerk's certificate shows that the time for filing a bill has expired, a judgment of conviction and sentence, based upon a verdict and regular on its face, will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. § 1182.*]

2. CRIMINAL LAW (§ 1186*)—APPEAL AND ERROR—REMAND—COSTS.

Where the judgment of conviction in a prosecution for violating the local option laws imposed a fine of \$75, but failed to show the amount of costs or the number of days necessary for the defendant to perform hard manual labor for the county in default of payment, the judgment will be remanded, in order that the court below may specify the allowance of costs at 75 cents a day, as provided by Code 1907, § 7635.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219; Dec. Dig. § 1186.*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Joe Barrentine was convicted of violating the local option law, and he appeals. Affirmed in part, and reversed and remanded in part.

R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. [1] The defendant was convicted of violating the prohibition law. The record contains no bill of exceptions, and the certificate of the clerk shows that the time for filing has expired. The judgment of conviction and sentence imposing a fine of \$75 is regular, and is based on a verdict finding the defendant guilty and assessing a fine of that amount; but the judgment fails to show the amount of costs, or the number of days necessary for the defendant to perform hard labor for the county in default of paying or securing the costs, although the

judgment entry shows the costs were not paid or secured.

[2] The judgment of the court determining the guilt of the defendant and the sentence on default in payment of the fine is affirmed. In order that the court below may specify in the judgment the amount of costs, number of days, and sum allowed for each day, and pronounce the proper sentence of hard labor imposed for costs, the case is remanded. Code 1907, § 7635; *Dowling v. City of Troy*, 1 Ala. App. 508, 56 South. 116; *Evans v. State*, 109 Ala. 11, 19 South. 535; *Johnson v. State*, 94 Ala. 35, 10 South. 667; *Herrington v. State*, 87 Ala. 1, 5 South. 831; *Walker v. State*, 58 Ala. 393.

Affirmed in part, and reversed and remanded in part.

GRANTHAM v. STATE.

(Court of Appeals of Alabama. Feb. 6, 1912.)

CRIMINAL LAW (§ 1109*)—APPEAL—DISMISSAL—GROUNDS.

An appeal will be dismissed, where the record fails to show that the judgment appealed from was rendered by a court held at a place designated by law, or presided over by the judge authorized to hold the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2897-2902, 3204; Dec. Dig. § 1109.*]

Appeal from Coffee County Court; J. N. Ham, Judge.

Tom Grantham was convicted of an offense, and he appeals. Appeal dismissed.

J. A. Carnley, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. The record in this case does not show that the court was held at the place designated by law, or that it was convened or presided over by a judge authorized by law to hold it. The appeal must be dismissed, because of the failure of the record to show that the judgment appealed from was rendered by a court organized pursuant to law. *Thomas v. Daniel Bros.*, 42 South. 623; *McPherson v. Wiggins*, 40 South. 961; 2 Cyc. 1033.

Appeal dismissed.

¹ Reported in full in the Southern Reporter; reported as a memorandum decision without opinion in 149 Ala. 675.

² Reported in full in the Southern Reporter; reported as a memorandum decision without opinion in 147 Ala. 692.

WHITEHURST v. STATE.

(Court of Appeals of Alabama. Feb. 1, 1912.
Rehearing Denied Feb. 22, 1912.)

1. CRIMINAL LAW (§ 636*)—RENDITION OF VERDICT—PRESENCE OF ACCUSED.

The verdict in a felony case must be rendered in open court, in the presence of the judge and accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1465-1482; Dec. Dig. § 636.*]

2. CRIMINAL LAW (§ 641*)—RENDITION OF VERDICT—PRESENCE OF ACCUSED.

Where the court, in open court, in the presence of accused, but in the absence of his counsel, without objection from accused, received the verdict of guilty, and without objection from accused imposed the sentence in the absence of accused's counsel, and, when his attention was called to the inadvertence in receiving the verdict and imposing the sentence in the absence of counsel, offered to poll the jury, which counsel declined to require, and reduced the sentence from six years to five years in the penitentiary, the conviction and sentence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1496-1506; Dec. Dig. § 641.*]

Appeal from Circuit Court, Barbour County; M. Sollie, Judge.

Willie Whitehurst was convicted of crime, and he appeals. Affirmed.

George W. Peach and E. P. Thomas, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. [1] Undoubtedly a writing delivered by a jury in a felony case to a court, or the clerk of the court, in the absence of the defendant, is no verdict. In a felony case it is essential that the verdict of the jury shall be rendered in open court in the presence of the judge and of the defendant. *Hayes v. State*, 107 Ala. 1, 18 South. 172.

[2] In the present case the court, in open court, in the presence of the defendant, but while the counsel of the defendant were ab-

sent, received, without objection on the part of the defendant, the verdict of the jury. Immediately upon receiving the verdict, the court, without objection on the part of the defendant, and in the absence of counsel for defendant, sentenced the defendant to the penitentiary for six years. While a court should be extremely careful in receiving a verdict against, and in passing a sentence upon, a defendant in a felony case in the absence of his counsel, the law does not require, certainly when the defendant does not call the court's attention to the absence of his counsel and request his presence, that the counsel shall be present when a verdict is received or the defendant sentenced. *Griffin v. State*, 90 Ala. 600, 8 South. 670.

A person who is indicted for a felony may be extremely ignorant of all forms of criminal procedure, and it is essential to the due and orderly administration of the law that, when a defendant in a felony case employs counsel to aid him in his trial, he shall have his services from the beginning of the trial until it is at an end. He may not know that he has the right to the presence of his counsel when the verdict is received, or when sentence is passed, and a case may occur where a defendant may suffer, through some mistake of a court in the reception of a verdict, or in passing sentence, on account of the absence of his counsel, grave injustice.

Such a situation is not shown by this record. The court, through inadvertence, received the verdict and sentenced the defendant, in the absence of his counsel, to a period of six years in the penitentiary. When the court's attention was called to its inadvertence, it immediately offered to poll the jury, which the defendant's counsel declined to require, and reduced the sentence of the defendant from six years to five years in the penitentiary.

There is no error shown by the record. *Griffin v. State*, 90 Ala. 600, 8 South. 670. The judgment of the court below is affirmed. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ASHLEY v. STATE.

(Court of Appeals of Alabama. Jan. 30, 1912.)

1. CRIMINAL LAW (§ 619*)—SEPARATE INDICTMENTS—TRIAL—JUDGMENT.

Defendant was indicted under five separate indictments for burglarizing as many railroad freight cars in the same train and at the same time. Defendant was arraigned only on one of the indictments. It was agreed in open court that the indictments might all be tried at the same time, and that one trial might stand for all. The verdict was a finding of guilty on the indictment on which he was actually tried, and the judgment followed the verdict and pronounced defendant guilty of burglary, on which he was sentenced. *Held*, that defendant was not prejudiced by the existence of the other indictments.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1376; Dec. Dig. § 619; * Indictment and Information, Cent. Dig. § 402.]

2. CRIMINAL LAW (§ 1055*)—APPEAL—NECESSITY OF EXCEPTIONS.

An objection to the conduct of the solicitor for the state cannot be reviewed on appeal, in the absence of an exception to a ruling of the court thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2666-2667; Dec. Dig. § 1055.*]

3. CRIMINAL LAW (§ 649*)—TRIAL—SUSPENSION.

Accused was not prejudiced by the court's suspension of the trial of the case for such a length of time as was necessary to draw from the jury box the names of sufficient jurors to complete a venire already partly drawn for the trial of another case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1512-1515; Dec. Dig. § 649.*]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

John Ashley was convicted of burglary, and he appeals. Affirmed.

Joseph Callaway, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. [1] There were five indictments against the defendant, charging offenses growing out of and connected with the burglary of railroad freight cars in the same train, and, as set out in the bill of exceptions, "it appearing that said cars were all coupled together and standing on the same track, and that said offenses were committed at the same time and place, and that the evidence was given by the same witnesses in each and every offense charged in each of said several indictments, and that said evidence was the same in each of said several indictments," it was agreed in open court between the solicitor, representing the state, and the defendant's counsel, representing the defendant, "that said indictments might all be tried at the same time, and that one trial might stand for all." The indictment on which the defendant was tried charged burglary of a railroad car, and it is not shown what the other four indict-

ments charged; but the record shows the arraignment was alone on the one indictment charging burglary, and the verdict was a finding of guilty on that indictment, and the judgment of guilt followed the finding of the jury and pronounced the defendant guilty of the charge of burglary, and sentence was accordingly imposed. It is insisted by counsel for defendant, in brief, that the sentence is unwarranted in law, because of the existence of the other indictments charging the same offense. No motion was made in arrest of judgment, and the consolidated trial, if such was had, is shown to have been had by agreement, and the verdict and judgment of guilty and sentence is on but one indictment charging burglary, upon which the defendant was duly arraigned and pleaded not guilty. No error prejudicial to the defendant is shown because of the existence of the other indictments, even if they were for the same offense (*Perkins v. State*, 66 Ala. 457); and that other indictments had been returned is not shown by the record otherwise than in the agreement of defendant's counsel and the solicitor set out in the bill of exceptions. The verdict and judgment of conviction are regular, and appear to be based alone upon the evidence given on a trial had on the indictment charging burglary, on which the defendant was duly arraigned and entered a plea of not guilty. The appeal is prosecuted from this judgment finding the defendant guilty on the indictment upon which he was arraigned, and brings no other case before us on appeal for review.

The burglary was proved and admitted on the trial to have occurred on May 19, 1911, in Montgomery county; the goods being taken from the car during the nighttime. The state introduced a witness, Tom Moore by name, who testified to the defendant's commission of the offense jointly with himself and a third party. This witness was an accomplice in the crime; but there was sufficient corroborating evidence introduced by the state to sustain a conviction in the testimony of the witnesses Tom Fitzsimmons and Jim Smith. *Malachi v. State*, 89 Ala. 134, 8 South. 104; *Bonner v. State*, 107 Ala. 97, 18 South. 226; *Burney v. State*, 87 Ala. 80, 6 South. 391.

[2] The objections to the conduct of the solicitor and objections to evidence are not so presented as that a court of review can consider the questions, as no exception was reserved to any ruling of the trial court on these matters.

[3] During the progress of the trial, and while one of the defendant's witnesses, Alice Abercrombie, was being examined, the court suspended the trial of the case to complete the drawing of a jury in another case, in which the jury had been previously partly drawn. This suspension was objected to by the defendant, and an exception reserved to

the action of the court in suspending the trial to complete drawing the jury in another case, and then resuming the trial of defendant's case. The jury in the case on trial was not discharged, and there could not have been a former jeopardy. *Lyman v. State*, 47 Ala. 686; *Adams v. State*, 115 Ala. 90, 22 South. 612, 67 Am. St. Rep. 17. And if the defendant desired to raise the question of former jeopardy, he should have done so by proper plea. *Lyman v. State*, supra; *McCauley v. State*, 26 Ala. 135.

It would appear, from the statement setting out the objection to the action of the presiding judge on the trial, that during the progress of the trial the judge suspended the proceedings only for such a length of time as necessary to draw from the jury box the names of sufficient jurors to complete a venire already partly drawn for the trial of some other case pending in the court. Evidently this was for the purpose of facilitating the trial in another case by giving the clerk an opportunity to prepare a list or venire for that case, and the sheriff time to serve the jurors so drawn, while the case then being tried was in progress, so that the trial of such other case could be promptly had without delay occasioned by waiting on the performance of these duties by the clerk and sheriff upon the termination of the case then on trial. It cannot be doubted that in the transaction of the business of the court and the general administration of justice the presiding judge at nisi prius may, during the progress of a case on trial, suspend the proceedings temporarily, for the purpose of expediting the orderly disposition of other business of the court, whenever the necessities require; and the rights of the parties whose case is on trial are not prejudiced thereby. No injury or prejudice is shown to have resulted to the defendant on trial by the suspension objected to; and no error was committed by the trial judge in delaying the trial for a few minutes that other business of the court might be expedited.

The general charge requested by the defendant was properly refused. The commission of the offense charged was proven, and there was positive evidence of defendant's guilt by an accomplice and sufficient corroborating circumstances tending to connect defendant with the offense charged to submit the question of his guilt to the jury.

No reversible error is shown by the record, and the case will be affirmed.

Affirmed.

O'BRIEN v. STATE.

(Court of Appeals of Alabama. Feb. 8, 1912.)

1. INTOXICATING LIQUORS (§ 131*)—OFFENSES—SALE—"GIFT."

There was no illegal sale or giving away of intoxicating liquor, unless the delivery of

the liquor was accompanied by an intention to transfer the right of property and possession therein for or without a consideration (citing 4 Words and Phrases, 3092).

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 140, 161; Dec. Dig. § 131.*]

2. INTOXICATING LIQUORS (§ 131*)—UNLAWFUL DISPOSITION — "OTHERWISE DISPOSE OF."

In view of Acts 1909 (Sp. Sess.) p. 91, § 31, providing that the term "otherwise dispose of" following the words "sold, offered for sale," etc., when used in any indictment, shall include a barter, exchange, giving away, furnishing, or other manner of disposition, the delivery of a bottle of whisky by accused to an acquaintance to keep for him, while accused went before the grand jury to testify, would not support an indictment charging that he sold or "otherwise disposed of" intoxicants contrary to law, in absence of a showing that he intended or consented that such acquaintance could use some part of the liquor.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 140, 161; Dec. Dig. § 131.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5105-5113.]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Bill O'Brien was convicted of unlawfully disposing of intoxicating liquors, and he appeals. Reversed and remanded.

Lacy & Lacy, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. On the trial of the defendant by the court sitting without a jury, he was convicted under the first count of the indictment, which charged that he "sold, offered for sale, kept for sale, or otherwise disposed of, spirituous, vinous, or malt liquors, contrary to law." The evidence against him was to the effect that the witness for the state, one Cross, an acquaintance of the defendant, who lived at Corona, where the defendant also lived, and the defendant casually met at the railroad depot at Jasper, and went up into the town together; "that after getting up to town defendant told him [the witness] that he had to go before the grand jury, which was in session at that time, and told witness that he had a pint of whisky, and that he wanted the witness to keep the whisky for him while he went before the grand jury; that the defendant handed the whisky to witness, and then went before the grand jury, or went to the courthouse; that witness drank some of the whisky which defendant had given him, and never returned the same to the defendant;" that witness did not pay the defendant offer for the whisky, nor did the defendant offer to sell the whisky to the witness, or ever ask him to pay for it; that the defendant, at the time the whisky was handed to the witness, did not tell the witness to take a drink, or that he could have a drink of the whisky, and the witness did not use any of the

whisky in the presence of the defendant. It further appeared that after Cross and the defendant separated the former got drunk, was arrested and put in jail, and carried before the grand jury the next day.

[1, 2] It is plain that the evidence did not show either a sale, a keeping for sale, or a gift of the whisky by the defendant. There was no evidence tending to show that the delivery of the whisky was accompanied by an intention, on his part, to transfer to Cross the right of property and possession in the whisky, or any part of it, for a consideration, or without a consideration. *Coker v. State*, 91 Ala. 92, 8 South. 874; 4 Words and Phrases, 3092. It is equally plain that the defendant did not "otherwise dispose of" the whisky, within the meaning of that part of the charge against him, unless those words, in the connection in which they are found, have been given by statute such an import as to make them cover a mere delivery of a prohibited liquor to another, unaccompanied by any intention on the part of the person so parting with its possession that the person to whom the delivery is made, or any one else other than the owner, may consume or use the whole or any part of it. Construction has been given to those words as used in statutes rendering it unlawful "to sell, give away, or otherwise dispose of spirituous, vinous or malt liquors." *Amos v. State*, 73 Ala. 498; *Reynolds v. State*, 73 Ala. 3; *Norris v. Town of Oakman*, 138 Ala. 411, 35 South. 450. In the opinion delivered in the case of *Amos v. State*, supra, the court, after referring to the rule which requires that the meaning of a word used in a statute must be construed in connection with the words with which it is associated, and that words of general import in a statute are limited in their meaning by words of restricted import which they immediately follow, unless there is a clear manifestation of a different legislative intent, said: "It would be a departure from the rule, not necessary to give effect to the legislative intent, and not within it, to give the general words 'or otherwise dispose of' a meaning so loose and expansive as to include within them any act not akin to a sale or a gift, not intended as, and not having in it any of the properties of, a parting of the property by one person to another. A common carrier, transporting the enumerated liquors to the designated locality, and there delivering them to the consignee, or to the true owner, it may be said, in a large or

loose sense, disposes of them. A warehouseman, with whom they were stored, delivering them on demand, could also be said to dispose of them, and a destruction of them intentionally could be denominated a disposition; and yet these acts are not within the proper significance of the general words, nor are they within the objects and purposes of the statute." So much as to the import of the words in question, when used in the connection in which they are found in the charge made against the defendant, in the absence of a clear manifestation of a legislative purpose that their meaning is not to be limited by words of more restricted import with which they are found associated.

But there is a legislative expression as to the meaning to be given to those words as they were used in the indictment in this case. "The term 'otherwise dispose of' following the words sold, offered for sale, kept for sale, when employed in any warrant, process, affidavit, indictment, information, or complaint, * * * shall include and be deemed to include barter, exchange, giving away, furnishing, or any manner of disposition by which said liquors and beverages may pass unlawfully from one person to another." Acts Special Session 1909, pp. 63, 91, § 31. There is nothing in this provision to indicate a purpose to give to the words under consideration, when used as they were used in the indictment in this case, "a meaning so loose and expansive as to include within them any act not akin to a sale or a gift, not intended as, and not having in it any of the properties of, a parting of the property by one person to another." The statute does not undertake to give to such a use of the words in question the effect of describing or embracing a mere delivery of prohibited liquor by one person to another for no other purpose than its safe-keeping for the benefit of the person so temporarily parting with the possession of it. The delivery of the bottle of whisky by the defendant to an acquaintance, to keep for him while he went before the grand jury, there being nothing in the evidence to support an inference that the defendant intended or consented that the person to whom it was handed was to be at liberty to use or consume any part of it, was not embraced in the charge made by the indictment. From the conclusion that the conviction was not warranted by the evidence, it follows that the judgment appealed from must be reversed.

Reversed and remanded.

WILLIAMS v. STATE.

(Court of Appeals of Alabama. Jan. 30, 1912.)

1. CONVICTS (§ 9*)—CONVICT LABOR—RIGHTS OF HIRER.

Under a contract pursuant to statute by a convict with a surety who confessed judgment for a fine and costs assessed against the convict, the surety as hirer only acquired the state's right to compel satisfaction of the fine and costs by the involuntary servitude of the convict.

[Ed. Note.—For other cases, see *Convicts*, Cent. Dig. §§ 17, 18; Dec. Dig. § 9.*]

2. CONVICTS (§ 9*)—BREACH OF CONVICT LABOR CONTRACT—OFFENSE.

An agreement between a convict and a surety, confessing judgment for fine and costs against the convict, by which the surety as hirer released the convict from further service in consideration of a stipulated sum, did not constitute a failure or refusal by the convict to continue in the service so as to make him punishable under Code 1907, § 6846, for failure to perform the labor contract.

[Ed. Note.—For other cases, see *Convicts*, Cent. Dig. §§ 17, 18; Dec. Dig. § 9.*]

3. CONVICTS (§ 9*)—LABOR CONTRACT—BREACH—OFFENSE.

A convict's cessation from labor under a convict labor contract because of his lawful arrest under a criminal charge while performing the service, and his inability to secure his release by giving bond, did not constitute a failure to perform his contract for service with the surety confessing judgment for him, so as to make him punishable for breach thereof under Code 1907, § 6846.

[Ed. Note.—For other cases, see *Convicts*, Cent. Dig. §§ 17, 18; Dec. Dig. § 9.*]

4. CRIMINAL LAW (§ 308*)—PRESUMPTIONS.

One is presumed to be innocent of a criminal offense until guilt is legally proved.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 731; Dec. Dig. § 308.*]

Appeal from Law Court, Pike County; T. L. Borum, Judge.

Garfield Williams was convicted of refusing to perform a convict labor contract with a surety who confessed judgment for a fine against accused on his conviction for a misdemeanor contrary to statute, and he appeals. Reversed and remanded.

E. R. Brannen, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. The appellant (the defendant below) was convicted of the offense provided for by section 6846 of the Code of failing or refusing without sufficient excuse to perform a contract with a surety who confessed judgment for the fine and costs assessed against the principal on his conviction of a misdemeanor.

[1] By the contract entered into in such an event, "the hirer becomes the transferee only of the right of the state to compel the satisfaction of such fine and costs, and nothing more, by exacting the involuntary servitude of the convict, who himself contracts to change masters for this purpose." *Smith v. State*, 82 Ala. 40, 2 South. 629; *Simmons v.*

State, 139 Ala. 149, 36 South. 723. There was no evidence tending to show that the defendant in this case, before his arrest on another criminal charge under which he was held in custody at the time of the institution of the present prosecution, had in any way failed or refused to perform the service which in the contract with his surety he promised or agreed to perform. So far as the evidence shows, the defendant performed all the duties required of him as a farm or dairy hand from the time he entered into the contract up to and including the morning of the 10th day of September, 1910, which was a Sunday. During the interval on that day between the completion of his morning's work and the time in the afternoon when he would be required to perform any further service, he was arrested under another criminal charge, and was still in jail, detained there under that charge, when the present prosecution was instituted on the following morning.

What occurred between the defendant and his hirer during the interval of leisure which was allowed the former on Sunday, and before his arrest that day, did not constitute evidence of his failure or refusal to perform the service for which he had contracted. The hirer, J. G. King, having testified in reference to a disturbance which occurred between the defendant and his wife, both of whom lived on King's place, testified further, as stated in the bill of exceptions, that the defendant "about 2:30 o'clock called him (J. G. King, the witness) up over the 'phone, and told him that he would have to quit working for him; that he could not stand the way things were going on, and asked him (J. G. King) if it would be all right for him (defendant) to pay him (J. G. King) the balance due him and quit; that he (J. G. King) told the defendant that it would be all right for him to quit if he would get up the money and pay him (J. G. King) the balance due him," which balance, as stated by the witness, was for 23 days' labor at the rate of \$8 per month.

[2] This shows an agreement between the hirer and the convict that the latter would be released from further service in consideration of the payment of a stipulated sum to the former. Certainly the making of this contract did not constitute a failure or refusal by the defendant to continue in the stipulated service, from the performance of which the hirer, by that contract, agreed to release him. And the defendant was arrested before there was any breach of duty on his part by his failure either to pay the stipulated amount or to resume work for the hirer when further work was due to be performed. So it is plain that, up to the time of his arrest, the defendant was not chargeable with any failure or refusal to perform the service which he had promised or agreed to perform.

[3] The arrest of the defendant legally put in abeyance his power or right to continue in the service of his surety. The law is not to be charged with the inconsistency of saying that a person who is legally detained in jail is required at the same time to be at work at another place. So long as the defendant was detained in the custody of the law under the new criminal charge brought against him, there was a suspension of the right of his hirer to exact the involuntary servitude provided for by the contract entered into on the confession of judgment for the fine and costs assessed on the previous conviction. During that time the law did not make it a crime for him to fail or refuse to do something which it did not permit him to do. The mere fact of the defendant's arrest and detention is not evidence of his guilt of the charge on which he was arrested.

[4] He is presumed to be innocent of the offense charged against him until his guilt has been legally proved. Nor can it be imputed to the defendant as a fault that he did not furnish bail and secure his release from custody so as to enable him to take up his duties to his hirer at the appointed time. Inability to furnish bail frequently is due to the poverty of the defendant and his friends. In short, while the defendant was detained under a lawful arrest, he was not chargeable with fault for failing to continue in the service of his hirer. There can be no question of the sufficiency of one's excuse for failing to be in person at one place at a given time when at that very time the law requires him to be in its custody at another place. While the defendant was under arrest, he cannot be said to have failed or refused without good and sufficient excuse to perform the service which he promised or agreed to perform for his hirer, within the meaning of the statute (Code, § 6846) making it a crime for him so to fail or refuse.

There was no evidence other than that above commented on tending to show that the appellant was guilty of the charge made against him. What has been said indicates the grounds of the court's conclusion that that evidence was legally insufficient to support the charge. It follows that the defendant was entitled to the general affirmative charge requested in his behalf.

Reversed and remanded.

JONES v. STATE.

(Court of Appeals of Alabama. Jan. 30, 1912.)
FINES (§ 15*)—STATE LAWS—MISDEMEANOR—
SENTENCE.

Where accused pleaded guilty to assault and battery, and there was no suggestion that

the prosecution was for violation of a municipal ordinance, the charge imported an offense against the criminal law of the state, under which accused could be punished only by a fine or imprisonment in the county jail or sentence to hard labor for the county for not more than six months, as provided by Code, § 6306, and it was therefore error for the court to sentence him to hard labor for the mayor and councilmen of the city.

[Ed. Note.—For other cases, see Fines, Cent. Dig. § 17; Dec. Dig. § 15.*]

Appeal from Law Court, Pike County; T. L. Borum, Judge.

Petition for writ of habeas corpus by Ike Jones. From a judgment dismissing the writ, the petitioner appeals. Reversed and rendered.

D. A. Baker, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. It appears from the petition for the writ of habeas corpus, the return to the writ, and the evidence offered on the hearing that the petitioner was detained by the superintendent of streets for the city of Troy under a sentence "to hard labor for the mayor and councilmen of Troy 200 days to pay fine, 8 days to pay costs," imposed by the mayor of Troy on petitioner's failure to pay or confess judgment for the fine and costs assessed against him on his plea of guilty to a charge of assault and battery.

The charge imported an offense against the criminal law of the state, as the petition alleged it to be; there being no suggestion that the prosecution was for a violation of a municipal ordinance. "When a person has been tried and convicted of any offense which is a misdemeanor under the state laws, by a municipal officer empowered by law to try such offenses, he must be punished as provided by law." This means that he shall be punished as provided by the laws of the state. *Culpepper v. Adams*, 1 Ala. App. 536, 55 South. 325. Under the state law a person convicted of an assault and battery must "be fined not more than five hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months." Code, § 6306. On a conviction on such a charge, there is no authority of law for sentencing the defendant to hard labor for a municipality.

It appearing that the judgment under which the petitioner was held is not within the power or jurisdiction of the mayor to impose on a conviction under such a charge, and is therefore void, the order or judgment appealed from is reversed, and a judgment discharging the appellant from custody will here be rendered.

Reversed and rendered.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

LEE v. STATE.

(Court of Appeals of Alabama. Feb. 1, 1912.)

MASTER AND SERVANT (§ 345*)—INTERFERENCE BY THIRD PERSON—CRIMINAL PROSECUTION—INDICTMENT.

An affidavit in a prosecution, under Code 1907, § 6850, which makes it an offense to interfere with or entice away any servant or laborer, etc., who has "contracted in writing to serve such other person for any given time not to exceed one year," which avers the enticing away of a servant or laborer who had "contracted in writing to serve affiant a given number of days, weeks, months, or for one year," is insufficient to sustain a conviction, as failing to show that the contract was for a term not exceeding one year.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1289; Dec. Dig. § 345.*]

Appeal from Coffee County Court; J. N. Ham, Judge.

George Lee was convicted of a misdemeanor, and he appeals. Reversed and remanded.

The affidavit was as follows: "Before me, R. A. King, clerk of the county court in and for said county, personally appeared J. D. Blue, who, being duly sworn, says on oath that he had probable cause for believing and does believe that within twelve months before the making of this affidavit, in this county, George Lee knowingly interfered with, hired, enticed away, or induced Lewis Brown, a laborer or servant who had stipulated or contracted in writing to serve affiant a given number of days, weeks, months, or for one year, before the expiration of the term stipulated or contracted for, such contract being in force and binding upon the parties thereto, without the consent of affiant, to whom such service was due, given in writing or in the presence of some credible person, against the peace and dignity," etc. The demurrer was that the complaint did not allege that the said Lewis Brown had contracted in writing to serve J. D. Blue for a given time, not to exceed one year, as required by law.

J. A. Carnley, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. To constitute the offense provided for by the statute (Code 1907, § 6850) against enticing away servants, renters, or laborers under a written contract, etc., the person knowingly interfered with, hired, employed, enticed away, or induced to leave the service of another before the expiration of his time contracted for, or upon whom an attempt is made to do either of these things, must have "contracted in writing to serve such other person for any given time, not to exceed one year." The affidavit

in the present case, on which the appellant was convicted, in averring that the laborer or servant charged to have been interfered with before the expiration of his term of service had "stipulated or contracted in writing to serve affiant a given number of days, weeks, months, or for one year," failed to show that the term of service contracted for was not to exceed one year. The contract mentioned may as well have been one for 24 months' service as one for a term of service not to exceed one year. The affidavit did not show the commission by the defendant of a criminal offense, and was insufficient to support a conviction.

Reversed and remanded.

MARTIN v. STATE.

(Court of Appeals of Alabama. Feb. 8, 1912.)

CRIMINAL LAW (§ 789*)—INSTRUCTION—REASONABLE DOUBT.

Where, though the court properly gave the general affirmative charge in favor of the state, there was still a question for the jury as to whether the evidence showed beyond a reasonable doubt that defendant was guilty, he was entitled to a requested charge on reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. § 789.*]

Appeal from Circuit Court, Lauderdale County; C. P. Almon, Judge.

Rube Martin was convicted of violating the prohibition law, and he appeals. Reversed and remanded.

The following is charge 5: "I charge you, gentlemen of the jury, if upon considering all the evidence you have a reasonable doubt of defendant's guilt, arising out of any part of the evidence, it is your duty to find him not guilty."

A. E. Walker and Almon & Andrews, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. Though the court properly gave the general affirmative charge in favor of the state, still it was a question for the jury whether the evidence showed beyond a reasonable doubt that the defendant was guilty, and he was entitled to have the court to give proper requested instructions bearing upon this question. The court was in error in refusing to give written charge 5, requested by the defendant. *Griffin v. State*, 150 Ala. 49. 43 South. 197.

It is not deemed necessary to a proper disposition of the case on another trial to pass upon other rulings presented for review.

Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

PHILLIPS v. STATE.

(Court of Appeals of Alabama. Jan. 30, 1912.)

1. CRIMINAL LAW (§ 1163*)—REVIEW—PRESUMPTION AS TO EFFECT OF ERROR.

Although the erroneous admission or rejection of evidence may sometimes be harmless, it is ordinarily reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163.*]

2. CRIMINAL LAW (§ 54*)—HOMICIDE (§ 203*)—EVIDENCE—DYING DECLARATIONS.

On a trial for manslaughter, declarations of deceased, made after the injury, but several days before he first stated that he believed he was going to die, which were not made in the presence of accused, and did not rebut any evidence introduced by accused, were hearsay and inadmissible; they not being dying declarations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 66; Dec. Dig. § 54;* Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

William Phillips was convicted of manslaughter, and he appeals. Reversed and remanded.

Espy & Farmer, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. It is a well-recognized rule of law that hearsay testimony is, except in certain well-recognized exceptions to the rule, illegal and inadmissible. The reasons for the exclusion of hearsay testimony are also well known, and we will not undertake to set them out. As jurors are, under our system of jurisprudence, the sole triers of the facts, it is essential to the due administration of the law that, in each case, they shall have before them all of the legal testimony which is offered as evidence in the cause, and only such evidence.

[1] While, in exceptional cases, an appellate court is sometimes able to say that the admission by a trial judge of illegal testimony, or the refusal by him to admit legal testimony, was, under the facts disclosed on the trial, harmless, such instances are not usual. Ordinarily erroneous rulings of a trial court in the admission or in the rejection

of evidence, if properly reserved for the consideration of an appellate court by the party aggrieved, will work a reversal of the judgment of the trial court. The reason is that an appellate court cannot say, ordinarily, what effect such erroneous ruling had upon the verdict of the jury. *Frierson v. Frierson*, 21 Ala. 549; *Lawson v. O'Rear*, 7 Ala. 784; *Mobley's Case*, 21 Ala. 277; *Thomas v. De Graffenreid*, 27 Ala. 651; 1 Mayfield's Dig., p. 129, § 20.

[2] In the present case the defendant cut the deceased with a knife, and about a week after receiving the wound the deceased came to his death from the wound so inflicted. It does not appear from the record that the deceased was aware of his dangerous condition until four or five days after the difficulty, at which time he stated to his attendants that he was going to die. On the day *after* the difficulty, about three or four days *before* the day on which the deceased announced to his attendants that he believed that he was going to die, Lewis Granger, a neighbor, called upon the deceased, and, according to the evidence of the widow of the deceased, had a conversation with deceased in her presence. On the trial of defendant for manslaughter in the first degree, the court, against the objection of the defendant, permitted the widow of the deceased to detail that conversation between Granger and deceased to the jury. The defendant was not present, the statements of the deceased were not admissible as dying declarations, and the statements of Granger were not under oath. The entire conversation was mere hearsay, was not in rebuttal of any evidence which the court had allowed to remain before the jury as evidence for the defendant, and was altogether inadmissible. We are not able to affirm that the admission of this evidence was not prejudicial to the defendant, and that its introduction was harmless error.

There are certain other objections to the rulings of the trial court on the evidence; but they may not arise on the next trial of this case, and we will not consider them.

For the error pointed out, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

DAVIE v. ROLAND.

(Court of Appeals of Alabama. Feb. 6, 1912.)

1. EVIDENCE (§ 354*)—DOCUMENTARY EVIDENCE—AUTHENTICATION—BOOKS OF ACCOUNT.

Where it appeared that plaintiff did not personally sell to defendant all the items charged on his account book, and did not himself make all the entries therein, but that some were made by his wife, as to the correctness of which he did not claim to have had personal knowledge, either at the time the sales were made or when the items were charged, the book was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*]

2. EVIDENCE (§ 354*)—DOCUMENTARY EVIDENCE—AUTHENTICATION—BOOKS OF ACCOUNT—CLERK.

Code 1907, § 4003, which authorizes the books of account of any merchant or other person doing a regular business and keeping daily entries thereof to be received in evidence as proof of such account, on condition that he kept no clerk, or else that the clerk is dead, or otherwise inaccessible, or disqualified, and upon proof, by the party's oath, that the book is his book of original entries, and upon inspection by the court to prevent the suspicion of fraud, requires that such conditions concur, and where a party offering his account book had had a clerk, not shown to be dead, inaccessible, or disqualified, the book was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*]

3. WITNESSES (§ 255*)—EXAMINATION—REFRESHING MEMORY—USE OF BOOKS OF ACCOUNT.

Where plaintiff offers his account book as proof of the account against defendant, it is permissible to allow him to refresh his memory by reference to entries therein made at or near the times of the sales referred to, where he had personal knowledge of the correctness of such entries; but his testimony as to entries of sales as to which he had no personal knowledge was inadmissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 874-890; Dec. Dig. § 255.*]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by G. E. Roland against M. S. Davie. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Pace & Chapman, for appellant. R. P. Coleman, for appellee.

WALKER, P. J. [1] The testimony of the plaintiff (the appellee here) in reference to the book to which the court permitted him to refer for the purpose of refreshing his memory as to the account sued on, and which subsequently it permitted him to offer in evidence, showed that he did not sell all the items charged thereon to the defend-

ant, and did not make all the entries thereon, a number of them being identified by him as having been made by his wife, as to the correctness of which he did not claim to have had personal knowledge at the times the sales were made or when the items were charged. On this testimony it was error to admit the book in evidence over the defendant's objection, seasonably interposed.

[2] The evidence did not show the existence of the conditions under which the statute (Code 1907, § 4003) authorizes "the books of account of any merchant, shopkeeper, physician, blacksmith, or other person doing a regular business and keeping daily entries thereof" to "be admitted in evidence as proof of such accounts." We understand the requirement of this statute to be that the three conditions set out in it must concur to render a book of account admissible in evidence as proof of an account contained in it. The first of these conditions is "(1) that he kept no clerk, or else the clerk is dead or otherwise inaccessible, or for any other reason the clerk is disqualified from testifying." In the present case it appeared from the testimony that the plaintiff did keep a clerk, and it was not made to appear that the clerk was dead or otherwise inaccessible, or that he was disqualified from testifying. Certainly such a meaning is not to be imputed to this statute as to give it the effect of authorizing, in such an event, the admission of the book in evidence as proof of the account sued on, upon showing the existence of either or both of the other conditions expressed in the statute, namely: "(2) Upon proof (the party's oath being sufficient) that the book tendered is his book of original entries; (3) upon inspection by the court, to see if the books are free from any suspicion of fraud."

[3] It was permissible to allow the plaintiff, for the purpose of refreshing his memory, to refer to entries on the book, made at or near the times of the sales referred to, of the correctness of which he had personal knowledge; but as to items on the book in reference to sales of which he had no personal knowledge, neither his testimony nor the entries on the book in reference to such items were admissible, in the absence of other competent evidence tending to show that such entries spoke the truth. *Stoudemire v. Harper Bros.*, 81 Ala. 242, 1 South. 857; *Horton v. Miller & Bro.*, 84 Ala. 537, 4 South. 370; *Louisville & Nashville R. Co. v. Cassibry*, 109 Ala. 697, 19 South. 900; *Wagar Lumber Co. v. Sullivan Logging Co.*, 120 Ala. 558, 24 South. 949.

Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

LEWIS v. STATE.

(Court of Appeals of Alabama. Feb. 1, 1912.)

1. INDICTMENT AND INFORMATION (§ 110*)—FORM—STATUTORY PROVISIONS.

Code 1907, § 7708, provides for punishment by fine and imprisonment in the county jail of any person knowingly and willfully opposing or resisting any officer of the state, county, or municipality in serving, executing, or attempting to serve or execute, any legal writ or process, or resisting any lawful arrest, whether under process or not. Code 1907, § 7161, form 92, prescribes the form of indictment for resisting an officer in executing process, as denounced by section 7708. No form of indictment is given by the Code for the resistance of lawful arrest, whether under process or not, also denounced by section 7708. *Held*, that the form prescribed for the resistance of the execution of process furnishes an analogy for the form of an indictment for resisting arrest, whether under process or not, and its sufficiency will be determined thereby.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

2. INDICTMENT AND INFORMATION (§ 110*)—FORMAL REQUISITES—SUFFICIENCY.

Where an indictment charged a defendant with knowingly and willfully opposing or resisting an officer or a constable in the arrest or attempt to arrest another person, who was in the actual commission of a public offense, it was sufficiently particular, under Code 1907, § 7161, form 92, which provides the form for an indictment for resisting an officer in executing process, and which charges the offense in the words, "did knowingly and willfully oppose or resist" the sheriff of said county in an attempt to serve or execute a writ.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

3. INDICTMENT AND INFORMATION (§ 72*)—SUFFICIENCY—STATUTORY PROVISIONS.

Under Code 1907, § 6267, which provides that an arrest may be made under a warrant or without a warrant by any sheriff, or other officer acting as sheriff, or his deputy, or by any constable, acting in their respective counties, or by any marshal, deputy marshal, or police of any incorporated city or town within the limits of the county, an indictment for a resistance of an arrest or attempt to arrest which charges that the arrest or attempt was by "an officer or constable of said county" is not objectionable for its alternative designation, as it imports an officer or constable of the county within the statute.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 195-199; Dec. Dig. § 72.*]

4. INDICTMENT AND INFORMATION (§ 180*)—TRIAL—ISSUES, PROOF, AND VARIANCE.

Where an indictment, in a prosecution for resisting an officer attempting to make or making an arrest, charges that the officer was "an officer or constable of the said county," proof that he was a deputy sheriff was not a variance, and was properly admitted.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 551-556; Dec. Dig. § 180.*]

5. CRIMINAL LAW (§ 364*)—EVIDENCE—RES GESTÆ.

Where, in a prosecution for resisting an officer in making an arrest, the officer testified that in arresting another person the defendant resisted him, and that he put him under arrest, but released him on his statement that he did not know it was an officer seeking to make

an arrest, further testimony that immediately thereafter he started running toward a house, exclaiming that he was not afraid of any damned officer and would get his gun, was admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805, 808-810, 813, 816-818; Dec. Dig. § 364.*]

6. OBSTRUCTING JUSTICE (§ 17½,* New, vol. 14, Key. No. Series)—TRIAL—QUESTION FOR JURY.

Evidence, in a prosecution for resisting an officer in making or attempting to make an arrest, held sufficient to go to the jury on the defendant's guilt.

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Lee Lewis was convicted of resisting an officer, and he appeals. Affirmed.

The indictment, omitting the formal part, was as follows: "Lee Lewis did knowingly and willfully oppose or resist R. L. Sears, an officer or constable of said county, in the lawful arrest of one Dave Robinson, who at the time of said lawful arrest was in the actual commission of a public offense. (2) Lee Lewis did knowingly and willfully oppose or resist R. L. Sears, an officer or constable of said county, in attempting to make a lawful arrest of one Dave Robinson, who at the time when said arrest was attempted was in the actual commission of a public offense, against the peace and dignity," etc. The demurrers to the indictment are that it fails to describe or allege the existence of any legal process which would justify the arrest of Dave Robinson; fails to allege that at the time Sears was attempting to arrest Robinson, Robinson was engaged in the commission of the offense for which said Sears was attempting to arrest him; fails to allege that Robinson, at the time Sears was attempting to arrest him, was charged with any offense; fails to designate with a sufficient degree of accuracy in what official capacity Sears was acting at the time he made the arrest, or attempted to make the arrest, of said Robinson.

Alex H. Clark and Phil H. Stern, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

WALKER, P. J. The indictment in this case contained two counts, the first of which charged that the defendant "did knowingly and willfully oppose or resist R. L. Sears, an officer or constable of said county, in the lawful arrest of one Dave Robinson, who at the time of said arrest was in the actual commission of a public offense." The second count is similar in its averments, except that it charges that the defendant so opposed or resisted the officer mentioned in attempting to make the arrest referred to in the first count. The court overruled the defendant's demurrer to the indictment, and to each count of it, separately and severally.

[1] The form of indictment prescribed by

the Code (Code, § 7161, form 92) for an offense under section 7708 is applicable to the offense of opposing or resisting an officer in serving, executing, or attempting to serve any legal writ or process; no form of indictment being given for the offense, also provided for by that section, of resisting any lawful arrest, whether under process or not. But the form prescribed for an offense under one clause of that statute furnishes an analogy for a form of indictment for the offense provided for by the other clause of the statute.

[2, 3] The indictment in this case has as much particularity in its allegations as that prescribed by the Code. It was not subject to objection because of the alternative designation of the office of the person by whom the arrest was made or attempted. *Murphy v. State*, 55 Ala. 252. The charge that the arrest or attempt to arrest was by "R. L. Sears, an officer or constable of said county," imported that he was an officer authorized to make arrests within the limits of the county, within the meaning of the statute on that subject. Code, § 6267. In averring that the arrest made or attempted was of a person who at the time was in the actual commission of a public offense, the arrest is as fully described as the warrant or writ of arrest is required to be described when the defendant is charged with resisting an officer in making or attempting to make an arrest under a warrant or writ of arrest. *Howard v. State*, 121 Ala. 21, 25 South. 1000. No greater particularity is required in the one case than in the other. We are of opinion that the indictment in this case with sufficient fullness directly and expressly alleged the fact in the doing of which the offense consists, "in such a manner as to enable a person of common understanding to know what is intended, and with that degree of

certainty which will enable the court, on conviction, to pronounce the proper judgment," and that it was not subject to any of the objections assigned in the demurrer. Code, § 7134; *Grattan v. State*, 71 Ala. 344.

[4] The evidence that the officer making the arrest was a deputy sheriff of the county was not variant from the allegation of the indictment that he was "an officer or constable of said county," and the motion to exclude the evidence on the ground that there was a variance in this respect was properly overruled.

[5] The testimony of the officer who arrested Dave Robinson tended to show that the defendant resisted him in making that arrest, and that thereupon he put the defendant under arrest, but released him upon his statement to the effect that he did not know it was an officer seeking to make an arrest. It was not improper to permit the officer to state that, immediately upon such release, the defendant started running towards the house, exclaiming that he was not afraid of any damned officer, and would get his gun. The act and statement deposed to were so immediately connected with the conduct of the defendant in reference to the arrest of Robinson as to constitute a part of it, and the evidence was not subject to objection on the ground that it was in reference to a subsequent and disconnected occurrence.

[6] There was evidence tending to prove that the arrest of Robinson was for a public offense, which he was in the act of committing in the presence of the officer at the time of the arrest. The defendant was not entitled to the general affirmative charge requested in his behalf, on the ground that there was a lack of such evidence, or on any other ground.

Affirmed.

MEMORANDUM DECISIONS

ALDREDGE v. BARNETT. (Supreme Court of Alabama. Jan. 11, 1912.) Appeal from Probate Court, Winston County; John S. Curtis, Judge.

PER CURIAM. Affirmed on certificate.

ANONYMOUS. (Supreme Court of Alabama. Jan. 18, 1912.) Appeal from Chancery Court, Chambers County; W. W. Whiteside, Chancellor. Decree for defendant. Complainant appeals. Affirmed. C. S. Moon, E. M. Oliver, and Strother, Hines & Fuller, for appellant. N. D. Denson, for appellee.

SIMPSON, J. After a careful consideration of the testimony in this case, we hold that the chancellor correctly held that "the complainant has not made out his case by that preponderance of testimony which the law requires." There is not any evidence to indicate that the respondent had been anything other than a pure woman up to the time of her connection with the complainant, and there is a verisimilitude about her testimony that leads us to the conclusion that her account of her intercourse and marriage with the complainant cannot be cast aside by the character of evidence which opposes it. No good can result by publishing the conflicting testimony in this case. The decree of the court is affirmed. Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

BLEY et al. v. LEWIS. (Supreme Court of Alabama. Feb. 8, 1912.) Appeal from Law and Equity Court, Marengo County; Edward J. Gilder, Judge.

PER CURIAM. Affirmed on certificate.

ERWIN v. BURDINE. (Supreme Court of Alabama. Jan. 30, 1912.) Appeal from Law and Equity Court, Madison County; Tancred Betts, Judge. Spragins & Speake, for appellant. Cooper & Cooper, for appellee.

PER CURIAM. Dismissed on motion of appellee.

HARMON et al. v. CROSWELL et al. (Supreme Court of Alabama. Jan. 30, 1912.) Appeal from Chancery Court, Pike County; L. D. Gardner, Chancellor. Action by Dinah and Miles Croswell against Annie Harmon and others. Judgment for plaintiffs, and defendants appeal. Affirmed. Foster, Samford & Carroll, for appellants. John H. Wilkerson, for appellees.

MAYFIELD, J. The bill in this case sought to have a certain instrument, in form an absolute deed, declared to be a mortgage, and to redeem. The law applicable to such cases has been so often declared by this court that it is unnecessary to restate it, being dealt with in a long line of cases, extending from *English v. Lane*, 1 Port. 328, to *Rodgers v. Burt*, 157 Ala. 104, 47 South. 226, and there is no dispute as to its applicability. The sole question of difference between counsel is the sufficiency vel non of the evidence to support the averments of the bill and the decree of the chancellor granting the relief prayed. The whole record, together with the exhibits sent up by the lower court for our inspection, has been here carefully ex-

amined, and we agree with the chancellor in his findings and conclusions. It would serve no good purpose to discuss the evidence, it being voluminous, and much of it being very conflicting; but upon the whole we think the complainant met and discharged the burden of proof which the law places upon him in such cases. Affirmed. All the Justices concur.

Ex parte JONES. (Supreme Court of Alabama. Jan. 11, 1912.) Kidd & Darden, for petitioner. Riddle, Ellis, Riddle & Pruett, for respondent.

PER CURIAM. Petition dismissed. See, also, 55 South. 491.

KING v. ROGERS et al. (Supreme Court of Alabama. Feb. 8, 1912.) Appeal from Chancery Court, Sumter County; Thomas H. Smith, Chancellor.

PER CURIAM. Appeal dismissed.

STROTHER et al. v. TUMLIN. (Supreme Court of Alabama. Jan. 18, 1912.) Appeal from Shelby County Court; E. S. Lyman, Judge.

PER CURIAM. Affirmed on certificate.

WILSON v. T. K. BRANTLEY & SON et al. (Supreme Court of Alabama. Jan. 18, 1912.) Appeal from Chancery Court, Coffee County; L. D. Gardner, Chancellor. J. F. Sanders, for appellant. Foster, Samford & Carroll, for appellees.

PER CURIAM. Appeal dismissed by agreement.

ANNISTON ELECTRIC & GAS CO. v. JACKSON. (Court of Appeals of Alabama. Dec. 21, 1911.) Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge. Knox, Acker, Dixon & Sterne, for appellant.

PER CURIAM. Dismissed on motion of appellant.

DRAKE v. STATE. (Court of Appeals of Alabama. Feb. 8, 1912.) Appeal from Law and Equity Court, Madison County; James H. Ballentine, Judge. Betts & Betts, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PER CURIAM. Appeal abated by death of appellant.

HARRISON v. ELDRIDGE. (Court of Appeals of Alabama. Jan. 16, 1912.) Appeal from Circuit Court, Houston County; H. A. Pearce, Judge. E. H. Hill, for appellant. Gaines & Mathis, for appellee.

PER CURIAM. Affirmed for want of assignment of error.

HAWKINS v. STATE. (Court of Appeals of Alabama. Jan. 9, 1912.) Appeal from City Court of Montgomery; Armstead Brown,

Judge. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PER CURIAM. There is no bill of exceptions, and the time for filing has expired. No error appears in the record, and the judgment of conviction is affirmed. Affirmed.

HUDGINS v. STATE. (Court of Appeals of Alabama. Jan. 18, 1912.) Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed on motion of appellant.

JONES v. STATE. (Court of Appeals of Alabama. Dec. 19, 1911.) Appeal from Criminal Court, Jefferson County; Samuel L. Weaver, Judge. Robert C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

PER CURIAM. No error appears of record, and, no bill of exceptions having been filed within the time provided by law, the case will be affirmed. Affirmed.

LENOX v. STATE. (Court of Appeals of Alabama. Feb. 8, 1912.) Appeal from Law and Equity Court, Madison County; J. H. Ballentine, Judge. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PER CURIAM. No error is disclosed by the record. Affirmed.

McNAIR v. STATE. (Court of Appeals of Alabama. Jan. 18, 1912.) Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed on motion of appellant.

MAYFIELD v. STATE. (Court of Appeals of Alabama. Jan. 18, 1912.) Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed on motion of appellant.

MERKLE & WHITTON v. J. P. HINSON LUMBER CO. (Court of Appeals of Alabama. Jan. 16, 1912.) Appeal from Circuit Court, Houston County; H. A. Pearce, Judge. E. H. Hill, for appellant. B. F. Reid, for appellee.

PER CURIAM. Affirmed for want of assignment of error.

MITCHELL v. HAWKINS. (Court of Appeals of Alabama. Nov. 28, 1911.) Appeal from City Court of Birmingham; C. C. Ne Smith, Judge.

PER CURIAM. Dismissed for want of prosecution. See, also, 55 South. 1038.

POPE v. STATE. (Court of Appeals of Alabama. Dec. 21, 1911.) Appeal from Criminal Court, Jefferson County; M. Frank Cahalan, Judge. Robert C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

WALKER, P. J. There is no error in the record. Affirmed.

SCHRIMMSCHER v. STATE. (Court of Appeals of Alabama. Feb. 8, 1912.) Appeal from Law and Equity Court, Madison County; J. H. Ballentine, Judge. Alvis Schrimmscher was convicted of an offense, and he appeals. Affirmed. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PER CURIAM. There is no bill of exceptions contained in the record in this case, and no error apparent upon the record. The judgment of the court below is therefore affirmed. Affirmed.

SWIMMS et al. v. CITY OF FLORENCE. (Court of Appeals of Alabama. Feb. 8, 1912.) Appeal from Circuit Court, Lauderdale County; C. P. Almon, Judge.

PER CURIAM. Affirmed on certificate.

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PER CURIAM. Dismissed for want of assignment of errors.

WEIR v. STATE (two cases). (Court of Appeals of Alabama. Jan. 11, 1912.) Appeals from City Court of Gadsden; James A. Bilbro, Judge. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. Abated by death of appellant. See, also, 55 South. 1038.

WILLIAMS v. STATE. (Court of Appeals of Alabama. Nov. 30, 1911.) Appeal from Criminal Court, Jefferson County; William E. Fort, Judge. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. No bill of exceptions, and no error apparent of record.

WILLIAMS v. STATE. (Court of Appeals of Alabama. Jan. 30, 1912.) Appeal from Law Court, Pike County; T. L. Borum, Judge. Addie Belle Williams was convicted of an offense, and she appeals. Affirmed. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PER CURIAM. No bill of exceptions having been filed in this case within the time prescribed by law, and there being no error in the record, the judgment of the lower court will be affirmed. Affirmed.

WILSON v. STATE. (Court of Appeals of Alabama. Dec. 19, 1911.) Appeal from Tuscaloosa County Court; Henry B. Foster, Judge. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. The record shows no error, and the case is affirmed. Affirmed.

WILSON v. STATE. (Court of Appeals of Alabama. Feb. 8, 1912.) S. W. Frierson, for petitioner. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PER CURIAM. Petition for writ of error to the circuit court of Lauderdale county. Petitioner dismissed.

WILSON, MERCANTILE CO. v. MARTIN. (Court of Appeals of Alabama. Jan. 30, 1912.) Appeal from Circuit Court, Lawrence County; D. W. Speake, Judge.

PER CURIAM. Appeal dismissed.

ANSLEY v. ATLANTIC COAST LINE R. CO. (Supreme Court of Florida, Division A. Dec. 19, 1911.) Error to Circuit Court, Hernando County; W. S. Bullock, Judge. Action between Claude T. Ansley, doing business as the Ansley Wood Company, and the Atlantic Coast Line Railroad Company. From the judgment, Ansley brings error. Affirmed. See, also, 55 South. 1039. Davant & Davant, for plaintiff in error. Geo. C. Martin and R. A. Burford, for defendant in error.

PER CURIAM. This cause coming on for final hearing upon transcripts of record, briefs of the respective parties, and oral argument of

the plaintiff in error, and having been duly considered by Division A, and no reversible error having been made to appear, it is therefore considered, ordered, and adjudged by the court that the judgment of the circuit court, to review which the writ of error was sued out herein, be and the same is hereby affirmed, at the cost of the plaintiff in error.

DAVIS v. STATE. (Supreme Court of Florida. Jan. 13, 1912.) Error to Criminal Court of Record, Walton County; E. D. Beggs, Judge. Anderson Davis was convicted of larceny, and brings error. Reversed. S. K. Gillis, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

PER CURIAM. In the criminal court of record for Walton county, Anderson Davis was convicted of the larceny of a cow, and took writ of error. The evidence does not show a felonious taking of the property as alleged, and the judgment is reversed.

END OF CASES IN VOL. 57.

*

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§ 664 (Ala.App.) A recital in a judgment entry *held* not to warrant a conclusion that issues tendered by pleadings other than defendant's pleas were waived or abandoned.—*Avery & Co. v. Turner*, 57 So. 255.

(K) Questions Presented for Review.

§ 701 (Ala.App.) Where the bill of exceptions failed to disclose what certain evidence was which was alleged by the bill to have been introduced, rulings based on such evidence are not reviewable.—*Hunnicut Lumber Co. v. Mobile & O. R. Co.*, 57 So. 73.

XI. ASSIGNMENT OF ERRORS.

§ 733 (Ala.App.) A judgment in detinue based on an improper verdict *held* not reviewable, in the absence of an assignment of error to the specific objection.—*Peters v. Nolen*, 57 So. 398.

§ 736 (Ala.) A joint assignment of error will be overruled, unless sustainable on both grounds.—*Continental Casualty Co. v. Ogburn*, 57 So. 852.

§ 737 (Ala.App.) Where one of two counts was good, an assignment that the court erred in overruling a demurrer to both counts could not be sustained.—*Burton v. Phillips*, 57 So. 152.

XII. BRIEFS.

§ 758 (Ala.App.) Civ. Code 1907, p. 1508, rule 10, requiring each ground of error insisted on to be separately presented, *held* not complied with.—*North Alabama Traction Co. v. Taylor*, 57 So. 146.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

§ 784 (Ala.) In view of Code 1907, §§ 2883, 2886, prohibiting dismissal of an appeal for irregularity in taking the appeal, or for want of a sufficient appeal bond, defects in a supersedeas bond, in not naming one of the defendants among the obligees, and in not naming the sureties in the body of the bond, are not ground for dismissal of the appeal.—*Birmingham Trust & Savings Co. v. Currey*, 57 So. 962.

§ 787 (Miss.) *Held*, that there was no such delay as warranted dismissal of an appeal.—*McAllister v. Richardson*, 57 So. 547.

§ 797 (Ala.App.) Under Code 1907, p. 1517, rule 41, a transcript filed within the term *held* sufficient where motion to dismiss was not filed within the time limited.—*Peters v. Nolen*, 57 So. 398.

§ 805 (La.) Where appellant files bond on a devolutive appeal, but fails to file transcript within the required time, it is an abandonment of the appeal.—*Cox v. Hope Shingle & Lumber Co.*, 57 So. 899.

XVI. REVIEW.

(A) Scope and Extent in General.

§ 837 (Ala.) A plea not filed until after the rejection of testimony cannot be looked to in determining its correctness.—*Southern Cotton Oil Co. v. Harris*, 57 So. 854.

§ 843 (Ala.App.) Where plaintiff indicated a purpose to abandon any claim based on specified counts of the complaint, the overruling of a demurrer to such counts would not be considered.—*Hudson v. Wright*, 57 So. 90.

§ 843 (Miss.) Where the parol evidence rule in Mississippi and in a sister state in which a contract was executed is the same, whether the contract is governed by the *lex fori* or the *lex loci* *held* immaterial.—*English v. New Orleans & N. E. R. Co.*, 57 So. 223.

§ 852 (Ala.) Where a verdict in ejectment was rendered on a plea of "not guilty," rulings on motions to strike and demurrers to special pleas will not be considered on review.—*Leath v. Cobia*, 57 So. 972.

§ 863 (Ala.) On appeal from a decree overruling a demurrer to a bill to remove the settlement and administration of an estate from the probate to the chancery court, *held*, that the will could not be construed.—*Ashurst v. Ashurst*, 57 So. 442.

§ 866 (Ala.App.) Appellant may only have reviewed, on appeal from a nonsuit taken under Code 1907, § 3017, the rulings causing the nonsuit.—*Corn Products Refining Co. v. Dreyfus Bros.*, 57 So. 517.

(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions.

§ 874 (Fla.) On appeal from temporary restraining order, where contract breached *prima facie* justifies the order, appellate court *held*, not required to make minute critical examination to see if some portion of the contract be invalid.—*Bowman v. Arey*, 57 So. 206.

(C) Parties Entitled to Allege Error.

§ 882 (Miss.) A party cannot complain of an erroneous instruction, where instructions embodying the same principle were given at his request.—*New Orleans, M. & C. R. Co. v. Cole*, 57 So. 556.

§ 883 (Fla.) Objections specifically abandoned in the circuit court cannot be renewed in the Supreme Court.—*Collier v. Cassady*, 57 So. 617.

(D) Presumptions.

§ 901 (Ala.App.) The record on appeal must affirmatively show error of the trial court to authorize a reversal.—*Davis v. Clausen*, 57 So. 79.

§ 901 (Ala.App.) Error must be affirmatively shown on appeal, and will not be presumed.—*Bickley v. Sherrod*, 57 So. 1018.

§ 901 (Fla.) The appellant or plaintiff in error must make the errors clearly appear; every presumption being in favor of the correctness of the rulings of the trial court.—*Bank of Jasper v. Tuten*, 57 So. 238.

§ 907 (Ala.) Giving the affirmative charge for defendant in ejectment *held* not shown error by a bill of exceptions not purporting to set out all or substantially all the evidence.—*Beard v. Du Bose*, 57 So. 703.

§ 916 (Ala.App.) On appeal, *held* that it would be presumed that defendants waived the filing of a complaint.—*Zavelo v. J. Goldstein & Co.*, 57 So. 102, 103.

§ 917 (Ala.) Where demurrers sustained by the trial court are not set out in the record, the Supreme Court presumes that the demurrers properly stated a valid objection to the pleading.—*Richardson v. Mertins*, 57 So. 720.

§ 926 (Fla.) That bonds properly in evidence as to some parties are copied in the transcript *held* not to raise conclusive presumption that they were properly used in evidence as to all parties.—*International Kaolin Co. v. Vause*, 57 So. 360.

§ 928 (Ala.App.) Where it is not shown that the bill of exceptions contains all of the evidence, the Court of Appeals must presume that an affirmative charge, abstractly correct, was justified by the evidence.—*Bickley v. Sherrod*, 57 So. 1013.

§ 934 (Fla.) In equity, as well as at law, final decree will not be reversed, unless the evidence clearly shows error.—*Bank of Jasper v. Tuten*, 57 So. 238.

§ 934 (Fla.) Final decree, based largely on questions of fact, will not be reversed, unless clearly erroneous.—*Dixon Lumber Co. v. Jennings*, 57 So. 615.

§ 938 (Ala.App.) Bills of exceptions are construed most strongly against the exceptor.—*Bickley v. Sherrod*, 57 So. 1018.

(G) Questions of Fact, Verdicts, and Findings.

§ 992 (Ala.) The ruling of the trial court upon the qualification of nonexpert witnesses to testify as to the sanity of a person will not be reviewed, unless clearly appearing erroneous.—*Johnston v. Johnston*, 57 So. 450.

§ 1002 (Ala.App.) A verdict of a jury in an action on an insurance policy *held* conclusive as to the fact of payment of dues.—*District Grand Lodge No. 23, United Order of Odd Fellows in America v. Hill*, 57 So. 147.

§ 1004 (Ala.App.) The court on appeal will not reverse for excessiveness of verdict where the lower court refused to grant a new trial thereon.—*Southern Ry. Co. v. Proctor*, 57 So. 513.

§ 1005 (Ala.) Denial of a new trial on conflicting evidence *held* not reviewable.—*Louisville & N. R. Co. v. Hutcherson*, 57 So. 379.

§ 1009 (Fla.) A final decree, based on questions of fact, will not be reversed, unless the evidence clearly shows it to be erroneous.—*Stanley v. Thompson*, 57 So. 196.

§ 1009 (Fla.) The findings of a chancellor on testimony taken before a master or examiner will not be disturbed, unless clearly erroneous.—*Bank of Jasper v. Tuten*, 57 So. 238.

§ 1009 (Fla.) Finding by chancellor on conflicting evidence will be affirmed.—*Alles v. Diaz*, 57 So. 614.

§ 1009 (Fla.) A decree will not be reversed, as being against the evidence and because no replication was filed, when ample evidence to support the decree was filed by consent.—*Gillett v. Beacham*, 57 So. 615.

§ 1009 (Fla.) Findings of chancellor should not be disturbed, unless clearly erroneous.—*Dixon Lumber Co. v. Jennings*, 57 So. 615.

§ 1010 (Ala.App.) Where the findings of the trial court are supported by the evidence, its conclusions as to all matters over which it had jurisdiction, and the judgment as to all such matters, should not be disturbed on appeal.—*Copeland v. Dixie Lumber Co.*, 57 So. 124.

§ 1010 (Fla.) Finding that a sale of goods was out of the usual course of business of the vendor, which is justified by the evidence, *held*

not to be disturbed by the Supreme Court.—*Goldstein v. Maloney*, 57 So. 342.

§ 1011 (La.) Where the evidence is conflicting, the findings of the trial judge will not be disturbed unless clearly against the preponderance of the evidence.—*Boudreaux v. First Nat. Bank*, 57 So. 990.

§ 1013 (La.) Judgment as to damages on conflicting evidence will not be disturbed.—*Police Jury of Parish of Iberville v. Texas & P. Ry. Co.*, 57 So. 163.

§ 1019 (Ala.) The finding by the register, in an action against a mortgagee of chattels for an accounting, as to the value of a horse, based upon conflicting evidence, is conclusive.—*Zadek v. Burnett*, 57 So. 447.

§ 1019 (Fla.) Where the evidence is conflicting the judgment of a referee will not be disturbed.—*Dowling Lumber Co. v. King*, 57 So. 337.

§ 1021 (Fla.) Where amount of damages found by referee is in accordance with issues and is not manifestly unreasonable, judgment will not be disturbed on appeal.—*Warfield v. Hepburn*, 57 So. 618.

(H) Harmless Error.

§ 1026 (Ala.) The court on appeal *held* not authorized to affirm a decree, merely because some of the appellants are not prejudiced thereby.—*Farr v. Chambless*, 57 So. 458.

§ 1033 (Ala.) A respondent who demurs and files a cross-bill against which demurrer is filed cannot on appeal from a decree overruling both demurrers complain that the demurrer to his cross-bill was overruled.—*Ashurst v. Ashurst*, 57 So. 442.

§ 1033 (Ala.App.) Appellant cannot complain that the trial court instructed the jury on a matter not put in issue by appellant's pleading.—*Avery & Co. v. Turner*, 57 So. 255.

§ 1040 (Ala.) Error in sustaining a demurrer which did not specify inaptness of a plea as a defense is harmless where the plea was not amendable.—*Montgomery County v. Pruet*, 57 So. 823.

Sustaining a demurrer to a plea of nonperformance in an action on contract *held* harmless in view of general denial.—*Id.*

To entitle defendant to a reversal, he must show that benefit from a special plea to which a demurrer was sustained would not be received from other pleadings.—*Id.*

§ 1040 (Ala.) Sustaining a demurrer to a plea is harmless where the defendant had the benefit of the facts therein alleged under other pleas.—*Southern Cotton Oil Co. v. Harris*, 57 So. 854.

§ 1040 (Ala.App.) Any error in sustaining demurrers to special pleas was harmless to defendant where defendant had the benefit of the facts alleged in such pleas under the general issue.—*Alexander v. Smith*, 57 So. 104.

§ 1040 (Ala.App.) The error, if any, in sustaining demurrers to a special plea alleging matters available under other pleas, is harmless.—*National Chemical Co. v. National Aniline & Chemical Co.*, 57 So. 114.

§ 1040 (Ala.App.) Defendant was not prejudiced by the sustaining of demurrers to pleas of contributory negligence, where it received the full benefit of such defense under pleas on which issue was joined.—*Birmingham Ry., Light & Power Co. v. Hunnicutt*, 57 So. 262.

§ 1040 (Fla.) Sustaining demurrers to a second set of replications setting up practically the same matters as in the first set *held* a practical revocation of the overruling of demurrers to the first set.—*Erickson v. Insurance Co. of North America*, 57 So. 340.

§ 1042 (Ala.) Error may not be predicated on the court's refusal to strike matters from the complaint.—*Bixby-Theisen Co. v. Evans*, 57 So. 39.

§ 1046 (Fla.) Trial of cause in the absence of defendant's counsel *held* no ground for reversal in the absence of a showing of abuse of discretion.—*American Tie & Timber Co. v. Washington*, 57 So. 201.

§ 1048 (Ala.) Overruling a valid objection to a question not answered by witness, or else answered favorably to the party objecting, is not prejudicial error.—*Cooper v. Slaughter*, 57 So. 477.

§ 1048 (Ala.) Overruling objection to a question cannot be complained of as error where the witness answered that he did not know.—*Southern Cotton Oil Co. v. Harris*, 57 So. 854.

§ 1050 (Ala.) Admission of parol evidence as to the time and place of conversations between plaintiff and defendant's president *held* harmless.—*Bixby-Theisen Co. v. Evans*, 57 So. 39.

§ 1050 (Ala.) In ejectment, the error in admitting evidence *held* not prejudicial.—*Chambly v. Williams*, 57 So. 374.

§ 1050 (Ala.) Reception of map of survey in evidence, which added nothing of value to the surveyor's oral testimony, *held* harmless.—*Cooper v. Slaughter*, 57 So. 477.

§ 1050 (Ala.) In trespass for the taking of goods, admission of evidence of a sheriff as to notice of a second levy given *held* at most harmless error, it being immaterial.—*Southern Cotton Oil Co. v. Harris*, 57 So. 854.

§ 1050 (Ala.App.) The error in the mode of proving signatures to a note and mortgage securing it *held* harmless.—*Moseley v. Selma Nat. Bank*, 57 So. 91.

In detinue by the transferee of a chattel mortgage for the chattels covered thereby, the error in the admission of certain evidence *held* not prejudicial.—*Id.*

§ 1050 (Fla.) Where the plaintiff and defendant in ejectment claim through a common source of title, errors committed in allowing improper evidence of such common title are harmless.—*Investment Co. v. Trueman*, 57 So. 663.

§ 1051 (Ala.) In a suit to quiet title to swamp land, defendant's patent from the state, under Acts 1911, p. 192, being prima facie proof of title, plaintiff was not prejudiced by the introduction of evidence of entries in the books of the State Treasurer, showing payment for the land by the patentee.—*Brue v. McMillan*, 57 So. 486.

§ 1051 (Ala.) Admission of a void order appointing trustees in a suit in ejectment by such trustees *held* not prejudicial, in view of other evidence.—*Busbee v. Thomas*, 57 So. 587.

§ 1051 (Ala.) Any error in admission of the record of a mortgage is harmless, it being an exact duplicate of the original mortgage, already in evidence.—*Mills v. Hudmon & Co.*, 57 So. 739.

§ 1056 (Ala.) The improper exclusion of a deed offered by defendant to show color of title was harmless where the evidence of adverse possession was insufficient to establish his right to any part of the land.—*Brannan v. Henry*, 57 So. 967.

§ 1056 (Ala.App.) Exclusion of relevant evidence is not reversible if appellant was not prejudiced.—*Birmingham Ry., Light & Power Co. v. Demmins*, 57 So. 404.

§ 1058 (Ala.App.) The exclusion of testimony later admitted is harmless, if erroneous.—*V. J. Forrester & Bro. v. J. A. May Co.*, 57 So. 64.

§ 1058 (Ala.App.) Error in permitting plaintiff to introduce a part only of defendant's deposition *held* not cured.—*North Alabama Traction Co. v. Daniel*, 57 So. 120.

Defendant *held* not prejudiced by a ruling permitting plaintiff to introduce a part only of defendant's deposition.—*Id.*

The sustaining of an objection to a question was without prejudice where the witness answered.—*Id.*

§ 1058 (Ala.App.) Sustaining an objection to a question put to a witness is not prejudicial, where the question was practically answered.—Polytinsky v. M. F. Patterson & Son, 57 So. 130.

§ 1058 (Ala.App.) A street railway company sued for collision between its car and a vehicle *held* not prejudiced by exclusion of testimony relating to the driver's acts.—Birmingham Ry., Light & Power Co. v. Demmins, 57 So. 404.

§ 1060 (Ala.) Denial of a motion for a new trial because of improper remarks of plaintiff's counsel *held* prejudicial error.—Birmingham Ry., Light & Power Co. v. Drennen, 57 So. 878.

§ 1062 (Ala.) Certain errors in a will contest *held* harmless to the proponent.—Johnston v. Johnston, 57 So. 450.

§ 1062 (Miss.) A plaintiff, who received a verdict, cannot complain that the court refused its instruction for a peremptory instruction.—New Orleans, M. & O. R. Co. v. Cole, 57 So. 556.

§ 1066 (Ala.) Charge relating to issue, which by stipulation had been eliminated from the case, *held* harmless.—Cooper v. Slaughter, 57 So. 477.

§ 1066 (Ala.) An abstract charge as to distances in a deed in ejectment *held* not erroneous.—Busbee v. Thomas, 57 So. 587.

§ 1066 (Fla.) Where the value of property lost or damaged in shipment shall be computed at place and time of shipment, *held*, not reversible error to charge that its value should be computed at the time and place of delivery, where the value was the same in both places.—Seaboard Air Line Ry. v. Rentz, 57 So. 612.

§ 1068 (Ala.) Erroneous contradictions in instructions are prejudicial error, where it cannot be determined which instruction was followed.—Christopher v. Curtis-Attalla Lumber Co., 57 So. 837.

§ 1068 (Ala.App.) The error in instructions permitting punitive damages *held* reversible.—Edwards v. Massingill, 57 So. 400.

§ 1068 (Ala.App.) Any error in authorizing recovery for punitive damages was harmless where the jury allowed actual damages only.—Birmingham Ry., Light & Power Co. v. Demmins, 57 So. 404.

§ 1068 (Fla.) In action against electric railroad company for injuries, erroneous instruction *held* to require reversal unless the evidence was such that the verdict could not have been different.—Farnsworth v. Tampa Electric Co., 57 So. 233.

§ 1073 (Fla.) Entry of default while a plea stood undisposed of *held* harmless, under the circumstances.—Franklin Phosphate Co. v. International Harvester Co. of America, 57 So. 206.

(I) Error Waived in Appellate Court.

§ 1078 (Ala.) A court on appeal will not consider refused charges which are not argued.—Busbee v. Thomas, 57 So. 587.

§ 1078 (Ala.) The failure to argue assignments of error to the overruling of demurrer further than to assert that the demurrer was improperly overruled is a waiver of the assignments.—Richardson v. Mertins, 57 So. 720.

§ 1078 (Ala.App.) Assignments of error *held* waived for insufficient presentation in the briefs.—Carbon Hill & Lost Creek Coal Co. v. W. P. Cooper & Son, 57 So. 81.

§ 1078 (Ala.App.) Assignments of error based on the giving of charges not supported by argument or citation of authority need not be considered on appeal.—Polytinsky v. M. F. Patterson & Son, 57 So. 130.

§ 1078 (Ala.App.) An assignment of error to the refusal of certain charges was waived

where the assignment was not argued.—Burton v. Phillips, 57 So. 152.

(K) Subsequent Appeals.

§ 1097 (La.) Where a motion to dismiss appeal has been overruled by Supreme Court, the matter *held* concluded on subsequent appeal.—Christina v. Cusimano, 57 So. 157.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) Decision in General.

§ 1118 (La.) A judgment cannot be amended as between coappellees.—Smith v. American Bridge Co., 57 So. 891.

(B) Affirmance.

§ 1135 (Fla.) Where evidence sustains verdict and no material error appears, the judgment will be affirmed.—Farnsworth v. Tampa Electric Co., 57 So. 233.

§ 1140 (Fla.) Under the statute authorizing recovery of compensation, where punitive damages are erroneously allowed, a remittitur may be ordered.—Florida East Coast R. Co. v. Schumacher, 57 So. 603.

(C) Modification.

§ 1151 (La.) Damages will be increased on appeal, but not beyond the amount claimed by plaintiff before suit.—Smith v. American Bridge Co., 57 So. 891.

(D) Reversal.

§ 1171 (Ala.App.) Where the evidence offered by plaintiff is such as to support a verdict for an amount which would carry costs, the error in excluding the evidence was prejudicial.—Kendrick & McGough v. Chafin, 57 So. 78.

§ 1171 (Ala.App.) The error, if any, in an instruction on the measure of damages in trover, *held* not to justify a reversal.—Blair v. Riddle, 57 So. 382.

§ 1175 (Ala.App.) Where the judgment in detinue did not follow the verdict, it was not reversible error, but the appellate court will enter a proper judgment.—Stinson v. Faircloth Byrd Co., 57 So. 143.

§ 1175 (Miss.) The Supreme Court is not authorized to consider the merits of a controversy, unless passed on in the lower court.—Ascher & Baxter v. Edward Moyse & Co., 57 So. 299.

§ 1177 (Fla.) When an erroneous charge could have misled the jury a new trial will be granted.—Farnsworth v. Tampa Electric Co., 57 So. 233.

§ 1178 (La.) Where court treats opposition of person claiming ownership and possession of property seized under execution as possessory action, the case will be remanded for decision on issue of title.—Mouton v. Southern Sawmill Co., 57 So. 934.

§ 1180 (Ala.) A reversal of a judgment under which a building was taken off premises by a lienholder under Code 1907, § 4756, *held* not to authorize an action in trespass.—Wildman v. Evans Bros. Const. Co., 57 So. 831.

§ 1180 (Ala.App.) Effect of reversal of judgment in proceedings to enforce a mechanic's lien stated.—Copeland v. Dixie Lumber Co., 57 So. 124.

(F) Mandate and Proceedings in Lower Court.

§ 1194 (Ala.App.) Motion for mandamus by appellants to compel the court below to vacate an order dismissing appellants' motion for a rehearing *held* properly dismissed.—Zavelo v. J. Goldstein & Co., 57 So. 102, 103.

§ 1201 (Fla.) Effect on subsequent appeal of decision on former appeal as to validity of in-

insurance policies, stated.—*Erickson v. Insurance Co. of North America*, 57 So. 340.

§ 1210 (La.) Where a case was remanded because not decided on the merits, the trial judge properly took it under advisement.—*La Barre v. Burton-Swartz Cypress Co.*, 57 So. 655.

§ 1212 (La.) Where a case is remanded for evidence as to damages, no other evidence can be introduced.—*Police Jury of Parish of Iberville v. Texas & P. Ry. Co.*, 57 So. 163.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

§ 1227 (Miss.) Sureties *held* not entitled to discharge of supersedeas bond on motion in Supreme Court, although they were misled into signing it.—*Douglas v. Parsons-May-Oberschmidt Co.*, 57 So. 624.

§ 1234 (Ala.App.) On appeal by the owner alone in proceedings to enforce a mechanic's lien, neither she nor her sureties on her appeal bond will be liable for the judgment against the contractor.—*Copeland v. Dixie Lumber Co.*, 57 So. 124.

APPEARANCE.

§ 9 (La.) Where nonresidents are proceeded against by curator and attachment, their appearance to bond the attachment confers jurisdiction generally.—*First Nat. Bank v. Johnson*, 57 So. 930.

§ 19 (La.) A defendant may appear without subjecting himself to the court's jurisdiction, for the purpose of removing the cause or attacking jurisdiction, or because of defective process.—*First Nat. Bank v. Johnson*, 57 So. 930.

APPLIANCES.

See Master and Servant, §§ 101-107.

APPLICATION.

See New Trial, § 140.

APPOINTMENT.

See Charities, §§ 33, 47; Municipal Corporations, § 146.

ARGUMENTATIVENESS.

See Criminal Law, § 807; Trial, § 240.

ARGUMENT OF COUNSEL.

See Appeal and Error, § 1060; Criminal Law, §§ 699-730.

ARMY AND NAVY.

See Militia.

ARREST.

See Criminal Law, § 364; False Imprisonment; Homicide, § 111; Indictment and Information, §§ 72, 110, 180; Obstructing Justice.

II. ON CRIMINAL CHARGES.

§ 65 (Ala.) A warrant in the possession of one of two officers *held* a justification for both; but the officer not having the warrant must, as required by Code 1907, § 6268, inform accused of his authority.—*Adams v. State*, 57 So. 591.

ARREST OF JUDGMENT.

See Criminal Law, §§ 970, 972, 1125, 1182.

ASSAULT AND BATTERY.

See Criminal Law, §§ 368, 380, 448, 991; Fines; Homicide, §§ 96, 179, 181, 191, 193; Indictment and Information, § 185; Infants. § 18; Master and Servant, § 202; Witnesses, §§ 268, 270, 372, 414.

II. CRIMINAL RESPONSIBILITY.

(A) Offenses.

§ 66 (Ala.App.) Under Code 1907, § 6308, abusive language by prosecutor at or near the time of the assault, not in the presence of accused, but communicated to him before the assault, *held* provable.—*Spear v. State*, 57 So. 510.

(B) Prosecution and Punishment.

§ 83 (Ala.App.) On a trial for assault and battery, evidence whether a witness had a pistol on his person the day before the trial while in court was immaterial.—*Wray v. State*, 57 So. 144.

§ 89 (Ala.App.) On a trial for assault and battery, it is competent to show what was said and done by those present during the assault, as giving character to the assault.—*Wray v. State*, 57 So. 144.

ASSETS.

See Creditors' Suit; Marshaling Assets and Securities.

ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 733, 737, 1078; Criminal Law, §§ 1178, 1182.

ASSIGNMENTS.

See Chattel Mortgages, § 209; Insurance, § 594; Mortgages, §§ 235, 298, 594.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy.

ASSOCIATIONS.

See Embezzlement, § 48; Insurance, §§ 715-819.

ASSUMPSIT, ACTION OF.

See Work and Labor.

§ 4 (Ala.App.) An express or implied promise sufficient to sustain assumpsit requires a consideration.—*Shannon & Co. v. McElroy*, 57 So. 118.

§ 23 (Ala.App.) Under a plea of general issue in assumpsit, defendant may prove any matter showing that plaintiff never had a cause of action or that he ought not to recover.—*Shannon & Co. v. McElroy*, 57 So. 118.

ASSUMPTION.

Of risk, see Master and Servant, §§ 205-223, 278.

ATTACHMENT.

See Appearance, § 9; Execution; Garnishment; Sheriffs and Constables, §§ 106, 137; Trespass, §§ 24, 41.

I. NATURE AND GROUNDS.

(B) Grounds of Attachment.

§ 25 (La.) Defendant's domicile in the state was not changed by temporary residence in another state for business purposes, so that an attachment against him as a nonresident was properly dissolved.—*Gates v. Otis*, 57 So. 371.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

§ 164 (Ala.App.) An arrangement by a constable levying an attachment with another to gather growing corn *held* not to constitute a levy.—*Sells v. Price*, 57 So. 265.

XL WRONGFUL ATTACHMENT.

§ 375 (Ala.App.) In an action by a retail merchant for wrongful attachment, *held* improper to permit the jury to consider whether the attachment of land caused loss of customers.—Gramling-Spalding Co. v. Parker, 57 So. 54.

Plaintiff *held* not entitled to recover for consequences, not legally entering into his damages, though they are pleaded.—Id.

A retail merchant can recover damages sustained to his credit by wrongful attachment, though the levy was upon land not connected with his business.—Id.

§ 377 (Ala.App.) Plaintiff *held* not liable in exemplary damages for wrongful attachment, if he acted on advice of counsel.—Gramling-Spalding Co. v. Parker, 57 So. 54.

ATTESTATION.

See Wills, § 115.

ATTORNEY AND CLIENT.

See Bills and Notes, § 534; Criminal Law, §§ 699-730; Guardian and Ward, § 42; Malicious Prosecution, §§ 21, 71; Mortgages, § 581; Receivers, § 154.

AUTHORITY.

See Arrest; Brokers, § 14; Partnership, §§ 125-160.

AUTOMOBILES.

See Carriers, § 263; Highways, § 169; Street Railroads, §§ 85-99, 113.

BAGGAGE.

See Carriers, § 397½.

BAIL.

See Mandamus, § 61.

II. IN CRIMINAL PROSECUTIONS.

§ 42 (Ala.) Accused's conviction of murder in the second degree *held* to entitle him to admission to bail.—Ex parte Spivey, 57 So. 491.

BAILMENT.

§ 16 (Ala.App.) A bailee *held* not in a position to question the bailor's right to dispose of the goods.—Blair v. Riddle, 57 So. 382.

BANKRUPTCY.

See Evidence, § 366.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 161 (Miss.) Deed of trust made more than four months before the filing of a petition in bankruptcy, but recorded within the four months, is not void, under Bankruptcy Act, § 60a, as amended in 1903.—Laurel Oil & Fertilizer Co. v. Horne, 57 So. 624.

(E) Actions by or Against Trustee.

§ 302 (Ala.) A complaint in an action by a trustee in bankruptcy on a bond executed by the bankrupts and sureties *held* bad on demurrer for failing to show the trustee's beneficial ownership of the bond, or that it was made for the benefit of the estate of the bank-

rupts.—A. Dreher & Co. v. National Surety Co., 57 So. 34.

A complaint, in an action on a bond for the benefit of the trustee in bankruptcy of the principals in the bond, *held* bad on demurrer notwithstanding Bankruptcy Act, § 64, subd. 3.—Id.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 399 (La.) One who about two months before filing a petition in bankruptcy divested himself of title to realty to protect it against the children of his first marriage in the interest of children of the present marriage could not claim the property as his homestead and not subject to the claims of creditors.—Kinder v. Trotti, 57 So. 1005.

§ 425 (Fla.) Where creditor has knowledge of bankruptcy proceedings in time to prove his claim, it will be discharged, though he was not designated in the schedule.—Perry Naval Stores Co. v. Caswell, 57 So. 660.

BANKS AND BANKING.

See Bills and Notes, § 362.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(E) Insolvency and Dissolution.

§ 77 (Ala.) Code 1907, § 3560, *held* to create a statutory receivership subject to the general principles of equity law and section 3509.—Oates v. Smith, 57 So. 438.

The appointment of a receiver of a bank under Code 1907, § 3560, *held* an adjudication of insolvency.—Id.

§ 80 (Ala.) Where a receiver was appointed under Code 1907, § 3560, to collect the assets of an insolvent bank, *held*, in view of section 3509, that a debtor could not offset an obligation of the bank acquired after insolvency.—Oates v. Smith, 57 So. 438.

Code 1907, § 5858, *held* not to give one indebted to a bank which has become insolvent, and has been placed in the hands of a receiver, the right to offset that debt with an obligation acquired after insolvency.—Id.

III. FUNCTIONS AND DEALINGS.

(E) Representation of Bank by Officers and Agents.

§ 116 (Fla.) Knowledge of officers of bank, while engaged in its business in their official capacity, *held* notice to the bank.—Perry Naval Stores Co. v. Caswell, 57 So. 660.

Actual knowledge of bankruptcy proceedings of a debtor of a bank by the cashier *held* binding on the bank.—Id.

BENEFICIAL ASSOCIATIONS.

See Insurance, §§ 715-819.

BEST AND SECONDARY EVIDENCE.

See Criminal Law, §§ 398, 400; Evidence, §§ 183-186.

BETTING.

See Gaming.

BIAS.

See Witnesses, § 372.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILLS AND NOTES.

See Agriculture, § 7; Chattel Mortgages, § 209; Corporations, §§ 336, 377; Estoppel, § 14; Frauds, Statute of, § 17; Gaming, §§

19, 48; Husband and Wife, § 232; Mortgages, §§ 218, 235, 298, 431, 581; Partnership, § 146; Pleading, § 248; Sales, § 479; Sunday; Trusts, § 213; Usury; Wills, § 194.

II. CONSTRUCTION AND OPERATION.

§ 129 (La.) On sale of collaterals securing note and credit on the note, the balance due *held* demandable, under the terms of the note, at the option of the holder.—*Gates v. Otis*, 57 So. 371.

§ 135 (Fla.) Effect of construing together note and mortgage securing it stated.—*Taylor v. American Nat. Bank of Pensacola*, 57 So. 678.

III. MODIFICATION, RENEWAL, AND RESCISSION.

§ 140 (Fla.) One who gives renewal note, knowing of partial failure of consideration, or false representation by payee, cannot set up such facts to defeat recovery.—*Franklin Phosphate Co. v. International Harvester Co. of America*, 57 So. 206.

IV. NEGOTIABILITY AND TRANSFER.

(A) Instruments Negotiable.

§ 157 (Fla.) Under Gen. St. 1906, § 2936, note *held* negotiable, though accompanied by real estate mortgage providing that on default in interest the whole amount of the note shall become due.—*Taylor v. American Nat. Bank of Pensacola*, 57 So. 678.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(B) Indorsement for Transfer.

§ 267 (Miss.) Effect of indorsement of a bill or note stated.—*Hawkins v. Shields*, 57 So. 4.

§ 285 (Miss.) Save for the fixing of the time of payment, an indorsement after maturity, so far as the rights of the indorser and indorsee are concerned, does not differ from an indorsement before maturity.—*Hawkins v. Shields*, 57 So. 4.

Where a payee of notes, after indorsing them in blank and pledging them, paid the debt, and later resold them to a third person with the indorsements upon them, he was liable as an indorser.—*Id.*

§ 299 (Miss.) Where facts are few and simple, or ascertained, *held*, that the court may determine what is a reasonable time in which to demand payment upon a bill or note indorsed after maturity.—*Hawkins v. Shields*, 57 So. 4.

(D) Bona Fide Purchasers.

§ 327 (Ala.) A purchaser of negotiable paper in due course before maturity without notice is a bona fide holder for value.—*Bluthenthal & Bickart v. City of Columbia*, 57 So. 814.

§ 333 (Ala.) A corporation purchasing from a partnership, whose members became stockholders of the corporation, a note executed contrary to the dispensary law has imputed notice of the illegality.—*Bluthenthal & Bickart v. City of Columbia*, 57 So. 814.

§ 344 (Fla.) Complainant bank in suit to foreclose mortgage *held* a holder in due course of the note secured under Gen. St. 1906, § 2985, and not guilty of bad faith under section 2989.—*Taylor v. American Nat. Bank of Pensacola*, 57 So. 678.

§ 362 (Miss.) Plaintiff *held* to have acquired defendant's note from a bank, which was a bona fide purchaser for value, so that a set-off which defendant had against the payee was unavailable.—*Sanders v. McAlister Bros. & Co.*, 57 So. 801.

§ 369 (Ala.App.) An agreement with the payee of a note *held* not available as a defense to

the note in the hands of a bona fide holder.—*Norris v. Merchants' Nat. Bank*, 57 So. 71.

§ 370 (La.) Where a member of a firm tenders notes of a third person to a cotton factor, who applies the proceeds to the debt of the partner, the maker, having assigned the notes before maturity, cannot claim their return.—*Victoria Lumber Co. v. Montgomery*, 57 So. 650.

§ 373 (Ala.App.) Fraud of the payee of a note in procuring its execution *held* not available as a defense to the note in the hands of a bona fide holder.—*Norris v. Merchants' Nat. Bank*, 57 So. 71.

§ 375 (Ala.) Where a statute merely makes the consideration of a note illegal, the note is valid in the hands of a bona fide holder.—*Bluthenthal & Bickart v. City of Columbia*, 57 So. 814.

§ 375 (Ala.App.) A maker of a note and chattel mortgage securing it *held* estopped to assert, as against a bona fide purchaser, that they were executed on Sunday.—*Moseley v. Selma Nat. Bank*, 57 So. 91.

VIII. ACTIONS.

§ 443 (Ala.) Under Code 1907, § 2489, a beneficial owner of a nonnegotiable instrument may sue thereon in his own name.—*A. Dreher & Co. v. National Surety Co.*, 57 So. 34.

§ 460 (Fla.) In an action on a joint and several note against all the makers, where plaintiff dismisses as to two of the makers, it discontinues the action as to all.—*Springstead v. Crawfordville State Bank*, 57 So. 668.

§ 467 (Ala.) A beneficial owner of a nonnegotiable instrument suing thereon in his own name, under Code 1907, § 2489, should aver in what manner he became owner.—*A. Dreher & Co. v. National Surety Co.*, 57 So. 34.

§ 481 (Fla.) Plea in action by indorsees of note alleging failure of consideration and breach of warranty *held* not demurrable.—*Springstead v. Crawfordville State Bank*, 57 So. 668.

§ 497 (La.) Subsequent holder of mortgage note which has been fraudulently disposed of *held* to have the burden of showing that he acquired it in good faith before maturity, and for a valuable consideration.—*Christina v. Cusimano*, 57 So. 157.

§ 516 (Ala.App.) Plaintiff's introduction of a negotiable note entitles him prima facie to recover the face value of the note, with interest and reasonable attorney's fees.—*Chilton Warehouse & Mfg. Co. v. Lewis*, 57 So. 100.

§ 525 (La.) Evidence *held* insufficient to show that holder of mortgage note acquired it in good faith.—*Christina v. Cusimano*, 57 So. 157.

§ 534 (La.) A stipulation in a note for attorney's fees if the note is placed in the hands of an attorney for collection *held* a stipulation for liquidated damages.—*First Nat. Bank v. Mayer*, 57 So. 308.

BOARDING HOUSES.

See Innkeepers.

BOARDS.

See Drains, §§ 43, 75; Licenses, § 20.

BONA FIDE PURCHASERS.

See Bills and Notes, §§ 327-375; Mortgages, § 261; Sales, § 472; Vendor and Purchaser, §§ 229-243.

BONDS.

See Appeal and Error, §§ 351, 460-485, 805, 1227-1234; Appearance, § 9; Bankruptcy, § 302; Costs, § 247; Guardian and Ward, § 175; Injunction, § 118; Justices of the Peace, § 194; Principal and Surety; Trial, § 45; Vendor and Purchaser, §§ 145, 191.

V. ACTIONS.

§ 128 (Ala.App.) Where the complaint is on a bond under seal, and the proof is an unsealed promise to pay, a variance is fatal.—Hughes v. Spratling, 57 So. 629.

BOOKS.

See Evidence, § 354; Witnesses, § 255.

BOUNDARIES.

See Counties, § 12; Ejectment, § 94; Judgment, § 460; Towns.

I. DESCRIPTION.

§ 3 (Ala.) Specific descriptions in a deed *held* to control a designation of amount.—Busbee v. Thomas, 57 So. 537.

§ 3 (La.) Location of mileposts on a basis meridian line by measurement from a degree of latitude cannot be affected by surveys from other starting points west of such meridian.—Elms v. Foote, 57 So. 306.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 27 (La.) A suit to have a boundary line established between tracts not adjacent will not lie.—Moss v. Drost, 57 So. 929.

§ 35 (Ala.) In an action involving disputed boundary, evidence bearing on possession and control *held* properly admitted.—Cooper v. Slaughter, 57 So. 477.

An instruction that the jury might consider an agreement to arbitrate boundary line, as bearing on the question of adverse possession, *held* proper.—Id.

§ 36 (Ala.) Evidence *held* properly admitted, where it was not subject to the only ground of objection specified.—Cooper v. Slaughter, 57 So. 477.

§ 40 (Ala.) In ejectment, evidence of an ancient stake *held* proper to identify the monuments of an ancient deed.—Busbee v. Thomas, 57 So. 537.

§ 41 (Ala.) Charge that if parties had agreed on boundary line they would be presumed to own to the line *held* proper.—Cooper v. Slaughter, 57 So. 477.

§ 46 (Ala.) Contract *held* properly received in evidence, over objection that it was not mutual, and was without consideration.—Cooper v. Slaughter, 57 So. 477.

The common-law submission to arbitration of a disputed boundary need not be in writing, and may be made in writing by an agent having only parol authority.—Id.

§ 54 (La.) Location of milepost on basis meridian by two governmental resurveys *held* to supersede the original survey.—Elms v. Foote, 57 So. 306.

BRIEFS.

See Appeal and Error, §§ 758, 1078.

BROKERS.

See Factors.

II. EMPLOYMENT AND AUTHORITY.

§ 14 (Ala.App.) A real estate agent has only authority to find a purchaser, and report him to the owner.—Davis v. Clausen, 57 So. 79.

IV. COMPENSATION AND LIEN.

§ 56 (Ala.App.) A broker employed to sell land *held* entitled to compensation where a sale is made to a purchaser procured by him.—Davis v. Clausen, 57 So. 79.

§ 57 (Ala.App.) A broker *held* entitled to compensation for his services, when his acts

were the procuring cause of a sale.—Davis v. Clausen, 57 So. 79.

V. ACTIONS FOR COMPENSATION.

§ 85 (Ala.App.) In an action by a broker for procuring a purchaser, certain evidence *held* admissible on the question of the procuring cause of the sale.—Davis v. Clausen, 57 So. 79.

§ 85 (Fla.) In an action for a commission on a sale of real estate, evidence that another agency to whom a commission was paid was the actual procuring cause is admissible.—Cameron v. Powers, 57 So. 888.

BUCKET SHOPS.

See Gaming, § 69.

BUILDING CONTRACTS.

See Contracts, § 247; Damages, § 122; Mechanics' Liens; Principal and Surety, §§ 82, 86; Set-Off and Counterclaim.

BULK STOCK LAWS.

See Constitutional Law, § 240.

BURGLARY.

See Criminal Law, § 619.

BY-LAWS.

See Insurance, § 750.

CANCELLATION OF INSTRUMENTS.

See Deeds, §§ 196-211; Equity, § 150; Evidence, § 314; Fraudulent Conveyances, § 290; Infants, § 31; Sales, § 130; Vendor and Purchaser, §§ 98, 104.

II. PROCEEDINGS AND RELIEF.

§ 37 (Ala.) In an action to set aside a conveyance made by a married woman, averment as to husband's nonjoinder in the deed *held* good as against a general demurrer.—Bell v. Burkhalter, 57 So. 460.

§ 37 (Ala.) In a bill to set aside a deed, offer to restore consideration received therefor *held* sufficient.—Wilks v. Wilks, 57 So. 776.

§ 60 (La.) Where defendant has sold property subject of suit, judgment ordering her to transfer the property to plaintiff *held* of no avail.—Copland v. Carey, 57 So. 796.

CARRIERS.

See Appeal and Error, § 1086; Commerce; Constitutional Law, §§ 241, 297; Evidence, §§ 155, 471; Pleading, § 245; Railroads; Shipping; Street Railroads; Trial, §§ 234, 244, 253.

I. CONTROL AND REGULATION OF COMMON CARRIERS.**(A) In General.**

§ 10 (Fla.) To determine that regulation of Railroad Commission is so unreasonable as to be unenforceable, the court will require the presumption of reasonableness to be overcome by clear and convincing proof.—State v. Louisville & N. R. Co., 57 So. 175.

The reasonableness of rate, rule, regulation, or order of Railroad Commissioners *held* to be determined by a consideration of rights of all parties directly and materially affected.—Id.

The Railroad Commissioners are authorized to make and enforce only reasonable regulations for intrastate transportation.—Id.

§ 11 (Fla.) A railroad common carrier *held* subject to requirement to render particular serv-

ice that is essentially the duty of the carrier.—*State v. Louisville & N. R. Co.*, 57 So. 175.

Requirement that railroad company perform service in itself unremunerative, but reasonably necessary for public convenience, *held* not a denial of a reasonable compensation for the services rendered as an entirety.—*Id.*

That a particular service by a common carrier will be unremunerative *held* not to excuse nonperformance, where it is a duty vitally necessary to the public.—*Id.*

That a particular useful, but nonessential, duty of a common carrier must be rendered at a loss, *held* not to excuse nonperformance.—*Id.*

Regulations of common carriers *held* enforceable, though service required is not remunerative, unless so unreasonable and arbitrary that they will deny to the carrier a reasonable compensation for its entire service.—*Id.*

In determining whether the burden of particular regulation is confiscatory, actual value of property and labor and management used in rendering service *held* to be considered.—*Id.*

It is the duty of the carrier to render a service that is reasonably adequate and of most convenience to the greatest number of the public affected.—*Id.*

§ 11 (Fla.) Common carrier *held* entitled to reasonable compensation for service, but not necessarily to full return for values used in rendering the service.—*State v. Louisville & N. R. Co.*, 57 So. 673.

The risks and burdens of contingency of producing return for property, management, and labor used by carrier *held* to be assumed by the carrier in voluntarily undertaking to render public service.—*Id.*

Prime duty of carrier to render safe and reasonable service *held* required to be performed when possible, whether profitable or not.—*Id.*

"Operating expenses" of a railroad defined.—*Id.*

§ 12 (Fla.) Where the same property, labor, and management are used by a common carrier in interstate and intrastate commerce, value *held* to be apportioned in determining reasonableness of compensation for service in intrastate business.—*State v. Louisville & N. R. Co.*, 57 So. 175.

§ 18 (Fla.) Averments of railroad companies as to adequacy of public service and future effect of order relating thereto *held* mere conclusions not admitted by demurrer.—*State v. Louisville & N. R. Co.*, 57 So. 673.

Orders and findings of railroad commissioners *held* not to be interfered with, unless the invalidity of the action taken is made to clearly appear.—*Id.*

II. CARRIAGE OF GOODS.

(C) Custody and Control of Goods.

§ 76 (Ala.App.) A consignor *held* entitled to sue the carrier for damages from a failure to promptly deliver.—*Southern Ry. Co. v. Proctor*, 57 So. 513.

(F) Loss of or Injury to Goods.

§ 113 (Ala.) A carrier *held* not liable for cotton burned in another's warehouse; the cotton never having been actually or constructively delivered to carrier.—*A. P. Loveman & Co. v. Alabama, T. & N. R. Co.*, 57 So. 817.

§ 131 (Ala.App.) The plea of contributory negligence in an action against a moving company for injury to a piano in moving it that plaintiff consented to an insufficient number of men moving it *held* bad in not alleging his knowledge of the necessary number of men to properly move it.—*Smiley, Son & Co. v. Keith*, 57 So. 127.

§ 132 (Ala.App.) A requested instruction that the burden was on plaintiff to show defendant failed to use due care *held* to exact too high a measure of proof, because of his burden being

only to prove facts to the reasonable satisfaction of the jury.—*Smiley, Son & Co. v. Keith*, 57 So. 127.

III. CARRIAGE OF LIVE STOCK.

§ 211 (Ala.App.) In an action against a carrier for injuries to cattle by failure to promptly deliver, plaintiff *held* entitled to show that injury was caused by lack of food and water.—*Southern Ry. Co. v. Proctor*, 57 So. 513.

Under Act Cong. June 29, 1906, a failure of a shipper to feed and water cattle in transit *held* negligence per se.—*Id.*

§ 218 (Ala.App.) Under Act Cong. June 29, 1906, a carrier may not contract to relieve itself from the duty to feed and water animals in transit.—*Southern Ry. Co. v. Proctor*, 57 So. 513.

§ 227 (Ala.App.) A complaint *held* to sufficiently allege that the defendant undertook the carriage of cattle for hire.—*Southern Ry. Co. v. Proctor*, 57 So. 513.

A complaint charging a common carrier with a failure to deliver cattle *held* to sufficiently comply with Code 1907, § 5382, form 15, in the allegation of a breach of duty.—*Id.*

§ 228 (Ala.App.) In an action for injuries to cattle from delay in delivery, evidence as to the condition of stock when properly delivered and as it actually was *held* admissible.—*Southern Ry. Co. v. Proctor*, 57 So. 513.

§ 230 (Ala.App.) An instruction in an action for injuries to cattle *held* to give the defendant the benefit of a stipulation against liability for improper bedding.—*Southern Ry. Co. v. Proctor*, 57 So. 513.

In an action for injuries to a shipment of cattle, evidence *held* sufficient for the jury as to whether value was proven as required by the contract of carriage.—*Id.*

In an action for injuries to cattle from a failure to promptly deliver, evidence *held* to justify a finding that notice of damage was given.—*Id.*

IV. CARRIAGE OF PASSENGERS.

(A) Relation Between Carrier and Passenger.

§ 236 (Ala.App.) Duty of common carrier to receive and transport passengers stated.—*Birmingham Ry., Light & Power Co. v. Anderson*, 57 So. 103.

Complaint in action against a carrier for damages for refusal to accept plaintiff as a passenger *held* not sufficient to show the carrier's duty to accept and carry plaintiff as a passenger.—*Id.*

(C) Performance of Contract of Transportation.

§ 263 (Ala.App.) A defendant contracting to carry plaintiff and companions in an automobile *held* required, on the breaking down of the automobile, to send another car to carry them.—*Taxicab Co. v. Grant*, 57 So. 141.

A party to a contract *held* not to waive performance by the adverse party of the duty assumed by him in the contract.—*Id.*

§ 267 (Ala.App.) A common carrier of passengers may establish reasonable rules and regulations in regard to the times and places of receiving passengers.—*Birmingham Ry., Light & Power Co. v. Anderson*, 57 So. 103.

§ 275 (Ala.App.) A plea in an action for breach of contract *held* bad on demurrer.—*Taxicab Co. v. Grant*, 57 So. 141.

§ 276 (Ala.App.) In an action for carrying plaintiff past his destination, evidence of conversations between plaintiff and defendant's employes *held* admissible.—*North Alabama Traction Co. v. Daniel*, 57 So. 120.

§ 277 (Ala.App.) In an action for injuries to a passenger by being carried past his destination, a verdict for \$1,000 *held* not excessive.—

North Alabama Traction Co. v. Daniel, 57 So. 120.

§ 277 (Miss.) In an action against a carrier for the refusal of its conductor to accept a check for a corpse, given by a claim agent to and tendered by a passenger accompanying the corpse, evidence *held* not to authorize punitive damages.—Alabama & V. Ry. Co. v. Lowry, 57 So. 289.

§ 278 (Ala.App.) In an action for failure to stop a car to enable plaintiff to alight, an instruction on the termination of the relation of carrier and passenger *held* not reversible error.—North Alabama Traction Co. v. Daniel, 57 So. 120.

In an action for failure to discharge plaintiff at his destination, instructions as to the termination of the relation of passenger and carrier *held* properly refused.—Id.

(D) Personal Injuries.

§ 283 (La.) A carrier of passengers must protect them from insult and injury at the hands of its own officers.—Alexander v. New Orleans Ry. & Light Co., 57 So. 283.

§ 314 (Ala.App.) In an action for injuries to a passenger, plaintiff may declare defendant's negligence in general terms.—Birmingham Ry., Light & Power Co. v. Hunnicutt, 57 So. 262.

A count in a complaint for injuries to a passenger *held* not demurrable.—Id.

§ 314 (Fla.) In action by passenger for injuries, allegation of ultimate facts as to relation of passenger and carrier and that defendant negligently did or omitted the acts proximately causing the injury *held* sufficient.—Warfield v. Hepburn, 57 So. 618.

Allegations *held* sufficient statements of ultimate facts to show negligence of carrier in operation of train and injury to plaintiff proximately resulting from a particular fact stated.—Id.

§ 316 (Fla.) Under Gen. St. 1906, § 3148, presumption of negligence *held* to arise against railroad company on proof of personal injury or property loss caused by running of train and proof of the ultimate fact that caused the injury or loss.—Warfield v. Hepburn, 57 So. 618.

§ 317 (Ala.App.) In an action for injuries to a passenger by being thrown from a street car by contact with another passenger, evidence as to whether the latter was drunk was admissible.—Birmingham Ry., Light & Power Co. v. Hunnicutt, 57 So. 262.

§ 318 (La.) In an action by a passenger for personal injuries, evidence *held* insufficient to show that the accident was unavoidable.—Brannon v. Yazoo & M. V. R. Co., 57 So. 172.

§ 321 (Ala.App.) In an action for injuries to a street car passenger, it was error to refuse to charge that plaintiff was bound to prove that he was compelled to ride on the running board.—Birmingham Ry., Light & Power Co. v. Hunnicutt, 57 So. 262.

(E) Contributory Negligence of Person Injured.

§ 323 (Fla.) Contributory negligence *held* not available as defense to action for damage to person or property by running of train unless pleaded and proved or shown by the case made by plaintiff.—Warfield v. Hepburn, 57 So. 618.

§ 343 (Ala.App.) In an action against a carrier for injuries to a passenger, certain pleas alleging contributory negligence *held* not demurrable.—Birmingham Ry., Light & Power Co. v. Mindler, 57 So. 113.

(G) Passengers' Effects.

§ 397½ (Miss.) A railroad company *held* not liable for loss of a passenger's baggage.—Yazoo & M. V. R. Co. v. McCall, 57 So. 224.

CARRYING WEAPONS.

See Weapons.

CATTLE.

See Railroads, §§ 439, 447.

CERTIFICATE.

See Insurance, § 715; Taxation, § 742.

CERTIFICATION.

See Municipal Corporations, § 109.

CERTIORARI.

See Justices of the Peace, §§ 194-208.

I. NATURE AND GROUNDS.

§ 5 (Ala.App.) Common-law certiorari will not lie to review a judgment where the remedy by appeal is adequate and complete.—Hines v. Tribble, 57 So. 265.

§ 5 (La.) Where relator has a right of appeal, certiorari and prohibition are not the proper remedies.—Denegre v. W. G. Tebault Furniture & Realty Co., 57 So. 929.

CHANCERY.

See Equity.

CHARACTER.

See Criminal Law, § 380; Witnesses, §§ 37, 274, 318, 333-361.

CHARGE.

See Carriers, §§ 10, 11.

To jury, see Criminal Law, §§ 741-845; Trial, §§ 189, 191-295.

CHARITIES.

II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.

§ 33 (Ala.) An appointment of trustees which is only voidable *held* not open to attack in their action in ejectment.—Busbee v. Thomas, 57 So. 587.

An election of trustees without fraud, and unquestioned for many years, *held* not open to attack for impropriety in the proceedings.—Id.

§ 47 (Ala.) Where the appointment of trustees under a deed is valid, later appointments by a register *held* void.—Busbee v. Thomas, 57 So. 587.

§ 50 (Ala.) The right of persons to sue as trustees *held* sufficiently shown.—Busbee v. Thomas, 57 So. 587.

CHARTER.

See Municipal Corporations, § 48.

CHATTEL MORTGAGES.

See Equity, §§ 149, 424; Evidence, § 317; Interest, § 18; Usury, § 117; Witnesses, § 268.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Transfers of Chattels as Security.

§ 22 (Miss.) A mortgage to secure future advances *held* not required to specify definitely the amount to be advanced.—Candler v. Cromwell, 57 So. 554.

III. CONSTRUCTION AND OPERATION.

(B) Parties and Debts or Liabilities Secured.

§ 109 (Miss.) A mortgage on crops to be grown by the mortgagor *held* to secure the

(C) **INTERESTS OF PARTIES THEREIN.**
§ 118 (Ala.App.) The progeny of mortgaged animals, born after the making of the mortgage, are subject to its lien.—*Swint v. State*, 57 So. 394.

(D) **Lien and Priority.**

§ 138 (Miss.) A mortgage on a crop to be made *held* to take precedence over the lien of a prior judgment.—*Candler v. Cromwell*, 57 So. 554.

§ 139 (Fla.) Mortgagee of personal property sold two years previously, without change of possession, *held* to have priority over the vendee.—*Dixon Lumber Co. v. Jennings*, 57 So. 615.

§ 147 (Ala.App.) Actual notice of a chattel mortgage is the equivalent of constructive notice of it afforded by registration of it in the proper office.—*Polytinsky v. M. F. Patterson & Son*, 57 So. 130.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 165 (Ala.) Rule as to expenses to which a mortgagee of chattels is entitled upon an accounting *held* to apply only where the mortgagee holds possession as bailee for the mortgagor.—*Zadek v. Burnett*, 57 So. 447.

§ 173 (Ala.App.) The right of a chattel mortgagee depends wholly upon whether the mortgagor had the right to encumber the property when he executed the mortgage.—*Stinson v. Faircloth Byrd Co.*, 57 So. 143.

§ 177 (Ala.App.) In an action by a mortgagee against the buyer of the mortgagor for conversion of mortgaged chattels, evidence in reference to the purchase of goods shown by defendant's books *held* admissible.—*Polytinsky v. M. F. Patterson & Son*, 57 So. 130.

In an action by a mortgagee for conversion of mortgaged chattels, certain evidence *held* properly excluded because immaterial.—*Id.*

An instruction in an action by a mortgagee for conversion of mortgaged chattels *held* not prejudicial.—*Id.*

In an action by a mortgagee for conversion of mortgaged chattels, an instruction on the subject of the recording of the mortgage *held* not prejudicial.—*Id.*

VI. ASSIGNMENT OF MORTGAGE OR DEBT.

§ 209 (Ala.App.) A transfer of a note and chattel mortgage securing it *held* to pass the legal title to the chattels to the transferee.—*Moseley v. Selma Nat. Bank*, 57 So. 91.

VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.

(B) **Criminal Responsibility.**

§ 232 (Ala.App.) Because of Code 1907, § 7423, certain proof *held* sufficient, under indictment charging unlawful disposition of personal property, and not to constitute a variance.—*Swint v. State*, 57 So. 394.

§ 233 (Ala.App.) In a prosecution for disposing of mortgaged property, proof of accused's possession of the property prior to the time of disposition is essential; and so evidence thereof is admissible.—*Swint v. State*, 57 So. 394.

In a prosecution for disposing of mortgaged animals, evidence of the birth of progeny of the mortgaged animals *held* admissible.—*Id.*

IX. FORECLOSURE.

§ 261 (Ala.) A mortgagee who seizes the mortgaged live stock for sale under the power in the mortgage *held* entitled to reasonable ex-

penses at a private sale under a power of sale in the mortgage, is accountable for at least the fair and reasonable value of the property, regardless of the price received.—*Zadek v. Burnett*, 57 So. 447.

X. REDEMPTION.

§ 300 (Ala.) Widow and heirs of a deceased mortgagor of chattels *held* proper co-complainants in a bill for an accounting and redemption.—*Zadek v. Burnett*, 57 So. 447.

In an action against a mortgagee of chattels for an accounting, *held*, that a credit to a complainant was properly allowed.—*Id.*

In an action against a mortgagee of chattels for an accounting, *held*, that the rejection of a credit claimed by the mortgagee would not be disturbed.—*Id.*

CHEAT.

See False Pretenses; Fraud.

CHILDREN.

See Guardian and Ward; Infants; Witnesses, § 40.

CITATION.

See Appeal and Error, § 435.

CITIES.

See Municipal Corporations.

CLAIMS.

See Executors and Administrators, § 256; Receivers, § 154; States.

CLERKS OF COURTS.

See Execution, § 75.

CLOUD ON TITLE.

See Quieting Title.

CLUBS.

See Embezzlement, § 48.

CODICIL.

See Wills, §§ 184, 476.

COHABITATION.

See Evidence, § 67.

COLLATERAL ATTACK.

See Eminent Domain, § 242; Wills, § 421.

COLLECTORS.

See Taxation, §§ 582, 710.

COLORS PERSONS.

See Street Railroads, § 70.

COLOR OF TITLE.

See Adverse Possession, §§ 71, 85, 100, 114.

COMMERCE.

See Carriers, § 12; Courts, § 97.

I. POWER TO REGULATE IN GENERAL.

§ 10 (Ala.) In the absence of action by Congress, the states may exercise police power over interstate carriers.—*Central of Georgia Ry. Co. v. Groesbeck & Armstrong*, 57 So. 330.

III. MEANS AND METHODS OF REGULATION.

§ 58 (Fla.) Regulations of common carriers in intrastate transportation *held* not violative of interstate commerce clause of federal Constitution, though interstate commerce is incidentally affected.—State v. Louisville & N. R. Co., 57 So. 175.

§ 61 (Ala.) Act Feb. 28, 1907 (Acts 1907, p. 225), requiring railroad companies to supply shippers with freight cars, *held* a burden upon interstate commerce, in violation of Const. U. S. art. 1, § 8.—Central of Georgia Ry. Co. v. Groesbeck & Armstrong, 57 So. 380.

§ 62 (Fla.) Safety and comfort of passengers, whether intrastate or interstate, may be provided for by state authority when not in conflict with regulations of Congress, and may not be subordinated to freight traffic.—State v. Louisville & N. R. Co., 57 So. 673.

§ 63 (Miss.) A tax on the privilege of operating a ferry, where the ferry company is exclusively engaged in ferrying passengers across a river from one state to another, is a burden on interstate commerce, which a state may not impose.—Helena-Glendale Ferry Co. v. State, 57 So. 362.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSIONERS.

See Carriers, §§ 10, 18; Drains, §§ 43, 75; Railroads, §§ 9, 227; Taxation, § 495.

COMMISSION MERCHANTS.

See Factors.

COMMISSIONS.

See Brokers, §§ 56, 57, 85; Principal and Agent, § 81; Sheriffs and Constables, § 45.

COMMON COUNTS.

See Work and Labor.

COMMON LAW.

See Certiorari; Navigable Waters, §§ 4, 36.

COMMON SCHOOLS.

See Schools and School Districts.

COMMUNITY PROPERTY.

See Husband and Wife, §§ 246-264.

COMPARATIVE NEGLIGENCE.

See Negligence, § 100.

COMPENSATION.

See Brokers, §§ 56, 57, 85; Eminent Domain, §§ 70, 181, 234; Notaries; Principal and Agent, § 81; Sheriffs and Constables.

COMPETENCY.

See Jury, §§ 90-116; Witnesses, §§ 37-159.

COMPLAINT.

See Municipal Corporations, § 639; Pleading.

COMPROMISE AND SETTLEMENT.

See Evidence, § 218; Guaranty, §§ 64, 65, 86; Libel and Slander, § 56.

COMPTROLLER.

See States.

CONCEALED WEAPONS.

See Weapons.

CONCEALMENT.

See Creditors' Suit.

CONCLUSION.

See Pleading, § 8.

CONCLUSIVENESS.

See Judgment, §§ 650-715.

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See Eminent Domain.

CONDITIONAL SALES.

See Sales, §§ 465-479.

CONFLICT OF LAWS.

See Husband and Wife, § 246; Wills, § 70.

CONSIDERATION.

See Assumpsit, Action of, § 4; Bills and Notes, § 140; Cancellation of Instruments, § 37; Contracts, §§ 71-75; Fraudulent Conveyances, § 96; Mines and Minerals; Sales, § 354.

CONSPIRACY.**II. CRIMINAL RESPONSIBILITY.****(A) Offenses.**

§ 41 (Ala.) "Conspiracy" defined.—Jones v. State, 57 So. 31.

(B) Prosecution and Punishment.

§ 47 (Ala.) The evidence of community of purpose or conspiracy which will render one a party to another's criminal act need not be proved by positive evidence.—Jones v. State, 57 So. 31.

CONSTITUTION.

See Insurance, § 750.

CONSTITUTIONAL LAW.

See Commerce, § 61; Counties, § 28; Courts, §§ 42, 121, 183, 204, 208; Criminal Law, § 872½; Drains, §§ 14, 66; Elections, § 83; Eminent Domain, § 70; Exemptions, § 43; Gaming, § 12; Intoxicating Liquors, §§ 15, 46; Judges, §§ 4, 29; Municipal Corporations, § 25; Pardon; Public Lands, § 61; Statutes.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 14 (La.) In interpreting the Constitution, presumption *held* to be in favor of natural and popular meaning of words, unless subject suggests that they were used technically.—City of Shreveport v. Smith, 57 So. 652.

§ 24 (La.) Act No. 317 of 1910, §§ 9, 23, 27, authorizing a tax which may now or hereafter be authorized by the Constitution, is valid as anticipatory legislation, and a drainage tax levied pursuant to a later amendment of the Constitution is valid.—Coguenham v. Avoca Drainage Dist., 57 So. 989.

§ 29 (La.) A constitutional provision which is complete in itself is self-executing.—Coguenham v. Avoca Drainage Dist., 57 So. 989.

§ 48 (Ala.) An act of the Legislature is presumed constitutional until clearly shown to be otherwise.—State v. Burke, 57 So. 870.

A statute should not be declared unconstitutional unless shown to be so beyond a rea-

the validity of the act. A reasonable doubt, that it violates the Constitution.—State v. Joseph, 57 So. 942.

§ 48 (Miss.) A statute should be construed so as to render it constitutional, if possible.—Richards v. City Lumber Co., 57 So. 977.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

§ 58 (Miss.) Code 1906, § 3384, *held* not invalid, as conflicting with the power of pardon committed to the Governor by Const. 1890, § 124.—Allen v. McGuire, 57 So. 217.

§ 65 (Fla.) The Legislature may enact a law complete in itself to take effect by its own terms upon the happening of the contingency of a stated affirmative vote at an election therein provided for.—State v. Sammons, 57 So. 196.

§ 65 (La.) Act No. 77 of 1910, creating parish of Jefferson Davis, *held* a constitutional exercise of legislative power, though submitting the question of its ratification to the voters of the parish of Calcasieu.—State ex rel. Carey v. Sanders, 57 So. 924; State ex rel. Moore v. Same, Id. 927; State ex rel. McMahon v. Same, Id.

(B) Judicial Powers and Functions.

§ 70 (Fla.) Expediency and reasonableness of government regulation by a valid legislative enactment *held* not to be inquired into by the courts.—State v. Louisville & N. R. Co., 57 So. 175.

§ 72 (Fla.) Action by administrative officer or board *held* subject to judicial review as to matters not concluded by administrative discretion.—State v. Louisville & N. R. Co., 57 So. 175.

VI. VESTED RIGHTS.

§ 105 (Miss.) The Legislature has no power to destroy vested rights, by creating a cause of action for which no remedy previously existed, or to destroy a valid defense to an existing cause of action.—Richards v. City Lumber Co., 57 So. 977.

VIII. RETROSPECTIVE AND EX POST FACTO LAWS.

§ 191 (Ala.) Act April 4, 1911 (Acts 1911, p. 192), authorizing the admission of certain documents conveying state lands, *held* not in violation of Const. 1901, § 95, prohibiting legislative interference with causes of action or defenses in pending suits.—Brannan v. Henry, 57 So. 967.

§ 191 (Fla.) Rules of evidence and procedure *held* subject to change by statute when substantive rights secured by the Constitution are not invaded.—Goldstein v. Maloney, 57 So. 342.

§ 196 (Ala.) The Legislature has the power to pass curative acts giving effect to defective conveyances of public lands.—Brannan v. Henry, 57 So. 967.

§ 197 (Fla.) Acts 1911, c. 6247, § 7, relating to jurisdiction of courts of newly created Pinellas county, *held* not an ex post facto law.—State v. Sammons, 57 So. 196.

§ 200 (Fla.) Laws 1911, c. 6179, § 3, making it a felony to commit a second offense of selling liquor in a county voting against the sale of liquors, is not an ex post facto law, though the prior conviction was had before the passage of the statute.—Smith v. State, 57 So. 348.

X. EQUAL PROTECTION OF LAWS.

§ 209 (Fla.) Classification by the lawmaking power which has a reasonable basis in real differences of practical conditions *held* not dis-

criminate every person who shall bargain for or purchase any stock of goods, wares, or merchandise in bulk, *held* not an unjust discrimination.—Goldstein v. Maloney, 57 So. 342.

§ 241 (Fla.) If a governmental regulation of a common carrier does not unreasonably discriminate against it, there is no denial of the equal protection of the laws.—State v. Louisville & N. R. Co., 57 So. 175.

§ 249 (Miss.) Code 1906, § 1985, *held* not in violation of Const. U. S. Amend. 14, in depriving railroads of the equal protection of the laws.—New Orleans, M. & C. R. Co. v. Cole, 57 So. 556.

XI. DUE PROCESS OF LAW.

§ 290 (La.) Act No. 317 of 1910, authorizing drainage taxes, and giving property owners a right of appeal within a specified time, is not invalid as depriving one of due process of law.—Coguenham v. Avoca Drainage Dist., 57 So. 989.

§ 297 (Fla.) Regulation of carrier not depriving it of just compensation for services rendered *held* not a deprivation of property without due process of law.—State v. Louisville & N. R. Co., 57 So. 175.

§ 297 (Fla.) The burdens of lawful governmental regulations are assumed by common carriers in undertaking to render the public service, and such burdens are not invasions of property rights.—State v. Louisville & N. R. Co., 57 So. 673.

§ 311 (Fla.) Creation by law of presumptions *held* not a denial of due process of law, where opposite party is not deprived of right to rebut them.—Goldstein v. Maloney, 57 So. 342.

§ 311 (Miss.) Code 1906, § 1985, *held* not in violation of Const. U. S. Amend. 14, as depriving railroads of property without due process of law.—New Orleans, M. & C. R. Co. v. Cole, 57 So. 556.

CONSTRUCTION.

See Bills and Notes, §§ 129, 135; Chattel Mortgages, §§ 109-147; Contracts, §§ 144-217; Insurance, § 146; Municipal Corporations, § 120; Pleading, § 34; Sales, §§ 54, 467; Statutes, §§ 181-225½; Wills, §§ 439-702.

Of instructions, see Trial, § 295.

CONTEMPT.

See Habeas Corpus, § 82.

CONTEST.

See Wills, §§ 220-329.

CONTINGENT REMAINDERS.

See Wills, § 629.

CONTINUANCE.

See Appeal and Error, § 87; Criminal Law, §§ 584-600, 1151.

CONTRACTS.

See Alteration of Instruments; Bills and Notes; Bonds; Boundaries, § 46; Cancellation of Instruments; Carriers, §§ 218, 263-278; Chattel Mortgages; Convicts; Counties, § 125; Damages, §§ 23, 56, 120, 122, 175; Deeds; Evidence, §§ 397, 419, 596; Executors and Administrators, § 189; Factors; Frauds, Statute of; Gaming; Guaranty; Husband and Wife; Infants, §§ 57, 58; Insurance; Limitation of Actions, § 30; Logs and Logging; Master and Servant, § 345; Mechanics' Liens; Mortgages; Principal and Surety; Reformation of Instruments; Sales; Set-Off and Coun-

terclaim; 'Shipping; Specific Performance; Usury; Vendor and Purchaser; Work and Labor.

I. REQUISITES AND VALIDITY.

(B) Parties, Proposals, and Acceptance.

§ 22 (Ala.) Unaccepted offer of a purchaser of property at a tax sale to release property on payment of a specified sum *held* unenforceable.—Osborne v. Waddell, 57 So. 698.

§ 22 (Ala.) A contract relating to ferry rights *held* not to have become a completed contract, not having been signed by all of the persons contemplated.—Graham v. Caperton, 57 So. 741.

(C) Formal Requisites.

§ 45 (Ala.) In an action for breach of a contract to loan money, plaintiff, under certain circumstances, *held* entitled to recover for defendant's refusal to reimburse him for money advanced by plaintiff.—Bixby-Thelsen Co. v. Evans, 57 So. 39.

(D) Consideration.

§ 71 (Ala.App.) An obligation *held* supported by a sufficient consideration.—Rankin v. McCleery, 57 So. 599.

§ 75 (Ala.) A promise by a vendee to pay the vendor rent, where the vendor executed bond for title providing only for stipulated payments, *held* invalid for want of consideration.—Able v. Gunter, 57 So. 464.

(F) Legality of Object and of Consideration.

§ 108 (Ala.App.) The public policy with which the court is concerned in determining the validity of a contract defined.—Couch v. Hutchinson, 57 So. 75.

A contract for the sale of a patent right *held* not void as contrary to public policy.—Id.

§ 141 (Ala.App.) The burden of establishing the invalidity of a contract because contrary to public policy is on the party asserting its invalidity.—Couch v. Hutchinson, 57 So. 75.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 144 (Miss.) A state statute has no extra-territorial force, and cannot make unlawful a contract entered into in another state.—Ascher & Baxter v. Edward Moyse & Co., 57 So. 299.

§ 163 (Ala.) In construing a contract, partly written and partly printed, the court should give greater weight to the written than to the printed provisions.—John Deere Plow Co. v. City Hardware Co., 57 So. 821.

§ 169 (Ala.App.) To ascertain the intention of the parties to a contract as to what should be done, regard may be had to the nature of the instrument, the condition of the parties, and their purposes.—Alexander v. Smith, 57 So. 104.

§ 170 (Ala.) The parties to a contract *held* entitled to interpret it.—Bixby-Thelsen Co. v. Evans, 57 So. 39.

§ 170 (Miss.) The court *held* required to construe a doubtful contract, when the parties thereto cannot agree.—Candler v. Cromwell, 57 So. 554.

(B) Parties.

§ 184 (Ala.App.) An obligation by two of three indorsers of a note *held* a joint and several obligation in favor of the third indorser.—Rankin v. McCleery, 57 So. 599.

§ 187 (Miss.) Where a wife paid a railroad agent for a ticket for her husband, the agent agreeing to notify the husband that the ticket

was awaiting him, the contract was made for the benefit of the husband, and he was entitled to sue thereon in his own name.—Canada v. Yazoo & M. V. R. Co., 57 So. 913.

(C) Subject-Matter.

§ 198 (Ala.App.) Under a contract between landowners for digging a ditch for drainage purposes, the one undertaking to dig the ditch *held* required to widen the old ditch, as well as to remove the rubbish therefrom.—Alexander v. Smith, 57 So. 104.

(D) Place and Time.

§ 217 (La.) Arrangement between vendor and vendee of realty for collection of revenues by vendor *held* terminable at the option of either party and terminated by notice from the executor of the vendee that the vendor should no longer collect the revenue.—Succession of Alexander, 57 So. 534.

III. MODIFICATION AND MERGER.

§ 247 (Ala.) A party to a building contract *held* to have the burden of proving a change in the contract.—Huntsville Elks' Club v. Garrity-Hahn Bldg. Co., 57 So. 750.

IV. RESCISSION AND ABANDONMENT.

§ 261 (Ala.) Plaintiff's misappropriation of funds advanced by defendant under a contract *held* to warrant defendant's refusal to make further advances.—Bixby-Thelsen Co. v. Evans, 57 So. 39.

§ 266 (Ala.) Restoration of benefit received, unless rendered impossible *held* a condition precedent to rescission.—Hafer v. Cole, 57 So. 757.

V. PERFORMANCE OR BREACH.

§ 295 (La.) Contract for construction of dam *held* not breached by furnishing perpendicular wing walls.—A. M. Blodgett Const. Co. v. Cheney Lumber Co., 57 So. 369.

§ 296 (Ala.App.) The fact that plaintiff agreed to dig a ditch on defendant's land, the parties to share the cost, and dug it to a depth exceeding that prescribed by the contract, *held* not to prevent him from recovering one-half of the cost, if the excess depth did not impair it as a drain.—Alexander v. Smith, 57 So. 104.

If the work done substantially conforms to the contract, immaterial deviations will not prevent recovery of the contract price, less the amount required to indemnify the other party for injuries sustained by such deviations.—Id.

§ 305 (Ala.) An owner employing a building contractor *held* not to waive nonperformance of the work within the time specified.—Huntsville Elks' Club v. Garrity-Hahn Bldg. Co., 57 So. 750.

§ 305 (La.) Owner permitting construction of perpendicular walls of dam *held* not entitled to assert several months afterwards that the construction of perpendicular walls is not a fulfillment of the contract.—A. M. Blodgett Const. Co. v. Cheney Lumber Co., 57 So. 369.

§ 312 (La.) In action on contract for construction of dam, defendant *held* not entitled to avoid liability, because of destruction of dam due to insufficient foundation chosen by both parties.—A. M. Blodgett Const. Co. v. Cheney Lumber Co., 57 So. 369.

§ 322 (La.) Where one seeks to escape from the obligation of his contract by alleging that the work sued for was defective, he must prove his allegation.—A. M. Blodgett Const. Co. v. Cheney Lumber Co., 57 So. 369.

In an action on a contract for the construction of a dam, proof *held* insufficient to sustain contention that the work sued for was defective.—Id.

VI. ACTIONS FOR BREACH.

§ 339 (Fla.) It is error to strike a plea of "did not promise as alleged" in an action on a simple contract other than a bill or note.—*Messer v. Dekle*, 57 So. 607.

CONTRADICTION.

See Witnesses, § 388.

CONTRIBUTORY NEGLIGENCE.

See Negligence, §§ 76, 100, 117, 119, 122, 136.

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Deeds; Tenancy in Common, § 35.

CONVICTS.

See Marriage, § 58; Pardon; Statutes, § 118.

§ 9 (Ala.App.) A convict labor contract, made by a surety who confesses judgment for fine against the convict, only gives the hirer the state's right to compel satisfaction of the fine by involuntary servitude.—*Williams v. State*, 57 So. 1030.

An agreement between a convict and the hirer under a suretyship contract, by the latter confessing judgment for the convict, by which the convict was released from further service, was not a failure or refusal to perform the labor contract so as to make the convict punishable under Code 1907, § 6846.—*Id.*

A convict's cessation from labor under a convict labor contract because of his subsequent lawful arrest and his inability to obtain bond so as to continue service was not a breach of the convict labor contract, making him punishable under Code 1907, § 6846.—*Id.*

COPY.

See Evidence, §§ 183, 342.

CORPORATIONS.

See Banks and Banking; Bills and Notes, § 333; Carriers; Damages, § 128; Evidence, §§ 243, 244; Frauds, Statute of, § 56; Insurance, §§ 55, 70; Municipal Corporations; Railroads; Street Railroads; Telegraphs and Telephones.

IV. CAPITAL, STOCK, AND DIVIDENDS.**(D) Transfer of Shares.**

§ 117 (Fla.) An equity to rescind a purchase of stock in a corporation upon the ground of fraud may be lost by accepting benefits after discovery of the fraud.—*Florida Cigar & Tobacco Co. v. Baker & Holmes Co.*, 57 So. 174.

V. MEMBERS AND STOCKHOLDERS.**(A) Rights and Liabilities as to Corporation.**

§ 170 (Ala.) One cannot by wrongful, legally fraudulent conduct of another be deprived of his status as stockholder, with right to sue on behalf of the corporation.—*Empire Realty Co. v. Harton*, 57 So. 763.

(C) Suing or Defending on Behalf of Corporation.

§ 207 (Ala.) One to maintain a suit in behalf of a corporation as a stockholder therein must be such a stockholder at the time.—*Empire Realty Co. v. Harton*, 57 So. 763.

More inadequacy of price at which stock is sold on execution, at most, renders the sale only voidable; so that, unless it is avoided, the execution debtor cannot maintain a suit on behalf of the corporation.—*Id.*

VI. OFFICERS AND AGENTS.**(D) Liability for Corporate Debts and Acts.**

§ 336 (Ala.App.) The president of a corporation, who executed an accommodation note in its name, *held* not liable personally, because the corporation had no power to execute such a note.—*B. J. Wolfe & Sons v. McKeon*, 57 So. 63.

VII. CORPORATE POWERS AND LIABILITIES.**(A) Extent and Exercise of Powers in General.**

§ 377 (Miss.) Despite Code 1906, § 5005, proof that corporate stock was really purchased by another corporation *held* no defense to an action against one guaranteeing a note for its price.—*Kelly v. Bank of Commerce*, 57 So. 978.

(B) Representation of Corporation by Officers and Agents.

§ 423 (Ala.) A corporation is liable for the wrongful acts of its employés, done in the course of their employment or line of their duties.—*Gassenheimer v. Western Ry. of Alabama*, 57 So. 718.

§ 432 (La.) Evidence *held* to warrant a finding that the agent of defendant mill company had authority to indorse a note to plaintiff bank, which had been executed to the company, so as to render the company liable as indorser.—*First Nat. Bank v. Johnson*, 57 So. 930.

(E) Torts.

§ 492 (Ala.App.) A corporation is not responsible for the acts of its agent committed outside the business for which he was engaged.—*Henderson-Misell Mercantile Co. v. C. D. Chapman & Co.*, 57 So. 82.

Acts of agents of a corporation, *held* so disconnected with the business for which they were employed as not to render their principal liable for a conversion thereby.—*Id.*

XII. FOREIGN CORPORATIONS.

§ 642 (Ala.) A foreign corporation *held* to have done business in the state within Code 1907, §§ 3642, 3644.—*Geo. W. Muller Mfg. Co. v. First Nat. Bank*, 57 So. 762.

§ 661 (Ala.) A foreign corporation may not exercise its corporate functions within the state until it has complied with Code 1907, §§ 3642, 3644.—*Geo. W. Muller Mfg. Co. v. First Nat. Bank*, 57 So. 762.

CORROBORATION.

See Witnesses, § 414.

COSTS.

See Mandamus, § 53.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

§ 3 (La.) Costs can be taxed only as provided by statute.—*Claussen v. Cumberland Telephone & Telegraph Co.*, 57 So. 780.

§ 42 (La.) The costs of a suit on rent notes *held* taxable on defendant, notwithstanding a tender of payment at trial; the tender not being a legal tender.—*Bonnabel v. Metairie Cypress Co.*, 57 So. 271.

IV. SECURITY FOR PAYMENT.

§ 106 (Ala.) Code 1907, § 3687, requiring the dismissal of actions by nonresident plaintiffs unless security for costs be given, *held* not subject to the rule that penal statutes must be strictly construed.—*Ex parte Bradshaw*, 57 So. 16.

§ 119 (Ala.) Under Code 1907, § 3687, requiring the giving of security for costs by a

nonresident plaintiff, the trial court may, after fixing the time for the giving of security, extend it.—*Ex parte Bradshaw*, 57 So. 16.

Where the trial court, under Code 1907, § 3687, extended the time to file security for costs, an order made after the extended time is invalid, though based upon an application made before such expiration.—*Id.*

§ 137 (Ala.) Upon default, an order directing a nonresident plaintiff to give security for costs within a set time *held* not to itself operate as a dismissal.—*Ex parte Bradshaw*, 57 So. 16.

In view of the prior legislation culminating in Act Feb. 17, 1885 (Sess. Acts 1884-85, p. 137), *held*, that Code 1907, § 3687, makes the giving of security by a nonresident plaintiff a condition precedent to the maintenance of the action.—*Id.*

Under Code 1907, § 3687, which supplanted Code 1852, § 2396, *held* that, an extension having been granted a nonresident plaintiff to give security for costs, the action must be dismissed upon the plaintiff's failure to give such security within the time fixed.—*Id.*

§ 137 (Miss.) A motion to dismiss an action for the failure of plaintiff to give security for costs, as required by Code 1906, § 940, *held* improperly granted.—*Wright v. Stanford*, 57 So. 289.

V. AMOUNT, RATE, AND ITEMS.

§ 173 (Ala.) Under Code 1907, § 3010, *held*, that the chancery court, in a bill against an administrator and others to set aside a conveyance, was not authorized to grant an attorney's fee to the complainant.—*Wilks v. Wilks*, 57 So. 776.

§ 175 (La.) Fees of jurors who are in attendance, but do not serve, are chargeable to the one cast in the suit.—*Claussen v. Cumberland Telephone & Telegraph Co.*, 57 So. 780.

§ 194 (La.) In a rule to tax costs, it is not necessary that plaintiff should allege that he has paid them; it is sufficient that he is liable therefor.—*Claussen v. Cumberland Telephone & Telegraph Co.*, 57 So. 780.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

§ 247 (Fla.) Under Gen. St. 1906, § 2789, the reasonable premium paid for a supersedeas bond may be taxed as costs only when the bond is given by a fiduciary.—*Hull v. Burr*, 57 So. 616.

§ 256 (Fla.) Where matters are improperly incorporated in a transcript on writ of error, the cost will be taxed against the party requiring it to be included.—*Seaboard Air Line Ry. v. Rents*, 57 So. 612.

VIII. PAYMENT AND REMEDIES FOR COLLECTION.

§ 277 (Ala.) It is well settled in equity that when the plaintiff has failed in one suit, and brings another against the same party on substantially the same cause of action, the court will stay proceedings in the second action until the costs of the former suit are paid.—*Jordan v. Jordan*, 57 So. 436.

IX. IN CRIMINAL PROSECUTIONS.

§ 322 (Ala.App.) One convicted of disposing of stolen property, and sentenced to hard labor for payment of costs, should be sentenced at the rate of 75 cents per day.—*Swint v. State*, 57 So. 894.

§ 322 (Ala.App.) A judgment, in a criminal prosecution sentencing defendants for payment of costs at 40 cents per day, *held* erroneous.—*Stanfield v. State*, 57 So. 402.

§ 322 (Ala.App.) A sentence to work out costs of a conviction should be at the rate of 75 cents per day.—*Johnson v. State*, 57 So. 499.

§ 322 (Ala.App.) In a prosecution for the illegal sale of intoxicating liquors, a sentence to imprisonment in default of payment of costs at the rate of 40 cents a day, instead of 75 cents, was improper.—*Wilson v. State*, 57 So. 503.

§ 322 (Ala.App.) On conviction of crime, no fine being imposed, a sentence imposing hard labor in lieu of payment of costs is erroneous.—*Lewis v. State*, 57 So. 1012.

CO-TENANCY.

See Tenancy in Common.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTIES.

See Mandamus, § 109; Officers; Paupers; Statutes, §§ 68, 94; Taxation, § 495.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

§ 12 (Fla.) Acts 1911, c. 6247, *held* to provide for the establishment of Pinellas county upon the contingency of an affirmative vote and also for the organization of the government of the county.—*State v. Sammons*, 57 So. 196.

Defect in the description of territory included in Pinellas county created by Acts 1911, c. 6247, do not render the statute unconstitutional.—*Id.*

Statute establishing new county *held* not void because of defect in description of territory unless so defective that the legislative intent cannot be effectuated in its essential features.—*Id.*

Acts 1911, c. 6247, creating Pinellas county construed as to description of boundary.—*Id.*

§ 14 (La.) The people of the parish of Calcasieu having voted against ratification of Act No. 77 of 1910, creating parish of Jefferson Davis, that act never became operative.—*State ex rel. Carey v. Sanders*, 57 So. 924; *State ex rel. Moore v. Same*, *Id.* 927; *State ex rel. McMahon v. Same*, *Id.*

II. GOVERNMENT AND OFFICERS.

(B) County Seat.

§ 26 (Fla.) Proviso to Laws 1911, c. 6239, relating to removal of county seats, that it shall not apply to any county having constructed a courthouse within the past twenty years, *held* prospective.—*Collier v. Cassady*, 57 So. 617.

§ 28 (Fla.) Under Const. art. 8, § 4, it is the duty of the Legislature to designate a temporary county seat of a new county.—*State v. Sammons*, 57 So. 196.

(D) Officers and Agents.

§ 62 (Fla.) Pinellas county being formed from territory of Hillsborough county, the officers of the latter *held* required to perform their duties until the organization of the new county government is effected by the qualification of the officers of the new county.—*State v. Sammons*, 57 So. 196.

§ 88 (Fla.) In a statute establishing a new county, the duties of officers that are incidental to such establishment may be regulated in the act.—*State v. Sammons*, 57 So. 196.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(B) Contracts.

§ 125 (Ala.) A county is liable in general assumpsit on an implied contract within the

range of its contractual powers.—*Montgomery County v. Pruett*, 57 So. 823.

COUNTY COURTS.

See Courts, § 183.

COUNTY TREASURER.

See Officers.

COURT HOUSES.

See Counties, §§ 26, 28.

COURTS.

See Constitutional Law, § 197; Criminal Law, §§ 260, 1144; Elections, § 154; Infants, § 18; Insane Persons; Judges; Justices of the Peace; Mandamus, §§ 53, 59; Taxation, § 495; Trial, § 367.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 2 (Ala.) Jurisdiction in personal actions depends upon the subject-matter to be adjudged, and the presence in court of the parties whose rights are to be affected by the judgment.—*Wolff v. McGaugh*, 57 So. 754.

§ 2 (Ala.) Excess of jurisdiction is an act not authorized as to a particular case, though within the general power of the judge.—*Broom v. Douglass*, 57 So. 860.

A colorable cause or a colorable invocation of jurisdiction means that a person apparently qualified has appeared and made complaint, under oath, stating a fact which, with other facts unstated, may constitute an offense, or be similar to a designated offense, for the purpose of eliciting process.—*Id.*

§ 5 (Ala.) Action of trespass for damages for injuries to real estate *held* a personal action.—*Wolff v. McGaugh*, 57 So. 754.

§ 7 (Ala.) Local and transitory actions, defined.—*Wolff v. McGaugh*, 57 So. 754.

§ 17 (Ala.) In respect to subject-matter, jurisdiction is acquired only by the constitution of the court.—*Wolff v. McGaugh*, 57 So. 754.

§ 18 (Ala.) It is the general rule that actions for injuries to realty must be brought in the forum *rei sitæ*.—*Wolff v. McGaugh*, 57 So. 754.

§ 21 (Ala.) The jurisdiction of the person is acquired by the court's own act, by its process properly issued and served, or by voluntary appearance of the defendant.—*Wolff v. McGaugh*, 57 So. 754.

§ 24 (Ala.) Consent cannot confer jurisdiction of the subject-matter, for that is derived from the law.—*Wolff v. McGaugh*, 57 So. 754.

§ 25 (Ala.) Where a court has jurisdiction of the subject-matter, parties may confer jurisdiction of their persons by submitting themselves to its judgment.—*Wolff v. McGaugh*, 57 So. 754.

§ 26 (Miss.) The inherent powers of courts are those which are essential to their existence and to the due administration of justice.—*Fuller v. State*, 57 So. 806.

§ 37 (Ala.) Territorial jurisdiction, or venue, may be waived, at least in personal actions.—*Wolff v. McGaugh*, 57 So. 754.

The statutory provisions fixing the local jurisdiction in both law and equity courts may be waived by a failure to make timely objection.—*Id.*

§ 39 (Ala.) Where it appears to a court that its judgment is asked in a case which it has no power to decide under any circumstances, it is the duty of the court to repudiate the cause *ex mero*.—*Wolff v. McGaugh*, 57 So. 754.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(A) Creation and Constitution, and Court Officers.

§ 42 (Fla.) Acts 1911, c. 6247, § 7, relating to jurisdiction of courts of newly created Pinellas county, *held* not unconstitutional.—*State v. Sammons*, 57 So. 196.

§ 56 (La.) The appointment as court interpreter of a person who had contributed toward a fund for accused's prosecution avoids a conviction.—*State v. Lazarone*, 57 So. 532.

(B) Terms, Vacations, Place and Time of Holding Court, Courthouses, and Accommodations.

§ 62 (Ala.App.) Act Nov. 23, 1907 (Loc. Laws, Sp. Sess. 1907, p. 32), amending Code 1896, § 909, so far as the same related to the times of holding circuit court of Franklin county, was not affected by the adoption of the Code of 1907, and is valid.—*Northern Alabama Ry. Co. v. Lowery*, 57 So. 260.

(D) Rules of Decision, Adjudications, Opinions, and Records.

§ 97 (Ala.) A decision of the Supreme Court that a state statute is an interference with interstate commerce is binding on the state courts.—*Central of Georgia Ry. Co. v. Groesbeck & Armstrong*, 57 So. 380.

III. COURTS OF GENERAL ORIGINAL JURISDICTION.

(A) Grounds of Jurisdiction in General.

§ 121 (Ala.App.) Under Const. 1901, § 143, the circuit court *held* without original jurisdiction of an action for negligent personal injury, where the complaint demands exactly \$50.—*Mobile Light & R. Co. v. George*, 57 So. 50.

§ 121 (Ala.App.) An action under Code 1907, § 6035, for a penalty for destroying, injuring, or removing trees, *held* governed by section 5355, so that a judgment for an amount beneath the jurisdiction of the court must be set aside, in absence of set-off or affidavit that an amount within the jurisdiction was actually due.—*O'Reilly v. Masterson*, 57 So. 1013.

§ 122 (La.) In a suit to restrain interference with moving picture show, petition *held* to sufficiently show jurisdiction.—*State ex rel. Barthe & Levy v. Mayor of City of New Orleans*, 57 So. 798.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 183 (Fla.) Under Const. art. 5, § 17, when a county court is duly organized in a county, the county judge as such has no trial jurisdiction in ordinary civil actions at law.—*Garcia v. Pardo*, 57 So. 974.

VI. COURTS OF APPELLATE JURISDICTION.

(A) Grounds of Jurisdiction in General.

§ 204 (La.) Const. art. 94, authorizes the Supreme Court under its supervisory jurisdiction to examine any question which it deems of sufficient importance for examination and decision.—*Brunner Mercantile Co. v. Rodgin*, 57 So. 1004.

§ 208 (Fla.) Const. art. 4, § 13, does not authorize Justices of the Supreme Court to give to the Governor at his request an opinion on the constitutionality of statutes affecting his executive powers and duties.—*In re Opinion of Judges*, 57 So. 345.

(B) Courts of Particular States.

§ 224 (La.) Appeal dismissed for insufficiency of amount involved.—*Britt v. Caldwell-Norton Lumber Co.*, 57 So. 162.

§ 224 (La.) Supreme Court has no jurisdiction when, by admission of defendant, the sum in controversy is less than \$2,000.—*Central Glass Co. v. Niagara Fire Ins. Co. of City of New York*, 57 So. 895.

§ 224 (La.) Where there is an amount to be distributed, the amount is the test of jurisdiction, and not the respective amounts claimed by the creditors.—*Denegre v. W. G. Tebault Furniture & Realty Co.*, 57 So. 929.

VII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

§ 484 (Ala.) The settlement and administration of certain estates where the construction of a will was a necessity *held* removable from the probate to the chancery court.—*Ashurst v. Ashurst*, 57 So. 442.

§ 485 (Ala.) The heirs at law of a decedent *held* entitled to maintain a bill for the removal of the administration from the probate into the chancery court, and for the allotment of dower.—*Snodgrass v. Snodgrass*, 57 So. 474.

§ 487 (Ala.) On demurrer to a bill filed to remove the settlement and administration of an estate from the probate to the chancery court, *held*, that the chancellor could not construe the will.—*Ashurst v. Ashurst*, 57 So. 442.

CREDIBILITY.

See Witnesses, §§ 318-414.

CREDITORS.

See Fraudulent Conveyances; Marshaling Assets and Securities.

CREDITORS' SUIT.

§ 7 (Ala.) A creditors' bill need not show any fraudulent conveyance or disposition, other than the concealment of assets which, if discovered, would be liable to the satisfaction of debts.—*Elliott v. Kyle*, 57 So. 752.

§ 11 (Ala.) Under Code 1907, § 3740 et seq., authorizing creditors' bills for discovery, a creditor by a foreign judgment need not sue on it or obtain judgment thereon in this state.—*Elliott v. Kyle*, 57 So. 752.

§ 22 (Ala.) A creditors' bill for the discovery of concealed assets may be maintained, under Code 1907, § 3740 et seq., although the property sought to be discovered is outside of the state.—*Elliott v. Kyle*, 57 So. 752.

§ 39 (Ala.) Creditors' bill, under Code 1907, § 3740 et seq., *held* to sufficiently aver the necessity of discovery.—*Elliott v. Kyle*, 57 So. 752.

Creditors' bill for discovery, under Code 1907, § 3740 et seq., *held* to sufficiently show that the complainant had no other means of ascertaining the facts sought to be discovered.—*Id.*

CRIMINAL LAW.

See Animals, § 18; Arrest; Assault and Battery; Bail; Chattel Mortgages, §§ 232-233; Conspiracy; Costs, § 322; Embezzlement; False Pretenses; Gaming, §§ 69-101; Grand Jury; Homicide; Indictment and Information; Insane Persons; Intoxicating Liquors; Larceny; Lewdness; Libel and Slander, §§ 141, 162; Master and Servant, § 345; Municipal Corporations, §§ 592-642; Obscenity; Obstructing Justice; Pardon; Perjury; Physicians and Surgeons, § 6; Rape; Robbery; Trespass, §§ 81, 89; Weapons; Witnesses.

II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

§ 55 (Ala.App.) Voluntary intoxication, unless it produces insanity or makes accused incapable of entertaining a specific intent, *held* not a defense to a prosecution for committing a crime of which a specific intent is not an essential ingredient.—*Rhodes v. State*, 57 So. 1021.

Voluntary intoxication when the liquor was sold is not a defense to a charge of unlawfully selling intoxicants; a specific intent not being an essential ingredient of the offense.—*Id.*

III. PARTIES TO OFFENSES.

§ 59 (Ala.) "Aid and abet" defined.—*Jones v. State*, 57 So. 31.

Mere presence of a person with intent to aid another in committing a crime if necessary, in the absence of preconcert, is not aiding and abetting.—*Id.*

§ 59 (Ala.App.) At common law all persons engaged in the commission of a misdemeanor are indictable as principals.—*Boyd v. State*, 57 So. 1019.

VII. FORMER JEOPARDY.

§ 178 (Ala.App.) Accused *held* estopped to plead as a former jeopardy the beginning of a former proceeding against him on the same charge which he procured to be dismissed.—*Stinson v. State*, 57 So. 509.

§ 193½ (Ala.) A judgment convicting defendant of murder in the second degree *held*, in view of Code 1907, § 7160, a bar to further prosecution for murder in the first degree.—*Ex parte Spivey*, 57 So. 491.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

§ 207 (Ala.App.) That the grand jury, before a preliminary trial before the county judge, as committing magistrate, pursuant to Code 1907, §§ 7598-7615, failed to find an indictment, and requested that petitioner be held for further investigation, *held* not to give the city court of Gadsden jurisdiction to hold petitioner for further investigation by the grand jury.—*Ex parte Simpson*, 57 So. 518.

That a city court made an order holding petitioner for further investigation by the grand jury, which was void because the committing magistrate had not then held a preliminary trial, would not deprive the magistrate of jurisdiction to hold the preliminary trial.—*Id.*

§ 218 (Ala.App.) In view of Code 1907, § 7348, and under Acts 1898-99, p. 186, a justice of the peace *held* to have properly made a warrant returnable to the county court.—*Barney v. State*, 57 So. 598.

§ 239 (Ala.App.) If the evidence at the preliminary trial does not show probable cause for believing accused guilty, he should be discharged.—*Ex parte Simpson*, 57 So. 518.

§ 240 (Ala.App.) An order holding petitioner for further investigation by the grand jury, void because the court had no jurisdiction to make it, *held* subject to attack in any court.—*Ex parte Simpson*, 57 So. 518.

If the evidence at the preliminary trial shows probable cause for believing accused guilty, he should be held for indictment.—*Id.*

§ 252 (Miss.) Amendments of an affidavit charging the unlawful sale of intoxicants, by striking out parts thereof charging a violation of city ordinances and making the affidavit charge an offense against the state, *held* to change the offense with which accused was charged.—*Wade v. State*, 57 So. 222.

§ 260 (Miss.) Where the record contained no certified copy of the proceedings, which orig-

inated in the justice court, the circuit court was without jurisdiction, and its judgment is a nullity.—*Cawthon v. State*, 57 So. 224.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 280 (Ala.) A plea in abatement that the trial court did not draw the grand jury before the last term of the present term of the circuit court adjourned *held* properly stricken out as unintelligible.—*Parris v. State*, 57 So. 857.

§ 280 (Fla.) Pleas in abatement must be strictly construed.—*Cannon v. State*, 57 So. 240.

§ 281 (Ala.) The state's demurrer to a plea of accused confesses the truth of the allegations.—*Ex parte Spivey*, 57 So. 491.

§ 292 (Ala.App.) A plea *held* sufficient to show that accused has been in former jeopardy.—*Palmer v. State*, 57 So. 507.

A plea of former jeopardy *held* not demurrable on grounds stated.—*Id.*

§ 293 (Ala.App.) A demurrer to a plea on an untenable ground should not be sustained, though the plea be demurrable on some other ground.—*Palmer v. State*, 57 So. 507.

X. EVIDENCE.

(A) Judicial Notice, Presumptions, and Burden of Proof.

§ 304 (Ala.App.) The Supreme Court will take judicial notice of the fact that certain towns are located in a certain county.—*Barney v. State*, 57 So. 598.

§ 304 (Miss.) The court will not take judicial notice of municipal ordinances.—*Thomas v. State*, 57 So. 364.

§ 308 (Ala.App.) One is presumed to be innocent of a criminal offense until guilt is legally proved.—*Williams v. State*, 57 So. 1030.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 338 (Ala.) In the absence of a claim of improper influence, whether a witness had talked with another person *held* irrelevant.—*Jones v. State*, 57 So. 31.

§ 338 (Ala.App.) Allowing a witness to answer a question is not improper, where the answer will merely tend to fix the date of an occurrence to which he has testified.—*Rowe v. State*, 57 So. 72.

§ 338 (Fla.) Where the question is whether accused made a certain statement, that others may also have made the same statement is immaterial.—*McRae v. State*, 57 So. 348.

§ 363 (Ala.) "Res gestæ" defined.—*Pope v. State*, 57 So. 245.

§ 364 (Ala.App.) What defendant said to witness at a time subsequent to and disconnected with the killing *held* inadmissible as part of res gestæ.—*Sandford v. State*, 57 So. 134.

§ 364 (Ala.App.) In a prosecution for resisting the making of an arrest, testimony that defendant, who had been placed under arrest by the officer, but released on his statement that he did not know he was an officer, started running saying that he was not afraid of any officers, and would get his gun, was admissible as part of the res gestæ.—*Lewis v. State*, 57 So. 1035.

§ 365 (Ala.App.) Where several crimes constitute in fact one criminal transaction, evidence of all may be given as part of the res gestæ, but collateral facts should not be allowed.—*Cheek v. State*, 57 So. 108.

§ 366 (Ala.) Evidence that deceased was shooting craps at witness' house 30 minutes before the shooting was not res gestæ.—*Parris v. State*, 57 So. 857.

§ 368 (Ala.) Where defendant claimed that the homicide was committed by B., evidence

of B.'s mother that he was in the house at the time and asked her if she did not hear some one fighting out in the road *held* inadmissible as res gestæ.—*Pope v. State*, 57 So. 245.

§ 368 (Ala.App.) It is competent to show on a trial for assault and battery what was said and done by those present during the assault, as a part of the res gestæ.—*Wray v. State*, 57 So. 144.

On a trial for assault and battery the testimony of a witness as to what he told an officer or others after the assault is inadmissible.—*Id.*

(C) Other Offenses, and Character of Accused.

§ 369 (Ala.App.) Evidence relevant to the offense charged is not inadmissible, though it proves accused's guilt of another offense.—*Kirkwood v. State*, 57 So. 504.

§ 371 (Fla.) Evidence of previous similar crimes by a defendant tending to show the criminal intent *held* admissible.—*Presley v. State*, 57 So. 605.

§ 380 (Ala.App.) It is proper to refuse to permit accused, on trial for assault and battery, to testify that another case against him had been nolle pro'd.—*Wray v. State*, 57 So. 144.

§ 380 (Miss.) A witness as to the character of accused could not be properly examined as to the details of independent transactions.—*Neal v. State*, 57 So. 419.

(D) Materiality and Competency in General.

§ 384 (Ala.App.) Evidence may be excluded when it is such as to furnish a basis for nothing more than mere conjecture or remote inferences in reference to the transaction in issue.—*Hadnot v. State*, 57 So. 383.

§ 390 (Ala.App.) In a prosecution for murder, questions to a witness for defendant *held* objectionable as tending to elicit incompetent evidence.—*Barlew v. State*, 57 So. 601.

Question *held* properly excluded, as calling for a witness' undisclosed condition of mind.—*Id.*

(E) Best and Secondary and Demonstrative Evidence.

§ 398 (Ala.) In a prosecution for homicide, a statement of a witness as to the appearance of certain shoes claimed to belong to accused which the witness had examined two days after the murder *held* not objectionable as not the best evidence.—*Pope v. State*, 57 So. 245.

§ 400 (La.) Evidence of persons present at the coroner's inquest as to statements then made by accused is not objectionable under the secondary evidence rule.—*State v. Lazarone*, 57 So. 532.

§ 404 (Ala.App.) A shirt worn by deceased at the time he was killed, having been sufficiently identified, was properly admitted in evidence.—*Sandford v. State*, 57 So. 134.

§ 404 (Ala.App.) Under Acts Sp. Sess. 1909, p. 93, § 32½, bottles of wine and beer *held* properly shown to the jury in a prosecution for the violation of the liquor laws.—*Bell v. State*, 57 So. 154.

(F) Admissions, Declarations, and Hearsay.

§ 408 (Ala.App.) Certain evidence *held* to relate to an attempted compromise by accused, and to be inadmissible.—*Stinson v. State*, 57 So. 500.

§ 409 (Ala.) Evidence *held* to constitute a sufficient foundation for the admission of statements made by accused to witness.—*Jones v. State*, 57 So. 36.

§ 412 (La.) Hearsay declaration against interest should only be admitted where it clearly appears that the declaration was against de-

clarant's interest.—*State v. Lazarone*, 57 So. 532.

§ 413 (Ala.) Evidence of a prior declaration of a codefendant to his wife as to his purpose at the time he left before going to the place where the murder was committed, *held* self-serving and inadmissible.—*Jones v. State*, 57 So. 31.

§ 415 (Ala.App.) In a prosecution for homicide, certain evidence *held* inadmissible.—*Long v. State*, 57 So. 62.

§ 417 (Ala.) A witness was not entitled to testify as to her father's state of feeling toward a codefendant who had been awarded a separate trial.—*Jones v. State*, 57 So. 31.

§ 417 (Ala.App.) Evidence *held* inadmissible, in a trial for assault with intent to murder, to show accused's insanity.—*Milford v. State*, 57 So. 96.

§§ 418, 420 (Ala.App.) Evidence that a third person admitted committing the offense *held* hearsay.—*Stinson v. State*, 57 So. 509.

§§ 419, 420 (La.) Certain evidence in a criminal case *held* not hearsay.—*State v. Lazarone*, 57 So. 532.

(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

§ 447 (Miss.) Parol evidence is inadmissible to contradict the record of a court of record.—*Clark v. State*, 57 So. 209.

(I) Opinion Evidence.

§ 448 (Ala.) In a prosecution for homicide, a statement of a witness as to the appearance of certain shoes claimed to belong to accused which the witness had examined two days after the murder *held* not objectionable as the witness' conclusion.—*Pope v. State*, 57 So. 245.

Statement of a witness that the vines growing over a fence alongside a road where he followed a wagon and mule from the scene of the murder were mashed down like something "went over the fence" *held* not objectionable as a conclusion.—*Id.*

In a prosecution for homicide, a question concerning whether a certain mule would have made a track like that traced by the witness shortly after the murder *held* not objectionable as calling for a conclusion.—*Id.*

§ 448 (Ala.App.) On a trial for assault and battery, a question *held* objectionable as calling for testimony by a witness on the mental state of another.—*Wray v. State*, 57 So. 144.

§ 448 (Ala.App.) In a prosecution for murder in the second degree, *held*, that questions were properly excluded as calling for a mere conclusion.—*Barlew v. State*, 57 So. 601.

§ 448 (La.) On trial for larceny, certain evidence *held* not inadmissible, as calling for the opinion of witness.—*State v. Jackson*, 57 So. 888.

§ 450 (Ala.) While a witness may testify that certain tracks corresponded because of measurement and certain marked peculiarities, he could not state that a certain shoe or foot could or would make a particular track.—*Pope v. State*, 57 So. 245.

§ 452 (Ala.) A witness who was a practical blacksmith with 15 years' experience in shoeing horses *held* properly permitted to testify as to the condition of a mule's right hind foot and the liability of loose nails to drop out.—*Pope v. State*, 57 So. 245.

§ 455 (Fla.) A witness may be asked how a defendant looked when the goods he is charged with having stolen were taken from a place where they had been concealed, and were shown to him.—*Presley v. State*, 57 So. 605.

§ 478 (Ala.App.) In a prosecution for murder, *held*, that it was within the discretion of the trial court to permit a witness to testify as an expert that there were powder marks on

the face of deceased.—*Barlew v. State*, 57 So. 601.

§ 490 (Ala.) Proof that a physician who testified for the defendant testified before the grand jury, *held* admissible to contradict his testimony to the contrary.—*Jones v. State*, 57 So. 31.

(L) Evidence at Preliminary Examination or at Former Trial.

§ 539 (Ala.) Where a showing as to what an absent witness would testify had been once read to the jury, it was not error to sustain the state's objection to a repetition thereof.—*Jones v. State*, 57 So. 36.

§ 547 (Ala.) Stenographer's notes of the testimony of a witness at a former trial, since deceased, *held* admissible to prove his testimony at a subsequent trial.—*Jones v. State*, 57 So. 36.

(M) Weight and Sufficiency.

§ 553 (Ala.) The jury may disregard the testimony of a witness for reasons other than that it has been impeached.—*Talley v. State*, 57 So. 445.

§ 561 (Ala.) If, giving due weight to all the testimony, the jury are convinced beyond a reasonable doubt that accused was present to render aid if necessary, that accused is an aider or abettor is made out.—*Jones v. State*, 57 So. 31.

§ 561 (Ala.) In a criminal case, the jury need not be absolutely convinced of defendant's guilt.—*Talley v. State*, 57 So. 445.

§ 562 (Miss.) One cannot be convicted of an offense upon evidence which merely raises a suspicion of guilt.—*City of Hazlehurst v. Byrd*, 57 So. 360.

XI. TIME OF TRIAL AND CONTINUANCE.

§ 575 (Ala.App.) Under Code 1907, § 8248, trial of a criminal prosecution during the second week of a term *held* not erroneous.—*Stanfield v. State*, 57 So. 402.

§ 578 (Ala.App.) A trial court, to which accused is properly bound over by a committing magistrate, may, for good cause, continue the case for further investigation by another grand jury.—*Ex parte Simpson*, 57 So. 518.

§ 584 (Ala.App.) One charged with crime at a jury term of the court, created by Loc. Acts 1907, pp. 369-377, who demands and receives a jury trial, *held* not entitled to complain of the refusal to grant a continuance to the next jury term.—*Banks v. State*, 57 So. 63.

§ 586 (Ala.App.) Rulings on applications for a continuance rest largely within the discretion of the trial court.—*Banks v. State*, 57 So. 63.

§ 586 (Ala.App.) The granting or refusing of a continuance rests in the sound discretion of the trial court.—*Scott v. State*, 57 So. 413; *Shelly v. Same*, Id. 416; *Wilson v. Same*, Id.; *Brannon v. Same*, Id.

§ 594 (Ala.App.) The denial of a continuance for absent witnesses is in the court's discretion.—*Gilbert v. State*, 57 So. 127.

§ 600 (Ala.) In a criminal prosecution, *held*, that the state did not make a judicial admission of the truth of a showing from an absent witness.—*Talley v. State*, 57 So. 445.

XII. TRIAL.

(A) Preliminary Proceedings.

§ 619 (Ala.App.) Where defendant was tried and convicted of burglary on one indictment, charging burglary of a freight car, he was not prejudiced by the existence of four other indictments, charging burglary of other cars in the same train at the same time.—*Ashley v. State*, 57 So. 1027.

§ 627 (Ala.) Jury Law, § 32, *held* not to require service of a copy of the indictment where a special venire was waived as authorized by Code 1907, § 7264.—*McSwean v. State*, 57 So. 732.

§ 627 (Ala.App.) Jury Law, § 32, *held* not to require service of copy of indictment with list of jurors, where special venire has been waived, as authorized by Code 1907, § 7264.—*Peacock v. State*, 57 So. 1020.

(B) Course and Conduct of Trial in General.

§ 636 (Ala.App.) The verdict in a felony case must be rendered in open court, in the presence of the judge and accused.—*Whitehurst v. State*, 57 So. 1023.

§ 641 (Ala.App.) Where the court, in the presence of accused, but in the absence of his counsel, received, without objection from accused, a verdict of guilty and imposed a sentence, and, on attention being called to the inadvertence, the court offered to poll the jury, which was declined, and reduced the sentence from six years to five years, conviction will not be disturbed on appeal.—*Whitehurst v. State*, 57 So. 1026.

§ 644 (Ala.App.) The impropriety thereof not being made to appear complaint may not be made of the action of court, on a prosecution for illegal fishing, allowing communication with the solicitor by the game warden, while his son was testifying.—*Rowe v. State*, 57 So. 72.

§ 649 (Ala.App.) Defendant was not prejudiced by the suspension of his trial long enough to enable the court to draw a sufficient number of jurors to complete a venire in another case.—*Ashley v. State*, 57 So. 1027.

(C) Reception of Evidence.

§ 673 (Ala.App.) Where evidence is admissible for one purpose only, the instructions should restrict it to such purpose.—*McGuire v. State*, 57 So. 57.

§ 681 (Ala.App.) Exclusion of evidence which is prima facie incompetent is not error, where the party offering it does not show to the court that he will subsequently introduce evidence to render it material.—*Milford v. State*, 57 So. 96.

§ 687 (Ala.App.) The further examination of a witness on matters not in rebuttal on being recalled by defendant after the evidence was closed was in the discretion of the trial court.—*Barlew v. State*, 57 So. 601.

(D) Objections to Evidence, Motions to Strike Out, and Exceptions.

§ 691 (Ala.) A party examining a witness may object to an answer as not responsive, but the opposite party cannot object to it on that ground if the answer is competent.—*Pope v. State*, 57 So. 245.

§ 693 (Ala.) Where a warrant was introduced in evidence without objection, and evidence disclosed that it was not genuine, the remedy was by motion to exclude it.—*Adams v. State*, 57 So. 591.

§ 693 (Ala.App.) Whether a question in a criminal prosecution exceeded the latitude allowed in cross-examination *held* not reviewable, where not objected to until answered.—*Tice v. State*, 57 So. 506.

§ 695 (Ala.App.) Where accused objected to the introduction of the number of letters as a whole, his objection may be overruled if any part of them be admissible.—*Jackson v. State*, 57 So. 110.

§ 696 (Fla.) Evidence of state's witness that at the time of the killing he believed he heard the deceased calling defendant's name *held* properly admitted.—*Ayers v. State*, 57 So. 349.

(E) Arguments and Conduct of Counsel.

§ 699 (Ala.) The extent and scope of statements to the jury in a criminal case are within the discretion of the trial court.—*Pope v. State*, 57 So. 245.

§ 703 (Ala.) The state's counsel having opened his case merely by reading the indictment, and defendant's counsel having made a full statement, the court did not err in permitting the state's counsel in reply to make a full statement outlining the state's case.—*Pope v. State*, 57 So. 245.

§ 713 (Miss.) In a prosecution for murder, argument of the district attorney *held* improper.—*Minor v. State*, 57 So. 548.

§ 720 (Ala.App.) A failure of a defendant, in a prosecution for assault with intent to murder, to remember what he had testified to in a preliminary examination, *held* proper to be referred to in argument.—*Stanfield v. State*, 57 So. 402.

§ 721 (Miss.) Argument of prosecuting attorney *held* a comment on the failure of accused to testify, and violative of Code 1906, § 1918.—*Gurley v. State*, 57 So. 565.

§ 726 (Ala.App.) Solicitor's remarks in his closing argument *held* in reply to the argument of accused's counsel and proper.—*Barney v. State*, 57 So. 598.

§ 728 (Ala.App.) Objections to and motions to exclude statements of counsel must be made during trial and before the jury has retired.—*Long v. State*, 57 So. 62.

§ 730 (Ala.App.) *Held*, that improper argument of accused's attorney was properly excluded.—*Jackson v. State*, 57 So. 110.

(F) Province of Court and Jury in General.

§ 741 (Ala.) Evidence *held* to require submission to the jury of the question whether a community of unlawful purpose existed between defendant and his codefendants or whether accused aided and abetted them.—*Jones v. State*, 57 So. 31.

§ 741 (Ala.App.) The weight of testimony in a criminal prosecution *held* for the jury.—*Tice v. State*, 57 So. 506.

§ 741 (Ala.App.) The general affirmative charge for the state should not be given, where the evidence as a whole does not necessarily show guilt.—*Carter v. State*, 57 So. 1022.

§ 742 (Ala.App.) The jury cannot arbitrarily reject evidence.—*Jackson v. State*, 57 So. 594.

§ 761 (Ala.App.) In a prosecution for assault and battery, a request to charge which assumed, as proved, facts in regard to which the evidence was conflicting *held* properly refused.—*Naftel v. State*, 57 So. 386.

§ 761 (Fla.) In a prosecution for larceny, instruction *held* not erroneous as assuming commission of the offense by accused.—*Presley v. State*, 57 So. 605.

§ 763, 764 (Ala.App.) A charge, on trial for trespass after warning, that, if the jury believed the evidence, prosecutor had not shown title at the time of the warning, and entry on the premises by accused, was properly refused as on the weight of the evidence.—*Hendley v. State*, 57 So. 1017.

§ 763, 764 (Miss.) Where the court admitted in evidence dying declarations, the jury *held* required to decide on the credibility thereof.—*Gurley v. State*, 57 So. 565.

§ 766 (Ala.App.) Requested charge in a prosecution for defamation *held* properly refused, as submitting a question of law to the jury.—*Dungan v. State*, 57 So. 117.

(G) Necessity, Requisites, and Sufficiency of Instructions.

§ 770 (Ala.) In a prosecution for homicide, an instruction with reference to the guilt of another *held* erroneous for failure to predicate

a reasonable theory of another's guilt.—*Pope v. State*, 57 So. 245.

§ 775 (Ala.App.) A charge on alibi held proper.—*Wray v. State*, 57 So. 144.

§ 775 (Fla.) Instruction on alibi held not prejudicial to defendant.—*McRae v. State*, 57 So. 348.

§ 782 (Ala.) An instruction that there was no evidence of a stated proposition held properly refused.—*Jones v. State*, 57 So. 31.

§ 782 (Ala.) A charge on reasonable doubt held properly refused.—*Savage v. State*, 57 So. 469.

§ 782 (Ala.) An instruction that, where the evidence is evenly balanced, the jury must acquit accused is properly refused.—*Adams v. State*, 57 So. 591.

§ 782 (Ala.App.) An instruction on self-defense held erroneous.—*Johnson v. State*, 57 So. 593.

§ 783 (Ala.App.) Instructions held misleading.—*McGuire v. State*, 57 So. 57.

The refusal to give a requested charge as to effect of evidence of bad character held erroneous.—*Id.*

§ 784 (Miss.) An instruction that a person can be convicted on circumstantial evidence is erroneous, in omitting the qualification that such circumstantial evidence must be sufficient to exclude every other reasonable hypothesis than that of guilt.—*Smith v. State*, 57 So. 913.

§ 785 (Ala.) On a trial for murder, the refusal to give a charge held, by equally divided court, reversible error.—*Adams v. State*, 57 So. 591.

§ 785 (Ala.App.) A requested charge that, if a witness exhibited malice toward accused, the jury might reject his entire testimony, held properly refused.—*Jackson v. State*, 57 So. 594.

§ 786 (Ala.App.) An instruction as to the weight the jury may give defendant's testimony held erroneous.—*Sandford v. State*, 57 So. 134.

§ 789 (Ala.) In a prosecution for murder, a request to charge on reasonable doubt held properly refused.—*Pope v. State*, 57 So. 245.

In a prosecution for murder, a request to charge with reference to the guilt of a third person held properly refused.—*Id.*

§ 789 (Ala.) It is reversible error to refuse a charge directing an acquittal on a specified ground.—*Adams v. State*, 57 So. 591.

§ 789 (Ala.) A charge that a single fact inconsistent with accused's guilt is sufficient to raise a reasonable doubt is proper.—*Roberson v. State*, 57 So. 829.

§ 789 (Ala.) Instructions on reasonable doubt held proper.—*Parris v. State*, 57 So. 857.

§ 789 (Ala.App.) A charge requiring an acquittal unless the jury "believes" a certain material fact held properly refused for omitting to limit the belief to one of reasonable doubt.—*Dungan v. State*, 57 So. 117.

§ 789 (Ala.App.) The refusal to give a charge on reasonable doubt held reversible error.—*Kirkwood v. State*, 57 So. 504.

§ 789 (Ala.App.) The refusal to charge that, if there is a probability of accused's innocence he must be acquitted, is reversible error.—*Johnson v. State*, 57 So. 593.

§ 789 (Ala.App.) Where, though the court properly gave a general affirmative charge for the state, there was still a question for the jury as to whether defendant was guilty, he was entitled to an instruction on reasonable doubt.—*Martin v. State*, 57 So. 1032.

§ 792 (Ala.App.) A charge requiring acquittal of larceny unless accused conspired with or aided another to steal the money held sufficiently favorable to accused.—*Jackson v. State*, 57 So. 594.

§ 798 (Fla.) Charge as to reasonable doubt, confining the doctrine to individual jurors, held properly denied.—*Ayers v. State*, 57 So. 349.

§ 807 (Ala.) In a prosecution for murder, an instruction with reference to defendant's prior friendliness to deceased held properly refused as argumentative.—*Jones v. State*, 57 So. 36.

§ 807 (Ala.) A requested charge which is argumentative may be properly refused.—*Pope v. State*, 57 So. 245.

In a prosecution of a negro for killing a white man, certain instructions held properly refused as argumentative.—*Id.*

§ 807 (Ala.) An instruction held properly refused, because argumentative.—*Savage v. State*, 57 So. 469.

§ 807 (Ala.App.) A requested instruction on the presumption of innocence held in part argumentative and properly refused.—*Wilson v. State*, 57 So. 503.

§ 807 (Ala.App.) The court cannot be put in error for refusing requested charges which were argumentative, or in reply to a statement by counsel.—*Barney v. State*, 57 So. 598.

§ 809 (Ala.App.) A requested charge on the duty to acquit in case of doubt held misleading.—*Wilson v. State*, 57 So. 503.

§ 809 (Ala.App.) A requested charge, unintelligible in using the word "defendant," instead of some other person, probably the prosecutor, was properly refused.—*Hendley v. State*, 57 So. 1017.

§ 811 (Ala.) In a prosecution for murder, an instruction with reference to defendant's prior friendliness to deceased held properly refused as giving undue prominence to particular facts.—*Jones v. State*, 57 So. 36.

§ 811 (Ala.) A requested charge, which singles out parts of the evidence, may be properly refused.—*Pope v. State*, 57 So. 245.

In a prosecution of a negro for killing a white man, certain instructions held properly refused because attempting to distinguish between white and colored people so far as the crime is concerned.—*Id.*

§ 811 (Ala.) A requested charge held properly refused, because singling out a particular feature of the evidence.—*Savage v. State*, 57 So. 469.

§ 811 (Ala.) A charge that the jury should consider the interest of accused in the result is erroneous as singling out the credibility of accused.—*Roberson v. State*, 57 So. 829.

§ 811 (Ala.) A request to charge held properly refused as singling out a part of the evidence.—*Parris v. State*, 57 So. 857.

§ 811 (Ala.App.) A charge limiting testimony to the particular purpose for which it was admitted held not bad as giving it undue prominence.—*Jackson v. State*, 57 So. 594.

§ 814 (Ala.App.) In a prosecution for the sale of intoxicating liquor, a charge held abstract, not being supported by the evidence.—*Scott v. State*, 57 So. 413; *Shelly v. Same*, *Id.* 416; *Wilson v. Same*, *Id.*; *Brannon v. Same*, *Id.*

§ 814 (Ala.App.) A charge which does not state a correct legal principle applicable to the evidence should be refused.—*Jackson v. State*, 57 So. 594.

§ 815 (Ala.) In a prosecution for homicide, an instruction held erroneous and properly refused.—*Talley v. State*, 57 So. 445.

(H) Requests for Instructions.

§ 829 (Ala.) It is not error to refuse a requested charge covered in substance by the charge given.—*Savage v. State*, 57 So. 469.

§ 829 (Ala.App.) It is not error to refuse a request to charge, substantially covered by instructions given.—*Sills v. State*, 57 So. 89.

§ 832 (Ala.App.) A requested charge on reasonable doubt held properly refused, because meaningless.—Lee v. State, 57 So. 395.

§ 834 (Ala.App.) Under Code 1907, § 5364, the giving of a charge with a modification or criticism held to constitute reversible error.—Barker v. State, 57 So. 88.

(I) Objections to Instructions or Refusal Thereof, and Exceptions.

§ 844 (Ala.App.) An exception to a part of an oral charge held to fail, unless the entire part is faulty.—Maxwell v. State, 57 So. 505.

An exception to a charge as a whole held not well taken, though a part of it violates Code 1907, § 5362.—Id.

§ 845 (Ala.App.) An exception to a charge as a whole, which contains several propositions of law, some of which are correctly stated, will not be sustained.—Johnson v. State, 57 So. 389.

(J) Custody, Conduct, and Deliberations of Jury.

§ 858 (Ala.) Whether a jury should be allowed to take to the jury room a written showing of accused's absent witness, rests in the discretion of the trial court.—Talley v. State, 57 So. 445.

§ 859 (Ala.App.) The court may properly permit the official stenographer to read over the testimony of a witness on the jury's request to refresh their memory.—Johnson v. State, 57 So. 499.

(K) Verdict.

§ 872½ (La.) As under Const. art. 116, a capital offense must be tried by a jury of 12, all of whom must concur, if, when polled, a juror answered it was not his verdict, there was no conviction.—State v. Nelson, 57 So. 1003.

§ 890 (Ala.App.) Trial court's correction of verdict in a trial for murder held proper.—Barlow v. State, 57 So. 601.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 958 (La.) Affidavit of accused to a motion for a new trial on the ground of newly discovered evidence, without corroboration of the witness or explanation of absence of corroborative affidavit, held insufficient.—State v. Louvier, 57 So. 270.

§ 970 (Fla.) Defective allegation not affecting the merits or clerical error or surplusage held not ground for arresting judgment.—Sumpster v. State, 57 So. 202.

§ 972 (La.) A motion in arrest will be sustained only when it is shown on the face of the record that there is some irregularity in one of the steps of the proceedings shown in the record.—State v. McCrocklin, 57 So. 645.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

§ 982 (Miss.) Independent of statute, a court of record may suspend a criminal sentence.—Fuller v. State, 57 So. 6; Howard v. Same, Id. 9; Allen v. Same, Id.; Hoggett v. Same, Id.

The common-law power of courts of record to suspend sentences upon conviction of crime does not interfere with the exclusive power of the Governor to grant respites and pardons.—Id.

§ 982 (Miss.) One who does not object to the suspension of a sentence, which is merely the continuation of the case for sentence at a subsequent time, may not complain at a subsequent term that the court has no authority to suspend sentence, and that by doing so it

is a court of record has no power to indefinitely suspend sentence after plea or verdict of guilty; and, where accused did not object, the court at a later term may impose sentence.—Id.

§ 991 (Ala.App.) Under Code 1907, §§ 6306, 7630, a judgment sentencing persons to hard labor held justified by a verdict of guilty of assault and battery.—Stanfield v. State, 57 So. 402.

§ 995 (Ala.) Failure to record a waiver of a special venire in a capital case, as required by Code 1907, § 7264, does not invalidate a conviction.—McSweeney v. State, 57 So. 732.

Waiver of a special venire in a capital case, authorized by Code 1907, § 7264, may be shown by the trial judge's bench notes.—Id.

§ 995 (Ala.App.) A judgment sentencing for failure to pay or secure costs held to sufficiently show that the costs were not in fact paid or secured.—Stanfield v. State, 57 So. 402.

§ 1001 (Miss.) A court has no power, inherent or otherwise, to suspend execution of a sentence during defendant's good behavior.—Fuller v. State, 57 So. 806.

Accused was not entitled to discharge on account of invalidity of a provision suspending execution of sentence during his good behavior.—Id.

XV. APPEAL AND ERROR, AND CERTIORARI.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1030 (Ala.) The constitutionality of statutes cannot be reviewed on an appeal from a demurrer to an information, not having been raised below.—State v. Burke, 57 So. 870.

§ 1030 (La.) Conviction of perjury affirmed, where no bill of exceptions was reserved, demurrer filed, or motion to quash made.—State v. McCrocklin, 57 So. 645.

§ 1031 (Ala.App.) A conviction for murder will not be reversed on appeal because a person who had not been drawn as a grand juror, served on the grand jury returning the indictment, where there was no objection or exception in the court below.—Mathes v. State, 57 So. 390.

§ 1032 (Ala.App.) Accused, having pleaded not guilty and gone to trial on an indictment, cannot, on appeal, raise the objection of uncertainty.—Johnson v. State, 57 So. 389.

§ 1032 (Miss.) Under Code 1906, § 4936, one convicted of murder held entitled to complain for the first time on appeal of a variance.—Clark v. State, 57 So. 200.

§ 1036 (Ala.App.) The question of the evidence of the corpus delicti having been insufficient cannot be raised for the first time on appeal.—Jones v. State, 57 So. 62.

§ 1036 (La.) It is no ground for reversal that defendant allowed hearsay evidence to go to the jury without objection.—State v. Louvier, 57 So. 270.

§ 1038 (Ala.App.) In the absence of an objection or exception to the manner in which a written requested charge was given, or to the judge's failure to make the customary indorsement on it, the court's action is not available on review.—Banks v. State, 57 So. 63.

§ 1053 (Ala.App.) Under Code 1907, § 6243, as to necessity of exception for review, exception to the putting of defendant on trial before the court sitting without a jury is necessary.—Rowe v. State, 57 So. 72.

§ 1055 (Ala.App.) An objection to the state solicitor's conduct cannot be reviewed without an exception to a ruling of the court thereon.—Ashley v. State, 57 So. 1027.

§ 1056 (Ala.App.) Where the court's oral charge is not shown to have been excepted to, it is not before the appellate court for consideration.—*Barlew v. State*, 57 So. 601.

§ 1066 (Fla.) In the absence of an exception to an order refusing a new trial, the sufficiency of the evidence cannot be reviewed.—*Phillips v. State*, 57 So. 341.

An allowance of time to prepare a bill of exceptions on denial of a new trial is not allowing an exception to that order.—*Id.*

(D) Record and Proceedings Not in Record.

§ 1086 (Ala.App.) Refusal of a request to charge is not available error where the record does not show that it was requested in writing as required by Code 1907, § 5364.—*Johnson v. State*, 57 So. 499.

§ 1086 (Ala.App.) Exceptions to an oral charge in a criminal prosecution *held* not available where not shown by the bill of exceptions to be before the jury retired.—*Tice v. State*, 57 So. 506.

§ 1090 (La.) In absence of bill of exceptions, the court will not review a conviction, unless there is error patent on the face of the record.—*State v. McCrocklin*, 57 So. 645.

§ 1090 (La.) The Supreme Court will not pass on a ruling of the lower court in a criminal proceeding, unless a formal bill of exceptions has been reserved and filed.—*State v. Pullen*, 57 So. 906.

§ 1091 (Ala.App.) The refusal of accused's motion to exclude the statement of a witness *held* not reviewable, where the bill of exceptions failed to show that the statement was not made in answer to a question properly objected to.—*Long v. State*, 57 So. 62.

Where bill of exceptions failed to show that an objection to and motion to exclude a statement of the solicitor had been made before the jury retired, the matter could not be reviewed.—*Id.*

§ 1104 (Ala.) The transcript should not be lettered in red ink.—*Roberson v. State*, 57 So. 829.

§ 1106 (La.) When appellant fails to file transcript on return day, it is an abandonment of the appeal which will be dismissed by the Supreme Court *ex proprio motu*, notwithstanding agreement of counsel.—*State v. Holt*, 57 So. 523.

§ 1109 (Ala.App.) An appeal will be dismissed, where the record does not show the judgment appealed from was rendered by a court organized by law.—*Grantham v. State*, 57 So. 1025.

§ 1111 (Miss.) The court, on appeal, must accept as true the statements of the trial court of its recollection of the proceedings sought to be reviewed.—*Gurley v. State*, 57 So. 565.

§ 1116 (Ala.App.) Error in overruling a demurrer to the indictment cannot be reviewed, where the demurrer is not set out in the transcript on appeal.—*Templeton v. State*, 57 So. 81.

§ 1121 (Ala.App.) The question of sufficiency of the evidence to prove venue cannot be reviewed, where the record does not purport to set out all the evidence.—*Rowe v. State*, 57 So. 72.

§ 1122 (Ala.App.) To make the refusal of requested charges reviewable, the record must show that they were requested in writing.—*Gilbert v. State*, 57 So. 127.

§ 1122 (Fla.) A charge *held* not shown to be erroneous, where all the testimony adduced at the trial is not brought up to the Supreme Court.—*Presley v. State*, 57 So. 605.

§ 1125 (Ala.App.) Where the motion in arrest of judgment is not set out in the record proper, but appears only in the bill of excep-

tions, the rulings thereon are not reviewable.—*Barlew v. State*, 57 So. 601.

(G) Review.

§ 1139 (La.) The court on appeal cannot consider evidence not introduced to determine whether the act charged comes within a criminal statute.—*State v. McCrocklin*, 57 So. 645.

§ 1141 (Ala.App.) Error must be affirmatively shown by the record on appeal, and will not be presumed.—*Jackson v. State*, 57 So. 594.

§ 1144 (Ala.) A judgment entry *held* to sufficiently show accused's presence when the verdict was received.—*McSwean v. State*, 57 So. 732.

§ 1144 (La.) As there is a presumption that the court which tried accused had jurisdiction, where the want of jurisdiction does not appear on the record on conviction of perjury in the original proceeding, the court on appeal will conclude that the lower court had jurisdiction.—*State v. McCrocklin*, 57 So. 645.

§ 1144 (La.) On appeal in a criminal case, the existence of facts necessary to the exercise of jurisdiction by the trial court must be presumed.—*State v. Rabb*, 57 So. 1008.

§ 1151 (Ala.App.) Rulings on applications for a continuance, in the absence of an abuse of discretion, will not be disturbed on appeal.—*Banks v. State*, 57 So. 63.

§ 1151 (Ala.App.) The exercise of the trial court's discretion in denying a continuance for absent witnesses will not be interfered with, in absence of abuse.—*Gilbert v. State*, 57 So. 127.

§ 1151 (Ala.App.) The granting or refusing of a continuance cannot be reviewed, save in the case of a palpable abuse of the trial court's discretion.—*Scott v. State*, 57 So. 413; *Shelly v. Same*, *Id.* 416; *Wilson v. Same*, *Id.*; *Brannon v. Same*, *Id.*

Denial of a continuance, on account of remarks of the court upon discharging a jury and summoning another, *held* not a manifest abuse of discretion.—*Id.*

§ 1151 (Fla.) Where no abuse of discretion is shown, denial of a continuance will not be reviewed.—*McRae v. State*, 57 So. 348.

§ 1153 (La.) Decision as to competency of child of tender years to testify being within the discretion of the trial judge, ruling thereon *held* not to be set aside, unless for very manifest error.—*State v. William*, 57 So. 927.

§ 1156 (Fla.) Where the evidence as to bias of the jury is conflicting, findings of the trial court thereon will not be disturbed.—*Sumpter v. State*, 57 So. 202.

§ 1158 (La.) Under Const. art. 85, findings of the jury or judge in criminal cases *held* not reviewable by the Supreme Court.—*State v. Nolan*, 57 So. 274.

§ 1159 (Ala.) The Supreme Court will not determine a question of the mere weight of evidence which a jury had before them.—*Pope v. State*, 57 So. 245.

§ 1159 (Ala.App.) A verdict of conviction *held* conclusive as to the venue, in absence of requested instruction.—*Barney v. State*, 57 So. 595.

§ 1159 (Fla.) A conviction on strong circumstantial evidence will not be reversed.—*McRae v. State*, 57 So. 348.

§ 1162 (Miss.) A conviction will not be reversed for an error not prejudicial to accused.—*Flowers v. State*, 57 So. 226.

§ 1163 (Ala.App.) Although the erroneous admission or rejection of evidence may sometimes be harmless, it is ordinarily reversible error.—*Phillips v. State*, 57 So. 1033.

§ 1165 (Ala.) The overruling of objections to certain questions *held* harmless.—*Talley v. State*, 57 So. 445.

§ 1166½ (Fla.) Alleged errors in rulings on challenges for cause held immaterial where none of the talesman objected to by defendant served on the jury.—McRae v. State, 57 So. 348.

§ 1169 (Ala.) In a prosecution for homicide, a question as to whether a mule, belonging to another whom defendant charged with the crime, could have formed the tracks which were found leading from the place of the homicide, held proper.—Pope v. State, 57 So. 245.

Wrongful admission of a hearsay statement of another held not prejudicial to accused.—Id.

§ 1169 (Ala.App.) Error in requiring a witness to testify as to whether he and another witness for the state were drunk at a certain time held cured by the subsequent admission of uncontradicted evidence of the fact.—Sills v. State, 57 So. 89.

§ 1169 (Ala.App.) Accused held not prejudiced by admitting evidence of a fact shown by the uncontroverted evidence.—Jackson v. State, 57 So. 594.

§ 1170 (Ala.App.) It is harmless error to overrule an objection to a question on redirect examination where the answer of the witness is a mere repetition of a statement made on cross-examination.—Naffel v. State, 57 So. 386.

§ 1170 (Ala.App.) Refusing to permit an answer to a question, where the witness had therefore answered the same question, was not prejudicial error.—Jackson v. State, 57 So. 594.

§ 1170½ (Ala.) Where a question asked a witness was not answered, accused may not complain of the question objected to by him.—Adams v. State, 57 So. 591.

§ 1170½ (Ala.App.) Any error in overruling accused's objection to a question asked a witness was harmless, where the answer was favorable to accused.—Crawford v. State, 57 So. 393.

§ 1172 (Miss.) In a prosecution for assault and battery with intent to murder a charge authorizing accused's conviction of assault and battery with intent, upon proof showing only assault with intent, held harmless, if erroneous.—Flowers v. State, 57 So. 226.

§ 1173 (Fla.) A refusal to instruct that the testimony of an accomplice should be received with great caution is not necessarily harmful error.—Presley v. State, 57 So. 605.

§ 1178 (Fla.) Statement of plaintiff in error that the motion for new trial should have been sustained for the reasons set out in the motion, and that none of the assignments of error are abandoned, without any argument, held an abandonment of the assignments.—Cannon v. State, 57 So. 240.

(H) Determination and Disposition of Cause.

§ 1182 (Ala.App.) Where the record shows no error, and no bill of exceptions has been filed, the time for filing having expired, a conviction must be affirmed.—Lewis v. State, 57 So. 1012.

§ 1182 (Ala.App.) Where the record on appeal contains no bill of exceptions, and the clerk's certificate shows that the time for filing a bill has expired, a conviction and sentence, based upon a verdict and regular on its face, will be affirmed.—Barrentine v. State, 57 So. 1025.

§ 1182 (La.) When no bill of exceptions has been reserved, no motion in arrest or assignment of error made, and no error appears on the face of the record, the judgment will not be disturbed.—State v. Bagley, 57 So. 271.

§ 1186 (Ala.) Under Code 1907, § 6264, the court must be satisfied that the verdict would

judgment will be reversed back to the judgment of guilt, and the case remanded for proper sentence.—Lewis v. State, 57 So. 1012.

§ 1186 (Ala.App.) A judgment of conviction for violating the local option laws, failing to show the amount of costs or the number of days' labor in default of payment, will be remanded, so that the lower court might specify costs at the rate of 75 cents a day, as provided by Code 1907, § 7635.—Barrentine v. State, 57 So. 1025.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

§ 1208 (Miss.) It was error to assess the punishment provided for a second conviction of vagrancy on defendant's first conviction of that offense.—Oaks v. State, 57 So. 1.

§ 1211 (Miss.) To justify a greater punishment for a second or subsequent offense, the indictment must allege that the offense is a second or subsequent offense.—Hoggett v. State, 57 So. 812.

CROPS.

See Chattel Mortgages, §§ 109, 138; Landlord and Tenant, §§ 248-254.

CROSS-BILL.

See Quieting Title, § 1.

CROSS-EXAMINATION.

See Witnesses, §§ 268-280.

CROSSINGS.

See Railroads, § 102.

CUTTING TIMBER.

See Trespass, § 89.

DAMAGES.

See Appeal and Error, §§ 1013, 1068; Attachment, § 377; Carriers, § 277; Eminent Domain, §§ 70, 131, 234; Habeas Corpus, § 82; Infants, § 31; Injunction, § 257; Malicious Prosecution, § 68; Municipal Corporations, § 671; Nuisance, § 50; Pleading, § 362; Receivers, § 183; Reformation of Instruments, § 1; Sales, § 448; Shipping, § 165; Telegraphs and Telephones, §§ 67, 68, 73; Trover and Conversion, § 46; Vendor and Purchaser, § 323.

I. NATURE AND GROUNDS IN GENERAL.

§ 1 (Fla.) Every award of damages should be just to both the plaintiff and the defendant under the facts shown.—Warfield v. Hepburn, 57 So. 618.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

§ 18 (Fla.) Where liability appears, compensatory damages may be recovered upon proper allegations and proofs for property losses and personal injuries that result proximately from the negligence.—Warfield v. Hepburn, 57 So. 618.

The compensatory damages that are recoverable for personal injuries are such only as proximately result from the negligence alleged.—Id.

§ 19 (La.) Proximate cause of damage to dam held to be the nature of the soil beneath

the foundation, and not the construction of the work above.—*A. M. Blodgett Const. Co. v. Cheney Lumber Co.*, 57 So. 369.

§ 23 (Ala.App.) Measure of damages for breach of contract defined.—*Western Union Telegraph Co. v. Reed*, 57 So. 83.

§ 56 (Ala.App.) Mental distress suffered by a party from a breach of contract *held* to support an award of additional compensatory damages.—*Taxicab Co. v. Grant*, 57 So. 141.

(B) Aggravation, Mitigation, and Reduction of Loss.

§ 82 (Ala.App.) Statement as to duty to minimize damages for a nuisance.—*Central of Georgia Ry. Co. v. Steverson*, 57 So. 494.

V. EXEMPLARY DAMAGES.

§ 91 (Ala.App.) Punitive damages for the destruction of property by fire *held* not authorized on the showing made.—*Edwards v. Massingill*, 57 So. 400.

§ 91 (Fla.) Gross negligence not amounting to wanton indifference to the rights of others will not warrant punitive damages.—*Dowling Lumber Co. v. King*, 57 So. 337.

VI. MEASURE OF DAMAGES.

(C) Breach of Contract.

§ 120 (Ala.) In an action for breach of a contract to loan money for the reconstruction of a mill, plaintiff could not recover profits alleged to have been lost.—*Birby-Theisen Co. v. Evans*, 57 So. 39.

In an action for breach of a contract to loan money to improve a water power and mill, plaintiff *held* entitled to recover expenditures and the rental value of a dismantled mill.—*Id.*

§ 122 (Ala.) Measure of damages for breach of a building contract defined.—*Huntsville Elks' Club v. Garrity-Hahn Bldg. Co.*, 57 So. 750.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 128 (La.) The amount to be awarded plaintiff cannot be affected by the suggestion that defendant company has been placed in the hands of a receiver, and is paying only 10 per cent. on the dollar to its creditors.—*Rogers v. Hiram J. Allen Lumber Co.*, 57 So. 166.

§ 130 (La.) In an action for personal injuries, verdict of \$1,000 *held* excessive, and reduced to \$250.—*Brannon v. Yazoo & M. V. R. Co.*, 57 So. 172.

§ 130 (La.) A verdict for \$3,000 for personal injuries *held* excessive and reduced to \$2,000.—*Raucum v. Pine Woods Lumber Co.*, 57 So. 577.

§ 132 (La.) A young man, 19 years of age, *held* entitled to recover \$7,500 for loss of his right hand.—*Rogers v. Hiram J. Allen Lumber Co.*, 57 So. 166.

§ 132 (La.) An award of \$3,500 for injuries to railroad section foreman *held* not excessive.—*Bailey v. Louisiana & Northwest R. Co.*, 57 So. 325.

§ 132 (La.) \$7,500 *held* to be awarded for loss, through negligence of employer, of plaintiff's foot.—*Cross v. Lee Lumber Co.*, 57 So. 631.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) Pleading.

§ 142 (Fla.) Damages for such losses and injuries as naturally result from the injury may be shown under a general claim for damages.—*Warfield v. Hepburn*, 57 So. 618.

(B) Evidence.

§ 163 (Fla.) When liability for negligence is shown, burden of proving character of injuries

sustained or property rights injured rests upon plaintiff.—*Warfield v. Hepburn*, 57 So. 618.

§ 174 (Fla.) All pertinent facts tending to establish value of property destroyed by fire, which had no market value, *held* admissible in evidence.—*Dowling Lumber Co. v. King*, 57 So. 337.

§ 175 (Ala.) In a suit for breach of a contract to loan money, evidence that plaintiff informed defendant's representatives that he would be unable to get money elsewhere *held* admissible.—*Birby-Theisen Co. v. Evans*, 57 So. 39.

(C) Proceedings for Assessment.

§ 197 (Miss.) Where the jury in replevin did not assess separately the values of the property, and was discharged, awarding a writ of inquiry and submission to another jury of the question of separate values was proper.—*Johnson v. Tabor*, 57 So. 365.

§ 208 (Ala.) The amount of punitive damages allowable in an action for malicious prosecution is a question for the jury.—*Abingdon Mills v. Grogan*, 57 So. 42.

§ 215 (Ala.App.) An instruction that if defendant recklessly or carelessly injured plaintiff then the jury might consider a count charging a willful or wanton injury, and award punitive damages, *held* erroneous.—*Birmingham Ry., Light & Power Co. v. Mindler*, 57 So. 113.

(D) Computation and Amount, Double and Treble Damages, and Remission.

§ 225 (Ala.) Damages from diverted surface waters *held* recoverable only to the date of the action.—*Killian v. Killian*, 57 So. 825.

DEADLY WEAPONS.

See Weapons.

DEATH.

See Abatement and Revival, § 74; Evidence, §§ 123, 143, 373, 471, 546; Master and Servant, § 103; Street Railroads, §§ 117, 118; Trial, §§ 194, 244, 248, 252, 253.

DEBTOR AND CREDITOR.

See Creditors' Suit; Fraudulent Conveyances; Marshaling Assets and Securities.

DECEDENTS.

See Evidence, § 278; Witnesses, §§ 140-159.

DECEIT.

See False Pretenses, Fraud.

DECISION.

See Courts, § 97.

DECLARATION.

See Pleading.

DECLARATIONS.

See Criminal Law, §§ 415-420; Evidence, §§ 273-278.

DECREE.

See Equity, §§ 418-431.

DEDICATION.

I. NATURE AND REQUISITES.

§ 15 (La.) To show dedication of private property to public use, intention of owner to dedicate must be shown.—*Quirk v. Miller*, 57 So. 521.

such street.—Quirk v. Miller, 57 So. 521.
§ 31 (La.) To show dedication of private property to public use, acceptance by public must be shown.—Quirk v. Miller, 57 So. 521.

DEEDS.

See Acknowledgment, § 54; Adverse Possession, § 71; Boundaries, § 3; Cancellation of Instruments, § 37; Ejectment, § 94; Estoppel, § 14; Evidence, §§ 184, 186, 314; Execution, § 311; Fraudulent Conveyances, § 290; Husband and Wife, § 70; Mortgages; Reformation of Instruments, § 36; Taxation, §§ 742, 750-788, 805; Trusts, § 152; Vendor and Purchaser, §§ 58, 232.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

§ 11 (Ala.) A deed *held* void because executed without authority.—Hays v. Dillard, 57 So. 695.

(B) Form and Contents of Instruments.

§ 38 (Ala.) A deed *prima facie* certain *held* admissible as evidence of title.—Busbee v. Thomas, 57 So. 587.

Words in a deed *held* not to render it invalid as a grant of power to lay off, not exercised.—Id.

(D) Delivery.

§ 54 (Ala.) Delivery *held* indispensable to the validity of a deed.—Culver v. Carroll, 57 So. 767.

§ 56 (Ala.) Certain acts by a grantor *held* to constitute a delivery of his deed.—Farr v. Chambless, 57 So. 458.

§ 58 (Ala.) Delivery of a deed to a third person to become effective in the grantee at the grantor's death *held* to pass title.—Culver v. Carroll, 57 So. 767.

A delivery of a deed subject to recall by the grantor before delivery to the grantee is not effective to pass title.—Id.

A right to revoke need not be expressly reserved in order to retain title in a grantor in a deed.—Id.

The presumption that a handing of a deed to a third person was a delivery to the grantee will not be indulged.—Id.

Leaving a deed with an attorney or agent *held* insufficient to show an intention to divest title.—Id.

Matters in a deed and suicide of grantor *held* not sufficient to show an intention that a delivery to a third person should be for his wife.—Id.

Handing a deed to a third person without explanation *held* insufficient as a delivery to the grantee.—Id.

§ 59 (Ala.) A voluntary deed not delivered to the grantee, and recorded by the grantor merely to mislead creditors, was not effective.—Loring v. Grummon, 57 So. 818.

§ 66 (Ala.) Whether a delivery of a deed was sufficient to pass title *held* generally for the jury.—Culver v. Carroll, 57 So. 767.

(E) Validity.

§ 74 (La.) Where parties to a sale of realty have acted for a number of years as if the sale had transferred real rights, they will be estopped from denying such sale.—Chatman v. Bundy, 57 So. 786.

III. CONSTRUCTION AND OPERATION.

(B) Property Conveyed.

§ 118 (Ala.) Evidence *held* admissible to identify the land sued for as the M. place.—Pendrey v. Godwin, 57 So. 724.

cestor *held* required to prove insanity by a clear preponderance of the evidence.—Farr v. Chambless, 57 So. 458.

§ 196 (La.) Presumption that sale by father to daughter, where vendor remains in possession, is a simulated sale *held* rebuttable by evidence to explain the possession.—Chatman v. Bundy, 57 So. 786.

§ 203 (Ala.) In a suit by a widow to annul deeds, the heirs of the deceased husband may show the source of title and offer the deeds in evidence.—Loring v. Grummon, 57 So. 818.

§ 208 (Ala.) Evidence *held* to justify a finding of a delivery of a deed.—Farr v. Chambless, 57 So. 458.

§ 211 (Ala.) Where an heir sues to set aside a deed on the ground of the insanity of his ancestor, and the evidence is equally balanced, the court will refuse to set aside the deed.—Farr v. Chambless, 57 So. 458.

§ 211 (Ala.) Evidence *held* to justify a finding that a grantor was insane at the time of the execution of a deed, rendering the same invalid.—Hays v. Dillard, 57 So. 695.

DEFAMATION.

See Libel and Slander.

DEFAULT.

See Judgment, §§ 101, 139.

DELIVERY.

See Deeds, §§ 54-74; Sales, §§ 199-218½.

DEMAND.

See Mortgages, § 542.

DEMONSTRATIVE EVIDENCE.

See Criminal Law, § 404.

DEMURRER.

See Criminal Law, §§ 281, 293; Equity, §§ 222-232; Mandamus, § 165; Pleading, §§ 184-216.

DEPARTURE.

See Pleading, § 248.

DEPOSITIONS.

§ 95 (Ala.App.) Where plaintiff took defendant's deposition under Code 1907, §§ 4049, 4056, he could not introduce part and exclude part thereof.—North Alabama Traction Co. v. Daniel, 57 So. 120.

DESCENT AND DISTRIBUTION.

See Executors and Administrators; Husband and Wife, § 246; Notaries; Partition, § 12; Tenancy in Common, §§ 30, 35; Wills.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) Nature and Establishment of Rights in General.

§ 69 (La.) An heir may sue his coheir to set aside a donation disguised as a sale from the common ancestor to his coheir.—Richard v. Richard, 57 So. 286.

Conveyance purporting to be a sale *held* a disguised donation.—Id.

§ 69 (La.) Under Civ. Code, art. 1493, wife of testator leaving three or more legitimate children cannot take from him by donations of any kind more than one-third of his estate.—Succession of Drysdale, 57 So. 789.

DESCRIPTION.

See Boundaries, § 3; Counties, § 12; Mortgages, § 48; Municipal Corporations, § 24; Parties, § 69.

DETINUE.

See Appeal and Error, §§ 733, 1050; Justices of the Peace, § 194; Sales, § 479.

§ 24 (Ala.) Where plaintiff in detinue recovers, the verdict, under Code 1907, § 3781, must be in the alternative for the specific chattels sued for, or their value as assessed by the jury.—Kirkland v. Pilcher, 57 So. 46.

§ 25 (Ala.) Where plaintiff in detinue recovers, the judgment must, under Code 1907, § 3781, be in the alternative for the specific chattels sued for, or their value as assessed by the jury.—Kirkland v. Pilcher, 57 So. 46.

§ 25 (Ala.App.) A judgment in detinue *held* erroneous.—Stinson v. Faircloth Byrd Co., 57 So. 143.

DIRECTING VERDICT.

See Trial, § 170.

DISCHARGE.

See Master and Servant, § 30.

DISCOVERED PERIL.

See Street Railroads, § 118.

DISCOVERY.

See Creditors' Suit, §§ 11-39; Equity, § 39.

II. UNDER STATUTORY PROVISIONS.

(A) Interrogatories and Examination of Parties and of Other Persons.

§ 67 (Fla.) Where defendant in ejectment has filed answers to interrogatories seeking a disclosure of title, and waits till the case is actually being tried, a motion at that time to amend an answer *held* properly denied.—Investment Co. v. Trueman, 57 So. 663.

DISCRETION OF COURT.

See Appeal and Error, § 1046; Criminal Law, §§ 586, 594, 699, 1153; Divorce, § 195; Homicide, § 264; New Trial, § 6; Pleading, § 285; Trial, § 62; Witnesses, §§ 40, 240.

DISMISSAL AND NONSUIT.

See Appeal and Error, §§ 105, 497, 627, 784-805, 866; Costs, § 137; Courts, § 224; Criminal Law, § 1106; Equity, §§ 362, 373; Evidence, § 208; Mandamus, § 43; New Trial, § 123; Nuisance, § 21; Trial, § 165.

DITCHES.

See Waters and Water Courses, § 126.

DIVERSION.

See Waters and Water Courses, §§ 126, 179.

DIVISION.

See Counties, § 12.

DIVISION WALLS.

See Party Walls.

DIVORCE.

See Homestead, § 142; Judgment, § 948; Mandamus, §§ 53, 59.

III. DEFENSES.

§ 49 (Miss.) In an action by a wife for divorce, *held* there was sufficient evidence of cruel treatment to render decree for defendant error.—Forrester v. Forrester, 57 So. 553.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.**(C) Pleading.**

§ 93 (Fla.) Bill for divorce by wife, for acts of violence and a long-continued course of abuse, *held* good as against demurrer.—Ray v. Ray, 57 So. 609.

(G) Appeal.

§ 177 (Ala.) Certain orders made in divorce action *held* not appealable.—Jordan v. Jordan, 57 So. 436.

(H) Fees and Costs.

§ 195 (Ala.) Allowance of alimony pending a second suit for divorce without first requiring complainant to pay the costs of the former suit *held* within the discretion of the court.—Jordan v. Jordan, 57 So. 436.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

§ 214 (Ala.) Where defendant in a divorce action had notice of the time and place for the execution of the reference as to alimony, but failed to appear, he could not except to the confirmation of the report.—Jordan v. Jordan, 57 So. 436.

§ 280 (Ala.) An order made in a divorce action granting alimony pendente lite *held* not appealable.—Jordan v. Jordan, 57 So. 436.

DOCTORS.

See Physicians and Surgeons.

DOCUMENTS.

See Evidence, §§ 339-383.

DOGS.

See Witnesses, § 268.

DONATIONS.

See Gifts.

DOWER.

See Homestead, § 142.

DRAINS.

See Contracts, §§ 198, 296; Injunction, § 118; Statutes, § 123; Waters and Water Courses, § 153.

I. ESTABLISHMENT AND MAINTENANCE.

§ 13 (La.) Constitution and statute *held* to provide for the establishment of subdrainage districts and to make them autonomous, not to be confused with the affairs of the drainage district.—St. Charles Municipal Drainage Dist. v. Cousin, 57 So. 992.

§ 14 (La.) Petition by taxpayers for the establishment of drainage district which specifies the amount of the acreage tax *held* unauthorized under Const. art. 281, as amended pursuant to Act No. 197 of 1910.—St. Charles Municipal Drainage Dist. v. Cousin, 57 So. 992.

§ 43 (Miss.) The board of drainage commissioners of Leflore county has no power to contribute to expenses incurred by the Rucker drainage district in deepening a natural water course.—Ex parte Drainage Com'rs of Leflore County, 57 So. 223.

II. ASSESSMENTS AND SPECIAL TAXES.

§ 66 (La.) The power of the majority in acreage of taxpayers, and of the board of commissioners of a drainage district, to impose a burden upon the minority, without their consent, *held* limited by Const. art. 281, as amended pursuant to Act No. 197 of 1910.—St. Charles Municipal Drainage Dist. v. Cousin, 57 So. 992.

§ 75 (La.) Board of commissioners of a drainage district *held* without power to levy acreage tax for an indefinite period, or for a term of 40 years, under Const. art. 281, as amended pursuant to Acts Nos. 197 and 317 of 1910.—St. Charles Municipal Drainage Dist. v. Cousin, 57 So. 992.

§ 82 (La.) The prescription established by Act No. 317 of 1910, § 28, within which an appeal may be taken in drainage proceedings, *held* not to apply to proceedings in contravention of Constitution and statutory law.—St. Charles Municipal Drainage Dist. v. Cousin, 57 So. 992.

DRAMSHOPS.

See Intoxicating Liquors.

DRUNKARDS.

See Criminal Law, § 55; Homicide, § 28; Master and Servant.

DUE PROCESS OF LAW.

See Constitutional Law, §§ 290-311.

DYING DECLARATIONS.

See Homicide, §§ 208, 218.

EASEMENTS.

See Dedication; Party Walls; Waters and Water Courses, § 153.

EJECTMENT.

See Adverse Possession, § 85; Appeal and Error, §§ 852, 907, 1050, 1051, 1066; Boundaries, § 40; Discovery; Eminent Domain, § 242; Evidence, §§ 324, 473; Mortgages, § 213.

II. JURISDICTION, PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS.

§ 49 (Ala.) Under Code 1907, § 3840, a conveyance by a landlord, who was brought in as a party to ejectment against his tenant, to the tenant pending the suit, *held* not to preclude the tenant from defending.—Leath v. Cobia, 57 So. 972.

III. PLEADING AND EVIDENCE.

§ 84 (Ala.) Examination of a witness in ejectment *held* to call for irrelevant matters.—Busbee v. Thomas, 57 So. 587.

§ 86 (Ala.) Plaintiffs in ejectment must locate by competent evidence monuments and boundaries in a deed introduced as evidence of title.—Busbee v. Thomas, 57 So. 587.

§ 93 (Fla.) Evidence *held* sufficient to sustain a verdict.—Geter v. Simmons, 57 So. 354.

§ 94 (Ala.) Possession under an ancient deed for more than 50 years *held* strong evidence of the location of boundaries and monuments.—Busbee v. Thomas, 57 So. 587.

Evidence in ejectment *held* to support a finding that boundaries and monuments in a deed are the same as those of the tract in suit.—Id.

IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 106 (Fla.) Plaintiff in ejectment must recover upon his own title, and not on the weak-

ness of his adversary's.—Holmes v. Thompson, 57 So. 433.

§ 109 (Fla.) Where plaintiff in ejectment shows title and right of possession, and no right is shown on which jury could find for the defendant, affirmative charge for plaintiff *held* proper.—Johnson v. Du Pont, 57 So. 670.

§ 110 (Ala.) In ejectment, a charge to find for plaintiff if the jury believed the evidence *held* proper.—Chambly v. Williams, 57 So. 374.

§ 110 (Ala.) An instruction on the issue of constructive notice of a purchaser must qualify the word "notice" by referring to it as constructive notice.—Christopher v. Curtis-Attalla Lumber Co., 57 So. 837.

ELECTION OF REMEDIES.

§ 3 (La.) If a party sue for ownership and possession of property, he will, under Code Prac. art. 54, be considered as having renounced his possessory to resort to a petitory action.—Mouton v. Southern Sawmill Co., 57 So. 934.

§ 11 (Fla.) The doctrine of election of remedies does not apply to a case where a party in his first action mistook his remedy.—Malsby v. Gamble, 57 So. 687.

ELECTIONS.

See Constitutional Law, § 65; Mandamus, §§ 50, 151; Statutes, § 94.

IV. QUALIFICATIONS OF VOTERS.

§ 83 (La.) Under Const. art. 197, § 4, a person owning and paying taxes on property which has not been assessed to him on the assessment roll is not entitled to register and vote.—Babcock v. Ball, 57 So. 581.

VI. NOMINATIONS AND PRIMARY ELECTIONS.

§ 123 (La.) Act No. 49 of 1906, § 28, *held* to prohibit political committees from declaring unopposed candidates to be elected before the holding of the primary election and to require the names of all candidates, whether opposed or not, to be placed on the ballots.—State ex rel. Williams v. Everett, 57 So. 576.

§ 152 (La.) A Democratic parish committee has no power to pass on eligibility of candidates for public office.—Roussel v. Dornier, 57 So. 1007.

§ 154 (La.) Under existing primary laws, no appeal to the courts is authorized, except as provided by Act No. 100, 1908, § 25, by protest to committee after returns have been promulgated, and appeal to the courts.—Roussel v. Dornier, 57 So. 272.

§ 154 (La.) If one receiving majority of votes in a primary election is ineligible, question of his eligibility must be contested in a suit brought by the state.—Roussel v. Dornier, 57 So. 1007.

Under the law regulating primaries, the Supreme Court is without jurisdiction to determine the eligibility of any candidate.—Id.

X. CONTESTS.

§ 285 (La.) Petition alleging irregularities in election, and that result was changed, *held* to show a cause of action, unless it clearly appears that the irregularities did not affect the result.—Fischer v. Parish School Board, 57 So. 525.

Allegations of petition, disclosing a corrupt combination to control election by inducements amounting to bribery of voters, *held* to show a cause of action.—Id.

§ 296 (Ala.) Refusal to set aside an order dismissing an election contest for insufficiency of the bond, under Code 1907, § 470, was improper, where petitioner offered to amend.—Lowery v. Petree, 57 So. 818.

ELECTRICITY.

See Street Railroads.

ELIGIBILITY.

See Officers.

EMBEZZLEMENT.

See Wills, § 710.

§ 11 (Ala.App.) Accused *held* an agent for the purpose of collection and so might be guilty of embezzlement of the funds collected.—*Jackson v. State*, 57 So. 110.

§ 26 (Fla.) Motion to quash information for embezzlement, based partly on Gen. St. 1906, § 3308, and partly on section 3309, should be granted.—*Townsend v. State*, 57 So. 611.

§ 38 (Ala.App.) In a prosecution for embezzlement, evidence of a contract of sale *held* admissible.—*Jackson v. State*, 57 So. 110.

§ 48 (Ala.App.) Where the treasurer of a lodge was charged with converting lodge funds, the refusal to give a charge that if defendant had not converted the money, but still held it as treasurer, he could be acquitted, was erroneous; there being evidence tending to show that he still had the money, but had refused to deliver it on an unauthorized demand of other officers.—*Hubbard v. State*, 57 So. 1012.

EMINENT DOMAIN.**II. COMPENSATION.**

(A) *Necessity and Sufficiency in General.*

§ 70 (Miss.) The public policy of the state cannot override the guaranty in Const. 1890, § 17.—*Hill v. Woodward*, 57 So. 294.

(C) *Measure and Amount.*

§ 131 (Fla.) Under Const. art. 16, § 29, if property to be condemned increases in value in anticipation of the proposed improvement before the appropriation, the compensation therefor is the actual market value at the time of the appropriation.—*Sunday v. Louisville & N. R. Co.*, 57 So. 351.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 191 (Ala.) A petition for condemnation, praying that "a writ issue from your honorable court of probate," etc., *held* to sufficiently show that the proceeding was in the probate court, as required by Code 1907, § 3889.—*Leath v. Cobia*, 57 So. 972.

Under Code 1907, § 3904, authorizing proceedings to raise a dam only where a previous dam had been "erected under this article," one who had commenced the erection of a dam without authority of law could only proceed to raise it as though he had no dam, and that his petition was to "establish a dam" would not render the condemnation proceedings void.—*Id.*

§ 191 (La.) Allegations in petition in expropriation proceedings *held* not insufficient.—*Morgan's Louisiana & T. R. & S. S. Co. v. John T. Moore Planting Co.*, 57 So. 635.

§ 196 (La.) Evidence *held* to show property sought to be expropriated is necessary for railroad purposes, entitling plaintiff to the land on payment of damages.—*Morgan's Louisiana & T. R. & S. S. Co. v. John T. Moore Planting Co.*, 57 So. 635.

§ 234 (La.) In expropriation proceedings, assessment of damages *held* sufficient.—*Morgan's Louisiana & T. R. & S. S. Co. v. John T. Moore Planting Co.*, 57 So. 635.

§ 242 (Ala.) That a petition in condemnation proceedings was addressed to the judge of probate, instead of the probate court, as required by Code 1907, § 3889, will not render the proceedings open to collateral attack in ejectment.—*Leath v. Cobia*, 57 So. 972.

A failure to state the age and residence of party owning lands in a petition for condemnation was not fatal when collaterally attacked, when it appears that summons was served on such party and his own testimony showed him to be over 21 years old.—*Id.*

EMPLOYÉS.

See Master and Servant.

ENLISTMENT.

See Militia, § 8.

ENTICEMENT.

See Master and Servant, § 345.

ENTRY.

See Public Lands, § 32.

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, §§ 209-249.

EQUITY.

See Account, § 14; Appeal and Error, § 1009; Cancellation of Instruments; Costs, §§ 173, 277; Courts, § 484; Estoppel, §§ 53-56; Injunction; Judgment, §§ 405, 460; Marshaling Assets and Securities; Partition; Quietting Title; Reformation of Instruments; Specific Performance; Taxation, § 722; Tenancy in Common, § 20; Trusts; Vendor and Purchaser, § 278.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) *Nature, Grounds, Subjects, and Extent of Jurisdiction in General.*

§ 39 (Ala.) A creditors' bill for discovery is not demurrable because some additional relief is sought, that may be obtained in connection with the discovery, which is the main equity upon which the bill rests.—*Elliott v. Kyle*, 57 So. 752.

(B) *Remedy at Law and Multiplicity of Suits.*

§ 46 (Ala.) Matters cognizable at law are the subject of equitable jurisdiction only when the ordinary tribunals are inadequate to full and complete relief.—*Ashurst v. Ashurst*, 57 So. 442.

§ 51 (Miss.) What is essential, in order to give equity jurisdiction on the ground of multiplicity of suits, stated.—*Cumberland Telephone & Telegraph Co. v. Williamson*, 57 So. 559.

II. LACHES AND STALE DEMANDS.

§ 67 (Miss.) "Laches" defined.—*Comans v. Tapley*, 57 So. 567.

IV. PLEADING.

(A) *Original Bill.*

§ 148 (Ala.) Under Code 1907, § 3095, bill in equity *held* not multifarious.—*Bellview Cemetery Co. v. McEvers*, 57 So. 375.

§ 148 (Ala.) A bill to avoid execution sale of complainant's stock in a corporation and to redress wrongs of the corporation *held* multifarious.—*Empire Realty Co. v. Harton*, 57 So. 763.

§ 149 (Ala.) Where complainants, in an action against a mortgagee of chattels for an accounting, have a community of interest in

the mortgaged property, the bill is not multifarious.—*Zadek v. Burnett*, 57 So. 447.

§ 150 (Ala.) Despite Code 1907, §§ 5231, 5232, *held*, that a bill seeking partition and to quiet title against the claims of third persons in adverse possession of the land was multifarious.—*Brown v. Feagin*, 57 So. 20.

§ 150 (Ala.) A bill, regarded as a bill to quiet title, *held* demurrable for multifariousness.—*Osborne v. Waddell*, 57 So. 698.

§ 150 (Ala.) Bill in equity to set aside a conveyance and to remove the administration of the estate to the chancery court *held* not multifarious.—*Wilks v. Wilks*, 57 So. 776.

(E) Demurrer, Exceptions, and Motions.

§ 222 (Ala.) A bill is not demurrable because it prays for unwarranted relief.—*Wilks v. Wilks*, 57 So. 776.

§ 232 (Ala.) Demurrer to bill for want of equity is properly overruled where the bill is good in part.—*Whitley v. Willingham & Bell*, 57 So. 816.

VII. DISMISSAL BEFORE HEARING.

§ 362 (Ala.) Where several complainants file a bill jointly and make no case for joint relief, the bill should be dismissed.—*Zadek v. Burnett*, 57 So. 447.

VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.

§ 373 (Fla.) Where pleading termed an answer, to which replication is filed, is in reality a plea setting up no defense, admission of the facts does not compel dismissal of the bill.—*Merrell v. Ridgely*, 57 So. 352.

X. DECREE AND ENFORCEMENT THEREOF.

§ 418 (Ala.) The setting down of a case for hearing and the submission thereof on the day of the decree pro confesso *held* violative of Code 1907, § 3165.—*Loring v. Grummon*, 57 So. 818.

§ 424 (Ala.) Where all the complainants in a bill against a mortgagee of chattels for an accounting are entitled to the main relief prayed for, the court has power to adjust their rights.—*Zadek v. Burnett*, 57 So. 447.

§ 427 (Ala.) The court cannot grant relief as to a matter or claim which was not made an issue of the bill, answer, or plea.—*Norsworthy v. Willoughby*, 57 So. 717.

§ 431 (Miss.) A recital in a decree *held* conclusive, in the absence of evidence to the contrary.—*Comans v. Tapley*, 57 So. 567.

EQUITY OF REDEMPTION.

See Mortgages, §§ 591-605.

ERROR, WRIT OF.

See Appeal and Error.

ESCAPE.

See Witnesses, § 277.

ESTATES.

See Descent and Distribution; Executors and Administrators; Joint Tenancy; Life Estates; Perpetuities; Tenancy in Common; Wills.

ESTOPPEL.

See Bills and Notes, § 375; Criminal Law, § 178; Deeds, § 74; Judgment, §§ 606-715, 948; Landlord and Tenant, § 254; Vendor and Purchaser, § 98.

II. BY DEED.

(A) Creation and Operation in General.

§ 14 (La.) Where a widow in community and her children, who are emancipated minors,

unite in executing a note and mortgage, and the minors unite in a notarial act declaring that their mother has settled with them, they cannot be heard to say that there was no settlement with the mother and tuitrix, and that the minors have a legal mortgage priming that so given by them.—*Roberson v. Goldsmith*, 57 So. 908.

III. EQUITABLE ESTOPPEL.

(A) Nature and Essentials in General.

§ 53 (Ala.) Conduct as basis of estoppel must have been intended for the party to act on who relies on the estoppel.—*Huntsville Elks' Club v. Garrity-Hahn Bldg. Co.*, 57 So. 750.

§ 54 (La.) There is no equitable estoppel against a party who was ignorant of the real facts and of his legal rights in the premises.—*Succession of Drysdale*, 57 So. 789.

§ 56 (Ala.) A party relying on conduct as a basis of estoppel must have been induced to act upon it.—*Huntsville Elks' Club v. Garrity-Hahn Bldg. Co.*, 57 So. 750.

EVIDENCE.

See Account, Action on, § 7; Adverse Possession, §§ 85, 112; Agriculture, § 7; Animals, § 13; Appeal and Error, §§ 204, 208, 237, 260, 639, 701, 926, 928, 992-1021, 1048-1053; Assault and Battery, §§ 83, 89; Bills and Notes, §§ 497, 525; Boundaries, §§ 35, 36, 40; Brokers, § 85; Carriers, §§ 211, 228, 276, 316-318; Charities, § 50; Chattel Mortgages, §§ 177, 232, 233; Conspiracy, § 47; Constitutional Law, §§ 14, 191, 311; Criminal Law, §§ 239, 304-562, 673-687, 691-696, 741-764, 782-786, 811-814, 858, 1036, 1121, 1139, 1156-1165, 1169-1173; Damages, §§ 163-175; Deeds, §§ 38, 118-211; Depositions; Discovery; Divorce, § 49; Ejectment, §§ 84-94; Embezzlement, § 38; Eminent Domain, § 196; False Imprisonment, § 22; Fraud, § 50; Frauds, Statute of, §§ 17, 158; Fraudulent Conveyances, §§ 271, 290; Garnishment, § 148; Gifts; Homicide, §§ 163-218, 332-345; Husband and Wife, § 232; Indictment and Information, §§ 9, 11; Insurance, §§ 655, 813, 819; Intoxicating Liquors, §§ 139, 250; Judgment, §§ 287, 316; Larceny, § 55; Lewdness; Libel and Slander, § 100; Malicious Prosecution, § 64; Marriage, §§ 40, 50; Master and Servant, §§ 268-281; Mechanics' Liens, § 281; Mortgages, §§ 37, 312; Municipal Corporations, § 122; Negligence, §§ 122, 125; Partition, § 63; Party Walls, § 2; Perjury, § 32; Physicians and Surgeons, § 18; Principal and Agent, § 122; Railroads, §§ 396, 479; Rape; Sales, §§ 359, 439; Specific Performance, § 119; Statutes, §§ 267, 284; Street Railroads, §§ 111-113; Taxation, §§ 788, 810; Telegraphs and Telephones, § 66; Tenancy in Common, § 55; Towns; Trespass, § 45; Trial, §§ 39-96, 111, 139-143, 170, 191-194, 207-210, 237, 244, 252, 253, 367; Trover and Conversion, § 37; Usury, § 117; Vendor and Purchaser, § 243; Waters and Water Courses, §§ 107, 126, 179; Weapons, § 17; Wills, §§ 52, 55, 329; Witnesses.

I. JUDICIAL NOTICE.

§ 10 (Ala.) The court will take judicial notice that there are two tracts of land in Mobile county which answer to the description—"N. E. ¼ of section 36, township 2, range 4"—*Brannan v. Henry*, 57 So. 967.

§ 25 (Ala.) The Supreme Court will take judicial notice that the city of Birmingham at the time of the enactment of Gen. Acts 1911, p. 204, was the only city to which it was applicable.—*State v. Joseph*, 57 So. 942.

§ 29 (Ala.) The courts will take judicial notice of local acts of the Legislature.—*Duy v. Alabama Western R. Co.*, 57 So. 724.

§ 32 (La.) The courts will not take judicial notice of city ordinances.—*State ex rel. Barthe & Levy v. Mayor of City of New Orleans*, 57 So. 798.

§ 33 (Ala.) The Supreme Court will take judicial notice of the journal of each legislative house.—*State v. Joseph*, 57 So. 942.

II. PRESUMPTIONS.

§ 63 (Ala.) Every person is presumed to be sane.—*Johnston v. Johnston*, 57 So. 450.

§ 67 (Ala.) Rule governing presumption of continuance of meretricious cohabitation stated.—*Prince v. Edwards*, 57 So. 714.

§ 69 (Ala.) In the absence of contrary evidence, it is presumed that the foreclosure of a mortgage under power of sale was regular.—*Horton v. Little*, 57 So. 851.

§ 83 (Ala.) School land trustees *held* presumed to have issued a certificate of purchase under Code 1852, § 538.—*Barry v. Stephens*, 57 So. 467.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(B) Res Gestæ.

§ 123 (Ala.) In an action against a railroad for wrongful death, certain evidence *held* properly excluded as being no part of the res gestæ.—*Neyman v. Alabama Great Southern R. Co.*, 57 So. 435.

§ 123 (Ala.App.) In an action for the death of a heifer, which fell into an unguarded pit, a conversation with the manager of defendant the day after the accident *held* no part of the res gestæ.—*Jefferson Fertilizer Co. v. Houston*, 57 So. 98.

(C) Similar Facts and Transactions.

§ 133 (Ala.) In an action on a note claimed to have been given by defendant to plaintiff's assignor for margins advanced and commissions for purchasing cotton evidence that, in other transactions between the parties, involving purchase of cotton for future delivery, there had never been any actual delivery, was admissible on the question whether they intended the purchases to be wagering contracts.—*Birmingham Trust & Savings Co. v. Currey*, 57 So. 962.

(D) Materiality.

§ 143 (Ala.) In an action against a railroad for wrongful death, certain evidence *held* properly excluded as being immaterial.—*Neyman v. Alabama Great Southern R. Co.*, 57 So. 435.

(E) Competency.

§ 155 (Ala.App.) Defendant in an action against a carrier for delay in delivery *held* precluded by its evidence from complaining of testimony as to time and place of shipment.—*Southern Ry. Co. v. Proctor*, 57 So. 513.

§ 155 (Miss.) Admission of parol evidence on behalf of one party *held* to have rendered it error to exclude similar evidence on behalf of the other.—*Thayer Export Lumber Co. v. Naylor*, 57 So. 227.

V. BEST AND SECONDARY EVIDENCE.

§ 183 (Miss.) A copy of a letter was not admissible in evidence, where no foundation was laid for its admission by accounting for the absence of the original.—*Baldrige v. Stribling*, 57 So. 658.

§ 184 (Ala.) Under Code 1907, § 3374, providing for the admission of a certified transcript of the record of a deed when it appears that the original conveyance is lost or destroyed or not in the custody of the party, a showing by one of the plaintiffs that he did not have custody of a deed *held* sufficient to permit the in-

roduction of the original record.—*McBride v. Lowe*, 57 So. 832.

§ 186 (Ala.) Under Code 1907, § 3374, which makes admissible a duly certified transcript of the record of a deed when it appears that the original conveyance has been lost or destroyed or that the party has not the custody or control thereof, the original record of a deed is admissible on such showing.—*McBride v. Lowe*, 57 So. 832.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

§ 208 (La.) A party whose suit is dismissed, whether as in case of nonsuit or otherwise, *held* bound by his judicial admissions as to the title of the property claimed.—*Gulf Refining Co. of Louisiana v. Hart*, 57 So. 581.

§ 213 (Ala.) Offer of compromise of a claim under a written guaranty *held* admissible to disprove plea of non est factum.—*Shows v. Steiner, Lobman & Frank*, 57 So. 700.

(D) By Agents or Other Representatives.

§ 243 (Ala.App.) Declarations by manager of fertilizer company made concerning a past transaction *held* not binding upon the company.—*Jefferson Fertilizer Co. v. Houston*, 57 So. 98.

§ 244 (Ala.App.) Declarations of an agent made after the occurrence of an act claimed to be a conversion *held* not admissible to bind the principal in an action for the conversion.—*Henderson-Mizell Mercantile Co. v. C. D. Chapman & Co.*, 57 So. 82.

(E) Proof and Effect.

§ 256 (Ala.App.) Where testimony constitutes an admission, it is not necessary to lay a foundation for its admission.—*Burton v. Phillips*, 57 So. 152.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

§ 273 (Ala.) Statements of a person claiming by adverse possession that he was in possession of the land are not admissible to prove his possession.—*McBride v. Lowe*, 57 So. 832.

§ 274 (Ala.) In an action for trespass involving the location of a boundary line, certain cross-examination of a defendant and defendants' witnesses *held* proper, as bearing on the character of a codefendant's possession.—*Cooper v. Slaughter*, 57 So. 477.

(B) By Decedents Against Interest.

§ 278 (Miss.) Evidence of certain statement by decedent *held* admissible as a declaration against interest.—*Baldrige v. Stribling*, 57 So. 658.

IX. HEARSAY.

§ 314 (Ala.) In a suit by a creditor of a husband to set aside as fraudulent a deed to the wife, evidence *held* not hearsay.—*Elam v. A. P. Brewer Lumber Co.*, 57 So. 483.

§ 317 (Ala.App.) In an action by a chattel mortgagee for conversion of mortgaged chattels, evidence *held* properly excluded as hearsay.—*Polytinsky v. M. F. Patterson & Son*, 57 So. 130.

§ 324 (Ala.) Common reputation *held* inadmissible in ejectment to prove the number of acres in the tract sued for.—*Busbee v. Thomas*, 57 So. 587.

X. DOCUMENTARY EVIDENCE.

(B) Exemplifications, Transcripts, and Certified Copies.

§ 339 (Ala.) Where, between the time an objection was made to the introduction in evi-

dence of a government patent to swamp lands and the time the court was required to rule thereon, Acts 1911, p. 192, was passed, curing the objection, it was properly overruled.—*Brue v. McMillan*, 57 So. 486.

§ 342 (Ala.) Copy of a map in the office of the state land agent, the original bearing date in 1871, *held* admissible to locate certain land in controversy.—*Brue v. McMillan*, 57 So. 486.

(C) Private Writings and Publications.

§ 354 (Ala.App.) Where it appears that some of the items charged on an account book were not personally sold by plaintiff, or the entries therein made by him, but by his wife, and he did not have personal knowledge of the sales or the charges, the book was inadmissible.—*Davie v. Roland*, 57 So. 1034.

Under Code 1907, § 4003, authorizing the admission in evidence of books of accounts, where certain conditions exist, such conditions must concur, and an account book, kept by one who had a clerk, not dead, inaccessible, or disqualified, is inadmissible.—*Id.*

(D) Production, Authentication, and Effect.

§ 366 (La.) Offer of original pleadings not certified *held* insufficient to prove bankruptcy proceeding.—*Horton v. Haralson*, 57 So. 643.

Papers in bankruptcy proceedings must be certified by referee or clerk of bankruptcy court to be admissible in evidence.—*Id.*

§ 372 (Ala.) An ancient document coming from proper custody is self-proving and admissible without evidence of its authenticity.—*Brannan v. Henry*, 57 So. 967.

§ 373 (Ala.) In an action against a railroad for wrongful death, *held*, that the pass used by deceased was admissible in evidence.—*Neyman v. Alabama Great Southern R. Co.*, 57 So. 435.

§ 378 (Miss.) A witness could testify that she received a certain letter, in order to lay a foundation for its introduction.—*Baldrige v. Stribling*, 57 So. 658.

§ 383 (Ala.) Recitals of payments for swamp land in a patent *held* of no consequence as evidence of the fact of payment in a suit to quiet title.—*Brue v. McMillan*, 57 So. 486.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

§ 397 (Miss.) It is not permissible to vary by parol the part of an agreement which has been reduced to writing by the parties, though the balance of the agreement is oral.—*English v. New Orleans & N. E. R. Co.*, 57 So. 223.

§ 403 (Miss.) Indorsements, whether special or in blank, cannot generally be explained or denied by parol evidence.—*Hawkins v. Shields*, 57 So. 4.

§ 408 (Ala.App.) A receipt in full for the amount due on a shipment of lumber *held* open to explanation or contradiction by parol evidence.—*Hunnicutt Lumber Co. v. Mobile & O. R. Co.*, 57 So. 73.

§ 419 (Ala.) Parol evidence *held* inadmissible to vary the consideration for a written bond for title.—*Able v. Gunter*, 57 So. 464.

(D) Construction or Application of Language of Written Instrument.

§ 461 (Ala.App.) In an action for conversion of machinery sold, to be paid for in lumber, the written order not specifying the kind of lumber, parol evidence of the kind was admissible.—*Avery & Co. v. Turner*, 57 So. 255.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

§ 471 (Ala.) Question to a witness in an action against a railroad for wrongful death *held*

objectionable as calling for a conclusion.—*Neyman v. Alabama Great Southern R. Co.*, 57 So. 435.

§ 471 (Ala.) It is not error to overrule an objection to a question asked a witness as to who was in actual possession of certain land.—*Cooper v. Slaughter*, 57 So. 477.

§ 471 (Ala.) A statement by a witness that he, as agent of a purchaser of standing timber, was in possession of the timber, though not in possession of the land, that being in possession of the vendor, is properly excluded as a mere conclusion.—*Christopher v. Curtis-Attalla Lumber Co.*, 57 So. 837.

§ 471 (Ala.App.) A question *held* not to call for a conclusion of the witness.—*Alexander v. Smith*, 57 So. 104.

§ 471 (Ala.App.) In an action for injury to a street car passenger, questions asked a witness *held* properly excluded, as calling for an opinion.—*North Alabama Traction Co. v. Taylor*, 57 So. 146.

§ 471 (Ala.App.) In an action on insurance policies, the statement of a clerk of defendant's local agent as to why the policies had been left with him *held* inadmissible, as being opinion evidence.—*Cosmopolitan Fire Ins. Co. v. Gindgold*, 57 So. 266.

§ 471 (Ala.App.) The testimony of a witness *held* objectionable as a conclusion.—*Edwards v. Massingill*, 57 So. 400.

§ 471 (Ala.App.) A question as to the condition of cattle on delivery by a carrier *held* not improper as calling for the opinion of the witness.—*Southern Ry. Co. v. Proctor*, 57 So. 513.

§ 473 (Ala.) A witness with personal knowledge may testify as to whether plaintiffs in ejectment had exercised acts of ownership.—*Busbee v. Thomas*, 57 So. 587.

§ 473 (Ala.App.) A question which calls for an inference which it is the province of the jury to draw is properly excluded.—*Polytinsky v. M. F. Patterson & Son*, 57 So. 130.

§ 474 (Ala.App.) A witness *held* not competent to testify to the condition of a fence.—*Edwards v. Massingill*, 57 So. 400.

§ 493 (Ala.App.) In an action for injuries, plaintiff, who was a nonexpert, should not have been permitted to testify that the injury had affected his lungs or speaking organs.—*Central of Georgia Ry. Co. v. Clements*, 57 So. 52.

§ 498½ (Ala.) Whether a nonexpert witness is qualified to testify as to the mental capacity of the subject of the inquiry is a question for the court.—*Johnston v. Johnston*, 57 So. 450.

§ 500 (Ala.) The examination of a nonexpert witness testifying as to the mental capacity of the testator should be full and ample.—*Johnston v. Johnston*, 57 So. 450.

(C) Competency of Experts.

§ 546 (Ala.) In an action against a railroad for wrongful death, *held*, that exclusion of testimony of an expert was within the court's discretion.—*Neyman v. Alabama Great Southern R. Co.*, 57 So. 435.

(F) Effect of Opinion Evidence.

§ 570 (Ala.) The jury are not bound to accept the conclusions of expert witnesses, but must determine for themselves the weight to be accorded thereto.—*Robinson v. Crotwell*, 57 So. 23.

§ 571 (Ala.App.) Weight of expert testimony as to physical condition, being matter of opinion, is for the jury.—*Central of Georgia Ry. Co. v. Clements*, 57 So. 52.

XIV. WEIGHT AND SUFFICIENCY.

§ 596 (Ala.) Sufficiency of proof of a change in a contract reduced to writing stated.—*Huntsville Elks' Club v. Garrity-Hahn Bldg. Co.*, 57 So. 750.

EXAMINATION.

See Witnesses, §§ 236-289.

EXCEPTIONS.

See Appeal and Error, § 260; Criminal Law, §§ 844, 845; Pleading, § 228; Trial, § 96.

EXCEPTIONS, BILL OF.

See Appeal and Error, §§ 123, 501, 548, 701, 928, 933; Criminal Law, §§ 1080, 1086-1091, 1182.

II. SETTLEMENT, SIGNING, AND FILING.

§ 32 (Ala.) Under Acts 1907, p. 562, and Code 1907, § 3300, the judge of the Mobile law and equity court may sign a bill of exceptions while temporarily outside of Mobile county.—Brue v. McMillan, 57 So. 486.

§ 36 (Ala.App.) Bill of exceptions filed within the time prescribed by Code 1907, § 3019, looked to for the purpose only of revising the rulings on a motion for a new trial.—McCloud v. Flournoy, 57 So. 630.

§ 43 (Ala.App.) Where a bill of exceptions was not presented to the judge within the time required by Code 1907, § 3019, it could not be considered.—J. A. Hartselle & Co. v. Wilhite, 57 So. 129.

Code 1907, § 3019, requiring presentation of a bill of exceptions to the judge for signing within 90 days from judgment entry, is not affected by section 2020, providing that the bill shall not be stricken because not signed by the judge within the time required by law.—Id.

EXCESSIVE DAMAGES.

See Damages, §§ 128-132.

EXCHANGE OF PROPERTY.

See Husband and Wife, § 255.

EXCUSABLE HOMICIDE.

See Homicide, §§ 111-122.

EXECUTION.

See Equity, § 148; Exemptions; Garnishment; Guardian and Ward, § 134; Judicial Sales; Sheriffs and Constables, §§ 45, 111.

II. PROPERTY SUBJECT TO EXECUTION.

§ 28 (Ala.App.) A section of roadbed, track, and right of way of a railroad company *held* not subject to levy and sale on execution against it.—Northern Alabama Ry. Co. v. Lowery, 57 So. 260.

III. ISSUANCE, FORM, AND REQUIREMENTS OF WRIT.

§ 75 (Ala.App.) The circuit court clerk, on receiving a certificate of affirmance from the clerk of the Supreme Court, is bound to promptly issue execution on the judgment.—Northern Alabama Ry. Co. v. Lowery, 57 So. 260.

IV. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

§ 125 (Ala.App.) The sheriff is bound to execute an execution with diligence, under Code 1907, § 4098.—Northern Alabama Ry. Co. v. Lowery, 57 So. 260.

§ 142 (Ala.App.) It is the duty of an officer to levy upon property sufficient to satisfy the execution, allowing for probable depreciation.—Levens v. State, 57 So. 497.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§ 171 (Fla.) Injunction will not be granted to restrain illegal levy of execution on personality where no equitable ground for relief appears.—Garcia v. Pardo, 57 So. 974.

VI. CLAIMS BY THIRD PERSONS.

§ 188 (La.) Opposition of a third person, claiming ownership and possession of property seized under execution, is a petitory action.—Mouton v. Southern Sawmill Co., 57 So. 934.

VII. SALE.

(A) Manner. Conduct, Validity, and Confirming or Vacating.

§ 256 (Ala.) Bill for equitable relief against execution sale *held* to show no inadequacy of price.—Harton v. Enslin, 57 So. 723.

Construing most strongly against complainant his bill for equitable relief against execution sale, *held*, it showed no acquisition of title by complainant from S. before S. gave a warranty deed to another.—Id.

A bill for equitable relief against execution sale *held* to show complainant acquired no title to the land by a quitclaim.—Id.

§ 256 (Ala.) Statement as to proper remedy for relief against sale on execution for inadequate price.—Empire Realty Co. v. Harton, 57 So. 763.

(B) Title and Rights of Purchaser.

§ 272 (Fla.) Recorded mortgage, covering a lot in a known subdivision by its proper name, but referring to wrong plat book, *held* notice to purchaser.—Merrell v. Ridgely, 57 So. 352.

§ 272 (Fla.) Purchaser at execution sale is not a purchaser without notice of a prior recorded conveyance.—Jacobs v. Scheurer, 57 So. 356.

§ 288 (Fla.) Rights of purchaser of corporate stock at execution sale, under Gen. St. 1906, § 2856, determined.—Jennings v. Saunders Co., 57 So. 353.

(D) Conveyance to Purchaser.

§ 311 (La.) Where there is a variance between the recitals of a sheriff's return and a deed, the latter will prevail.—Hughes v. Edson, 57 So. 154.

XII. WRONGFUL EXECUTION.

§ 459 (Ala.App.) An officer making an excessive levy is liable to the defendant for the damages suffered.—Levens v. State, 57 So. 497.

EXECUTORS AND ADMINISTRATORS.

See Appeal and Error, § 863; Courts, §§ 484-487; Descent and Distribution; Homestead, § 150; Wills.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 14 (Ala.) Testamentary executors can only be named by a will executed in the manner prescribed by Code 1907, § 6172; they not being entitled to letters under section 2507 until the will is admitted to probate.—Blacksher Co. v. Northrup, 57 So. 743.

§ 29 (La.) Where one has qualified as administrator of a succession and has performed acts of administration, he cannot deny that he was administrator.—Kerlec v. New Orleans Land Co., 57 So. 647.

III. ASSETS, APPRAISAL, AND INVENTORY.

§ 55 (Ala.) Jewelry, which a wife permitted her husband to wear during his life, does not become part of his estate.—Chamboredon v. Fayet, 57 So. 845.

IV. COLLECTION AND MANAGEMENT OF ESTATE.**(B) Real Property and Interests Therein.**

§ 137 (La.) In Louisiana an executrix cannot sell at private sale the property of the succession she represents.—*Bender v. Bailey*, 57 So. 998.

V. ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

§ 177 (Ala.) Under Code 1907, § 4199, minor child *held* not entitled to claim as exempt an iron safe and an electric battery.—*Chamboredon v. Fayet*, 57 So. 845.

Under Code 1907, § 4199, a minor child is entitled to a watch and chain belonging to the decedent.—*Id.*

§ 181 (Ala.) The exemption provided for by Code 1907, § 4200, can only be taken out of personal property.—*Chamboredon v. Fayet*, 57 So. 845.

§ 189 (Ala.) The rights of a minor to the exemption given by Code 1907, § 4200, *held* not lost by an agreement to abandon a contest of the will.—*Chamboredon v. Fayet*, 57 So. 845.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.**(C) Disputed Claims.**

§ 256 (Miss.) State of the record on appeal from a decree disallowing claims against a decedent's estate *held* to require affirmance.—*Horne v. McAlpin*, 57 So. 420.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.**(C) Sale.**

§ 380 (La.) Suit to set aside a succession sale on the ground that order was obtained by fraud must be brought within one year from discovery of fraud.—*Kerlec v. New Orleans Land Co.*, 57 So. 647.

§ 388 (La.) Purchaser at succession sale need not look beyond validity of order authorizing it.—*Kerlec v. New Orleans Land Co.*, 57 So. 647.

XI. ACCOUNTING AND SETTLEMENT.**(B) Proceedings for Accounting.**

§§ 473, 474 (Ala.) A creditor of a testator *held* entitled to sue in equity for his debt.—*Whaley v. D. Rothschild & Co.*, 57 So. 707.

A demand by a creditor, filing a bill in equity against an executrix for the payment of his claim against testator for a discovery, *held* but an incident to the relief demanded.—*Id.*

EXEMPLARY DAMAGES.

See Damages, §§ 91, 208.

EXEMPTIONS.

See Executors and Administrators, §§ 177-189; Homestead.

I. NATURE AND EXTENT.**(C) Property and Rights Exempt.**

§ 43 (La.) Under Const. art. 244, exempting the necessary quantity of corn for the current year from seizure, an allowance of 300 barrels of corn was sufficient.—*Tolbert v. Freeman*, 57 So. 580.

Under Const. art. 244, creditor *held* not entitled to seize mules, nor to charge plaintiff with price of mule which was not seized.—*Id.*

IV. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 123 (Ala.App.) Plaintiff in execution, by proceeding to trial after defendant had pre-

sented a claim of exemptions to the sheriff, *held* to have waived his right to claim a default judgment, upon a contest of the claim, because of defendant's failure to file an inventory of his personality, pursuant to Code 1907, §§ 4174, 4178.—*Pilcher v. Chaffin*, 57 So. 1014.

EXPERT TESTIMONY.

See Criminal Law, §§ 448-490; Evidence, §§ 471-571.

EX POST FACTO LAWS.

See Statutes, §§ 263-287.

EXTRADITION.

See Habeas Corpus, § 75.

FACTORIES.

See Nuisance, § 7.

FACTORS.

See Brokers.

§ 31 (La.) Factor's contract construed, and obligation thereunder determined.—*National Packing Co. v. Davis & Scharff Grocery Co.*, 57 So. 280.

FALSE IMPRISONMENT.**I. CIVIL LIABILITY.**

(A) Acts Constituting False Imprisonment and Liability Therefor.

§ 7 (Ala.) A justice of the peace issuing a warrant for the arrest of accused on an affidavit wholly insufficient to charge a criminal offense, though intending to charge a threatened criminal trespass on affiant's land, is not liable for false imprisonment.—*Broom v. Douglass*, 57 So. 860.

(B) Actions.

§ 22 (Ala.) The burden of proof is on one suing a justice of the peace for damages for false imprisonment to prove want of good faith.—*Broom v. Douglass*, 57 So. 860.

FALSE PRETENSES.

§ 18 (La.) One receiving pay for services rendered a city by another, acting on his behalf, *held* not to violate Acts 1888, No. 155.—*State v. Farrell*, 57 So. 898.

FALSE SWEARING.

See Perjury.

FEDERAL COURTS.

See Courts, § 97.

FEEES.

See Notaries; Sheriffs and Constables.

FELLOW SERVANTS.

See Master and Servant, § 185.

FENCES.

See Evidence, § 474.

FERRIES.

See Commerce, § 63; Contracts, § 22.

I. ESTABLISHMENT AND MAINTENANCE.

§ 10 (Ala.) The right to keep a public ferry for toll *held* not appurtenant to the land of the riparian owner, being a public franchise.—*Graham v. Caperton*, 57 So. 741.

FERTILIZERS.

See Agriculture, § 7.

FIDEI COMMISSUM.

See Perpetuities.

FILING.

See Exceptions, Bill of, § 36.

FINDINGS.

See Reference, § 99.

FINES.

§ 15 (Ala.App.) Where accused was convicted of assault and battery, he was only subject to sentence to hard labor for the county, under Code 1907, § 6306, and could not properly be sentenced to labor for a city.—*Jones v. State*, 57 So. 1031.

FIRE INSURANCE.

See Insurance, §§ 594, 624-665.

FIRES.

See Carriers, § 113; Damages, §§ 91, 174; Negligence, § 21; Railroads, §§ 456, 479.

FLOWAGE.

See Waters and Water Courses, § 119.

FOOD.

See Licenses; Sales, § 274.

FORCIBLE DEFILEMENT.

See Rape.

FORECLOSURE.

See Chattel Mortgages, §§ 261, 262; Mortgages, §§ 340-581.

FOREIGN CORPORATIONS.

See Corporations, §§ 642, 661.

FOREMAN.

See Master and Servant, § 96.

FORFEITURES.

See Insurance, §§ 146, 755; Wills, § 710.

FORGERY.

See New Trial, § 86.

FORMER ADJUDICATION.

See Judgment, §§ 606-715, 948.

FORMER JEOPARDY.

See Criminal Law, §§ 178, 193½, 292.

FORNICATION.

See Lewdness.

FRATERNAL INSURANCE.

See Insurance, §§ 715-819.

FRATERNITIES.

See Embezzlement, § 48.

FRAUD.

See Bills and Notes, §§ 140, 373; Charities, § 33; Corporations, § 117; False Pretenses; Fraudulent Conveyances; Gifts; Insurance, § 655; Pleading, § 8; Sales, §§ 38, 113-130, 260; Wills, §§ 153, 155, 282.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 13 (Ala.) Under Code 1907, § 4298, held, that the good faith of a party making a misrepresentation was immaterial.—*Hafer v. Cole*, 57 So. 757.

§ 13 (Fla.) Representations that are mere guesswork are not proper bases for fraud.—*Florida Cigar & Tobacco Co. v. Baker & Holmes Co.*, 57 So. 174.

§ 22 (Ala.) Where statements of fact are made concerning matters which may be assumed to be within the knowledge of the party making them, the party to whom they are made has the right to rely upon them.—*Wilks v. Wilks*, 57 So. 776.

II. ACTIONS.**(B) Parties and Pleading.**

§ 43 (Ala.) Facts pleaded to constitute fraud in title must actually show it.—*Southern Cotton Oil Co. v. Harris*, 57 So. 854.

(C) Evidence.

§ 50 (La.) Fraud is never presumed.—*Hamilton v. Hamilton*, 57 So. 935.

FRAUDS, STATUTE OF.**III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCARriage OF ANOTHER.**

§ 17 (La.) Parol evidence to prove an agent's authority to indorse a note for his principal held not objectionable, under Civ. Code, art. 2278, prohibiting parol proof of promise to pay debt of another.—*First Nat. Bank v. Johnson*, 57 So. 930.

§ 26 (Ala.App.) A person held chargeable on an oral agreement to pay for goods sold to a third person.—*Cameron v. Haas Bros. Packing Co.*, 57 So. 388.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§ 56 (Ala.) Written authority is unnecessary to enable an agent to bid in land for his principal at mortgage foreclosure sale, even though the principal be a corporation.—*Mills v. Hudson & Co.*, 57 So. 739.

§ 63 (Ala.) A parol agreement by the purchaser of land for taxes to release the lien on payment of a specified sum is within the statute of frauds.—*Osborne v. Waddell*, 57 So. 698.

VII. SALES OF GOODS.**(C) Giving Earnest or Part Payment.**

§ 95 (Miss.) Within the statute of frauds as to personality (Code 1906, § 4779), there is a payment of the "purchase money" where the consideration is to be a credit on indebtedness and credit is actually entered.—*Johnson v. Tabor*, 57 So. 365.

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 158 (Ala.App.) In an action on a promise to pay for goods sold, but delivered to a third person, evidence as to whom credit was given held not conclusive.—*Cameron v. Haas Bros. Packing Co.*, 57 So. 388.

FRAUDULENT CONVEYANCES.

See Evidence, § 314.

I. TRANSFERS AND TRANSACTIONS INVALID.

(B) Nature and Form of Transfer.

§ 24 (Ala.) Under Code 1907, § 4293, mere attempt to convey stock of goods, and their removal and intermingling with goods of purchaser, is not fraudulent.—Southern Cotton Oil Co. v. Harris, 57 So. 854.

§ 38 (Ala.) A creditor may reach funds fraudulently attempted to be placed beyond the reach of creditors and invested in land before it becomes a bona fide homestead.—Elam v. A. P. Brewer Lumber Co., 57 So. 483.

(E) Consideration.

§ 96 (Ala.) Conveyance of real property by a debtor to his mother, to whom he was bona fide indebted, held not fraudulent as against his other creditors.—Wertheimer v. Sig. & Sol. Freiberg, 57 So. 703.

(F) Confidential Relations of Parties.

§ 104 (Ala.) A deed to a wife of land purchased and paid for by her husband held fraudulent as to creditors of the husband.—Elam v. A. P. Brewer Lumber Co., 57 So. 483.

§ 104 (Miss.) Gifts of necessary wearing apparel and personal ornaments by a husband to his wife are not within Code 1906, § 2522, providing that a transfer of "goods and chattels" between husband and wife is invalid as against third persons, unless in writing and acknowledged and filed for record as a mortgage.—Kennington v. Hemingway, 57 So. 809.

(J) Knowledge and Intent of Grantee.

§ 159 (Ala.) Insolvency of a seller of personality and knowledge of the buyer held not sufficient to invalidate the sale.—Southern Cotton Oil Co. v. Harris, 57 So. 854.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(G) Evidence.

§ 271 (Fla.) Under Acts 1907, c. 5679, presumption as to fraudulent character of sale of goods in bulk held subject to rebuttal.—Goldstein v. Maloney, 57 So. 342.

§ 290 (Ala.) In a suit by a creditor of a husband to set aside as fraudulent a deed to the wife, evidence held to show that the wife was contemplating purchasing the land at the time it was purchased.—Elam v. A. P. Brewer Lumber Co., 57 So. 483.

FUTURES.

See Gaming.

GAMING.

See Statutes, § 267.

I. GAMBLING CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

§ 3 (Miss.) Laws 1908, c. 118, prohibiting dealings in futures, held not to impliedly repeal Code 1906, §§ 1201, 1202, 2303.—Ascher & Baxter v. Edward Moyse & Co., 57 So. 299.

§ 11 (Ala.) An agreement by defendant with plaintiff's assignor to procure contracts for the purchase of cotton on margins, without actual delivery, held void, barring recovery of commissions or money advanced by assignor, irrespective of whether the contracts procured were for actual delivery or not.—Birmingham Trust & Savings Co. v. Currey, 57 So. 962.

§ 12 (Miss.) A proviso of Laws 1908, c. 118, § 2, held merely inserted on the erroneous

idea that it was necessary to render the act constitutional.—Ascher & Baxter v. Edward Moyse & Co., 57 So. 299.

§ 14 (Miss.) It is the public policy of the state, as evidenced by statutes, to condemn contracts known as "dealings in futures."—Ascher & Baxter v. Edward Moyse & Co., 57 So. 299.

§ 19 (Ala.) Plaintiff's assignor of the note sued on, given for advances for purchases of cotton on margins and for commissions for making such purchases, by accepting the note, though without knowledge that it included the unlawful commissions, adopted the illegal transaction as part of the consideration, preventing recovery on the note.—Birmingham Trust & Savings Co. v. Currey, 57 So. 962.

(B) Rights and Remedies of Parties.

§ 48 (Ala.) Pleas in an action on a note alleged to have been given by defendant to plaintiff's assignor for margins advanced and commissions for purchasing cotton on margins without actual delivery held to allege that such parties mutually intended that the transaction was to be adjusted by the payment of differences only.—Birmingham Trust & Savings Co. v. Currey, 57 So. 962.

III. CRIMINAL RESPONSIBILITY.

(A) Offenses.

§ 69 (Miss.) Laws 1908, c. 118, § 1, held to deal exclusively with bucket shops maintained in the state.—Ascher & Baxter v. Edward Moyse & Co., 57 So. 299.

§ 74 (La.) Where players in a gambling gambet and settle with each other, it is not a banking game, but where one stands ready, by himself or another, to take all bets, receiving what is lost and paying what is won, it is a banking game.—State v. Rabb, 57 So. 1008.

(B) Prosecution and Punishment.

§ 101 (La.) Whether the conditions exist which constitute a banking game is a question of fact.—State v. Rabb, 57 So. 1008.

GARNISHMENT.

See Contribution; Justices of the Peace, § 174.

V. LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE.

§ 116 (Ala.App.) Garnishment on a judgment operated to intercept debts owing by the garnishee to defendant while the proceeding was pending.—Montgomery Candy Co. v. Wertheimer-Swartz Shoe Co., 57 So. 54.

Garnishment of salary could not be avoided by the garnishee intrusting claims to defendant for collection and permitting him to retain the amount of his salary out of the proceeds.—Id.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 148 (Ala.App.) A garnishee's denial of indebtedness held subject to be overcome by disclosures made on his oral examination, under Code 1907, § 4316.—Montgomery Candy Co. v. Wertheimer-Swartz Shoe Co., 57 So. 54.

GIFTS.

See Descent and Distribution, § 69; Fraudulent Conveyances, § 104.

I. INTER VIVOS.

§ 47 (Ala.) A party claiming an interest in land under a parol gift has the burden of establishing the gift.—Norsworthy v. Willoughby, 57 So. 717.

§ 47 (Miss.) The burden of proof was upon one seeking to invalidate a gift on account of undue influence.—Baldridge v. Stribling, 57 So. 658.

§ 49 (Miss.) The mere suspicion of undue influence in making a gift *inter vivos*, however strong, is insufficient to set aside the gift.—*Baldrige v. Stribling*, 57 So. 658.

GOVERNOR.

See Constitutional Law, § 58; Pardon; Statutes, §§ 29, 30.

GRAND JURY.

See Criminal Law, §§ 207, 240: Indictment and Information, §§ 33, 137.

§ 11 (Miss.) Rights of court and of foreman as to excusing members of the grand jury after its due organization stated.—*McCoy v. State*, 57 So. 622.

In view of the common law and Code 1906, § 2704, relating to the number and organization of the grand jury, *held*, that an indictment upon the affirmative votes of 12 or more members of a grand jury was returned by a legal grand jury.—*Id.*

§ 12 (Ala.App.) An order of the court in summoning a grand jury *held* in substantial conformity with Code 1896, § 5023.—*Kirkwood v. State*, 57 So. 504.

§ 30 (Fla.) A grand jury that has been discharged may be recalled during the same term of the court, and indictments then properly returned are valid.—*Cannon v. State*, 57 So. 240.

Reassembling of grand jury after adjournment to a fixed date *held* a continuance of the original term, so that an indictment then returned will be valid.—*Id.*

GUARANTY.

See Alteration of Instruments, § 7; Evidence, § 213; Principal and Surety.

I. REQUISITES AND VALIDITY.

§ 7 (Ala.) Where a guaranty was fully executed and recited a consideration as paid, no further acceptance was necessary.—*Shows v. Steiner, Lobman & Frank*, 57 So. 700.

§ 10 (Ala.) Order in which parties signed guaranty *held* immaterial.—*Shows v. Steiner, Lobman & Frank*, 57 So. 700.

§ 14 (Ala.) Where a guaranty recited that a nominal consideration had been paid, it was immaterial that it had not been actually paid.—*Shows v. Steiner, Lobman & Frank*, 57 So. 700.

III. DISCHARGE OF GUARANTOR.

§§ 64, 65 (Ala.) Under guaranty permitting a compromise, *held*, that a compromise does not extinguish the guarantor's liability.—*Shows v. Steiner, Lobman & Frank*, 57 So. 700.

IV. REMEDIES OF CREDITORS.

§ 86 (Ala.) In view of the terms of the guaranty, it was insufficient for the guarantor to merely plead a compromise releasing the principal debtors.—*Shows v. Steiner, Lobman & Frank*, 57 So. 700.

§ 92 (Ala.) Under the pleading and evidence, *held*, jury question whether credit to the amount named in the guaranty was extended.—*Shows v. Steiner, Lobman & Frank*, 57 So. 700.

GUARDIAN AND WARD.

II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

§ 11 (Ala.) Testamentary guardians can only be named by a will executed in the manner prescribed by Code 1907, § 8172, they not being entitled to letters under section 2507 until

the will is admitted to probate.—*Blacksher Co. v. Northrup*, 57 So. 745.

III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

§ 34 (Miss.) The guardian of the beneficiary of a spendthrift trust takes the proceeds of the trust property burdened with the trust.—*Cady v. Lincoln*, 57 So. 213.

§ 41 (La.) The sale by a tutrix of a minor's share in a succession, when not authorized by the court, on the advice of a family meeting, is an absolute nullity.—*Succession of Drysdale*, 57 So. 789.

§ 42 (La.) Under Civ. Code, art. 341, the tutor of a minor had no power to convey an interest in land belonging to the minor to attorneys employed to redeem the same from mortgage foreclosure.—*Keel v. Sutherland*, 57 So. 794.

Civ. Code, art. 341, prohibiting sale of minor's property except at auction, *held* not impliedly repealed by Act No. 124 of 1906, so as to permit a conveyance of an interest in a minor's land to his attorneys in consideration of services in redeeming the same.—*Id.*

§ 74 (La.) The general mortgage of a minor for an unliquidated amount will not prevent the seizure of the property at the instance of a judgment creditor of the owner.—*Roberson v. Goldsmith*, 57 So. 908.

V. ACTIONS.

§ 133 (La.) Where the cost of maintenance of a minor borne by the tutrix exceeded any interest on money due the minor under a judgment against the tutrix by confession, the claim for interest will not be allowed at the expense of a creditor.—*Roberson v. Goldsmith*, 57 So. 908.

§ 134 (La.) Undertutor *held* to have no authority to cause execution on judgment for ward against tutor, while the latter remains in office.—*Roberson v. Goldsmith*, 57 So. 908.

VI. ACCOUNTING AND SETTLEMENT.

§ 145 (La.) Where in an inventory of a husband's succession and adjudication, the community property is undervalued, the proper value will be attributed to it on settlement between the widow as tutrix and the issue of the marriage.—*Dillon v. Freville*, 57 So. 316.

VIII. LIABILITIES ON GUARDIANSHIP BONDS.

§ 175 (Miss.) An order releasing sureties on a guardian's bond from further liability thereon, and ordering that a new bond be recorded, gives the new bond no retrospective effect, in the absence of such intention indicated in the bond itself.—*Etna Indemnity Co. v. State*, 57 So. 980.

Where a guardian's conversion of bonds was made while acting under his first bond, the first bondsmen are liable for the conversion, and the actual conversion is not a liability against the sureties on the bond subsequently given.—*Id.*

Where a guardian while acting under his first bond, converted money, and after the discharge of the first bond, and the giving of the new bond, neglected to pay the amount converted, though solvent, the sureties on the second bond, were liable.—*Id.*

HABEAS CORPUS.

See Indictment and Information, § 111.

I. NATURE AND GROUNDS OF REMEDY.

§ 21 (Ala.App.) Habeas corpus *held* not to lie for discharge of petitioner before his pre-

liminary trial before the committing magistrate.—*Ex parte Simpson*, 57 So. 518.

After preliminary trial and before indictment, the legality of accused's commitment may be inquired into upon habeas corpus.—*Id.*

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 75 (Ala.App.) A return to a writ of habeas corpus in extradition proceedings *held* sufficient.—*Brewer v. State*, 57 So. 386.

§ 82 (Ala.App.) At common law, one who refuses to obey a writ of habeas corpus was liable in damages to the one aggrieved, and also guilty of contempt of the court issuing the writ.—*Wright v. State*, 57 So. 1023.

HARMLESS ERROR.

See Appeal and Error, §§ 1028-1073; Criminal Law, §§ 1163-1173.

HEALTH.

See Licenses, § 20.

HEARSAY EVIDENCE.

See Criminal Law, §§ 417-420; Evidence, §§ 314-324.

HIGHWAYS.

See Injunction, § 257; Limitation of Actions, § 32; Railroads, § 102; Statutes, § 118.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(A) Establishment by Prescription, User, or Recognition.

§ 1 (Ala.) A public highway must have been established either by regular proceeding or general use by the public for 20 years or dedicated by owner of the soil.—*Bellview Cemetery Co. v. McEvers*, 57 So. 375.

§ 16 (Ala.) Averments in a bill to enjoin the closing of a road *held* to sufficiently charge that the road was a public one.—*Bellview Cemetery Co. v. McEvers*, 57 So. 375.

IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

§ 151 (Ala.App.) An indictment for refusal to do road work *held* not defective for failure to allege the specific road that defendant failed to work.—*Bynum v. State*, 57 So. 1024.

V. REGULATION AND USE FOR TRAVEL.

(B) Use of Highway and Law of the Road.

§ 169 (Fla.) Owners and operators of automobiles have the same right to use the streets that owners and operators of other vehicles possess.—*Farnsworth v. Tampa Electric Co.*, 57 So. 233.

HOLIDAYS.

See Sunday.

HOMESTEAD.

See Bankruptcy, § 399; Fraudulent Conveyances, § 38; Husband and Wife, § 246; Taxation, § 631.

III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§ 136 (Ala.) A testator cannot by will bar the right of his wife and minor children to claim homestead, in accordance with Code 1907, § 4197.—*Chamboredon v. Fayet*, 57 So. 845.

§ 141 (Ala.) A wife, though living apart from her husband prior to his death, is, under Code

1907, § 4197, entitled to a homestead.—*Chamboredon v. Fayet*, 57 So. 845.

§ 142 (Ala.) Under Code 1907, § 4197, a minor child, though not a member of the household of her father, *held* entitled to a homestead out of his property.—*Chamboredon v. Fayet*, 57 So. 845.

Under Code 1907, § 3816, a divorce bars the wife's right to dower, and to any distributive right in his personality, but does not conclude the homestead right of the children.—*Id.*

§ 145 (Ala.) Under Code 1907, § 4197, until there has been a final distribution, no laches of a widow or guardian of a minor child will bar their right to a homestead.—*Chamboredon v. Fayet*, 57 So. 845.

A voluntary distribution of the estate of a testator *held* not to bar the right of a minor child to a homestead, under Code 1907, § 4197.—*Id.*

§ 150 (Ala.) Upon failure of the widow or minor children to make selection of a homestead, the probate court must make the selection; but there is no such duty on the executor or administrator.—*Chamboredon v. Fayet*, 57 So. 845.

V. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 205 (Ala.) The right of a widow and children to homestead is waived, unless claimed.—*Chamboredon v. Fayet*, 57 So. 845.

HOMICIDE.

See Bail; Criminal Law; Indictment and Information, §§ 110, 137; Witnesses, §§ 240, 268, 269, 274, 277, 280, 387.

I. THE HOMICIDE.

§ 5 (Ala.) That the wound inflicted by accused was not the sole cause of death *held* no defense.—*Talley v. State*, 57 So. 445.

II. MURDER.

§ 11 (Ala.) That accused struck a fatal blow on the impulse of the moment does not negative malice aforethought.—*Talley v. State*, 57 So. 445.

§ 28 (Ala.App.) It is no defense to a murder charge that accused was under the influence of whisky furnished by decedent.—*Crawford v. State*, 57 So. 393.

IV. ASSAULT WITH INTENT TO KILL.

§ 96 (Ala.App.) Owner of flour, exempt under Code 1907, § 4237, *held* to have a right to resist arrest attempted because of his refusal to permit a levy upon such property.—*Levens v. State*, 57 So. 497.

Defendant in a prosecution for assault with intent to kill *held* not the provoker of the difficulty.—*Id.*

Every person *held* to have the right to defend his person and property against unlawful violence.—*Id.*

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§ 111 (Ala.) A citizen *held* not entitled to resist an unlawful arrest with such force as to endanger the life of an officer.—*Adams v. State*, 57 So. 591.

§ 112 (Ala.App.) A defendant, who provoked or brought on the difficulty which resulted in the homicide with which he was charged, cannot set up self-defense.—*Sills v. State*, 57 So. 89.

§ 118 (Ala.App.) A man when assailed in his home is free from the obligation to retreat only when he has been free from fault in bringing on the difficulty, and is acting under an impending necessity to protect himself or his home.—*Sandford v. State*, 57 So. 134.

§ 122 (Ala.) Defense of another *held* not to justify a homicide.—*Talley v. State*, 57 So. 445.

VI. INDICTMENT AND INFORMATION.

§ 134 (Fla.) An indictment charging murder in the second degree need not allege that the act was "imminently dangerous to another," but it is sufficient to describe the act.—*Sumpter v. State*, 57 So. 202.

§ 142 (Miss.) A conviction of murder *held* not sustainable, in view of a variance, on the theory that the trial court could have amended the indictment, pursuant to Code 1906, § 1508.—*Clark v. State*, 57 So. 209.

VII. EVIDENCE.

(B) Admissibility in General.

§ 163 (Ala.App.) In a prosecution for homicide, evidence of decedent's reputation for sobriety *held* inadmissible.—*Sandford v. State*, 57 So. 134.

§ 163 (La.) Evidence of immoral acts by accused *held* not admissible in a murder case.—*State v. Lazarone*, 57 So. 532.

§ 169 (Ala.) Declarations of deceased several hours before the killing as to how he received certain other wounds from which he was then suffering *held* inadmissible.—*Jones v. State*, 57 So. 31.

§ 169 (Ala.) Evidence that deceased was shooting craps at witness' house 30 minutes before the shooting *held* inadmissible.—*Parris v. State*, 57 So. 857.

§ 169 (Ala.App.) Evidence that decedent had an engagement to go to town with defendant on the day of the killing *held* competent to explain his purpose in going to defendant's home.—*Sandford v. State*, 57 So. 134.

§ 169 (Ala.App.) Questions in a prosecution for murder in the second degree *held* immaterial.—*Barlew v. State*, 57 So. 601.

§ 174 (Ala.) In a prosecution for homicide, evidence that accused broke jail and fled was admissible as an inculpatory circumstance.—*Jones v. State*, 57 So. 36.

In a prosecution for homicide, it was not error to permit evidence of the circumstances of defendant's recapture after his escape and his statement that no one helped him escape.—*Id.*

§ 174 (Ala.) In a prosecution for homicide, a witness, who had followed a wagon and mule from the scene of the murder, *held* properly allowed to testify that at the time he was following the tracks he had not heard who was accused of the killing.—*Pope v. State*, 57 So. 245.

Evidence of the finding of sorghum seed and peas, taken from decedent's ginhouse, in defendant's back yard several weeks after the murder, *held* admissible.—*Id.*

§ 174 (Ala.App.) Evidence of what defendant said to decedent's widow, and how he acted toward her after the shooting, *held* irrelevant.—*Sandford v. State*, 57 So. 134.

§ 174 (Ala.App.) The state *held* authorized to prove that accused after killing decedent resisted arrest by shooting one attempting to arrest him.—*Kirkwood v. State*, 57 So. 504.

§ 179 (Ala.App.) In a trial for assault with intent to murder, evidence offered as tending to show that accused was rendered insane by misconduct of his wife, the assaulted person, *held* properly excluded.—*Milford v. State*, 57 So. 96.

§ 180 (Ala.) The condition of deceased as to sobriety several hours before the tragedy was irrelevant.—*Jones v. State*, 57 So. 31.

§ 181 (Ala.App.) In a prosecution for assault with intent to kill, evidence *held* admissible as bearing upon provocation.—*Levens v. State*, 57 So. 497.

§ 188 (Ala.App.) In a prosecution for homicide, defendant may prove decedent's character as a violent or turbulent man, but not his general reputation as a man.—*Sandford v. State*, 57 So. 134.

§ 189 (Ala.App.) Evidence of hearsay particulars of a former trouble between defendant and deceased that caused the making of certain threats *held* inadmissible.—*Sandford v. State*, 57 So. 134.

§ 190 (Ala.App.) Threats of decedent, to be admissible, must have direct reference to accused, or must be made under such circumstances as to be reasonably capable of being construed as referring to him.—*Olive v. State*, 57 So. 66.

Threats to kill some one not definitely designated, made shortly before the commission of the offense to which they may be construed to refer, *held* admissible.—*Id.*

The refusal to admit evidence of threats by decedent against accused *held* erroneous.—*Id.*

§ 190 (Ala.App.) In a prosecution for murder in the second degree, *held*, that evidence tending to show threats against defendant was incompetent.—*Barlew v. State*, 57 So. 601.

§ 190 (Miss.) The exclusion of certain evidence as to threats by decedent to accused *held* reversible error.—*Burks v. State*, 57 So. 867.

§ 191 (Ala.App.) In a prosecution for assault and battery, testimony of prior threats, etc., by the assaulted person, *held* inadmissible.—*Stanfield v. State*, 57 So. 402.

§ 193 (Ala.App.) In a prosecution for assault with intent to kill an officer, evidence as to whether the officer was armed when he came upon defendant's premises *held* admissible.—*Levens v. State*, 57 So. 497.

(C) Dying Declarations.

§ 203 (Ala.App.) On a trial for manslaughter, declarations of deceased, made after the injury, but several days before he first stated his belief that he was going to die, were not admissible as dying declarations.—*Phillips v. State*, 57 So. 1033.

§ 218 (Miss.) The competency of dying declarations *held* exclusively for the court.—*Gurley v. State*, 57 So. 565.

VIII. TRIAL.

(A) Conduct in General.

§ 264 (La.) The question whether sufficient foundation has been laid to warrant evidence to show dangerous character of deceased is in discretion of trial judge.—*State v. Pullen*, 57 So. 906.

(C) Instructions.

§ 287 (Ala.) In a prosecution for murder, an instruction on the motive *held* properly refused.—*Jones v. State*, 57 So. 36.

§ 300 (Ala.) An instruction on self-defense *held* properly refused, because premitting an essential element.—*Savage v. State*, 57 So. 469.

§ 300 (Ala.) Requested charges on self-defense were properly refused, where they were not hypothecated on the ground that the belief of imminent danger must be "honestly and reasonably" held.—*Roberson v. State*, 57 So. 829.

§ 300 (Ala.) In a prosecution for homicide, an instruction on self-defense *held* properly refused as eliminating whether defendant was without fault and whether he believed he was in imminent danger and whether he could retreat without increasing his danger.—*Parris v. State*, 57 So. 857.

Requests to charge on self-defense *held* argumentative, unintelligible, and elliptical.—*Id.*

A request to charge on love of life in prosecution for homicide *held* properly refused as argumentative.—*Id.*

§ 300 (Ala.App.) In a prosecution for homicide, an instruction that defendant was not

bound to retreat from his own home *held* objectionable for failure to hypothesize defendant's freedom from fault.—*Sandford v. State*, 57 So. 134.

An instruction in a prosecution for homicide *held* properly refused as argumentative.—*Id.*

An instruction on defendant's right to defend himself against attack in his own home *held* objectionable as ignoring the question of imminent danger, and impending necessity to kill to save life, etc.—*Id.*

In a prosecution for homicide, an instruction that a man is not required to retreat from his own home, and, if assailed there, may take life in order to save his own life or his body from harm, *held* erroneous as failing to hypothesize freedom from fault.—*Id.*

In a prosecution for homicide, an instruction on the right of defendant to kill by reason of prior communicated threats made by decedent *held* properly refused as ignoring the question of freedom from fault and imminent danger.—*Id.*

In a prosecution for homicide, a request to charge on self-defense *held* properly refused as ignoring the question of defendant's freedom from fault in bringing on the difficulty, etc.—*Id.*

A request to charge in a prosecution for homicide *held* properly refused for failure to hypothesize defendant's freedom from fault.—*Id.*

§ 300 (Ala.App.) A requested instruction as to self-defense making defendant's belief as to his danger and his understanding of the law the test of his right to exercise self-defense *held* properly refused.—*Mathes v. State*, 57 So. 390.

In a prosecution for homicide, a request to charge as to self-defense which ignores the element of retreat, is properly refused.—*Id.*

In a prosecution for homicide, a request to charge which gave undue prominence to a part of the evidence, limited the question of defendant's freedom from fault and duty to retreat to a restricted time, and is confusing in its tendency and involved in its statements *held* properly refused.—*Id.*

In a prosecution for homicide, a request to charge that authorized defendant to act on his own honest belief as to the necessity for killing deceased without regard to whether his belief was such as would have been entertained by a reasonably prudent man *held* properly refused.—*Id.*

In a prosecution for murder, a refusal to charge a request as to self-defense which ignored the element of retreat and was unintelligible *held* no error.—*Id.*

§ 300 (Ala.App.) A requested charge in a criminal case *held* properly refused, because not clear.—*Lee v. State*, 57 So. 395.

A requested charge on a trial for assault with intent to murder *held* properly refused, because bad.—*Id.*

§ 300 (Ala.App.) Requested instruction on self-defense in a prosecution for murder *held* properly refused.—*Barlew v. State*, 57 So. 601.

In a prosecution for murder, defendant's requested instruction upon the commencement of the difficulty *held* faulty.—*Id.*

In prosecution for murder, *held*, that requested instruction as to effect of threats was erroneous.—*Id.*

In a prosecution for murder, requested instruction as to freedom from fault in bringing on difficulty *held* erroneous.—*Id.*

§ 307 (Ala.) In a prosecution for homicide, a charge to acquit accused under certain circumstances *held* erroneous.—*Talley v. State*, 57 So. 445.

§ 308 (Miss.) An instruction drawn under Code 1906, § 1227, defining murder, *held* fatally bad for omitting qualifying words.—*Rutherford v. State*, 57 So. 224.

§ 309 (Ala.) It was not error to omit to charge on manslaughter, where there was no evidence on which a conviction of that offense could be predicated.—*Jones v. State*, 57 So. 36.

(D) Verdict.

§ 313 (Ala.) Under Code 1907, § 7087, a verdict convicting for murder cannot stand unless it expressly finds as to whether it be first or second degree murder.—*Roberson v. State*, 57 So. 829.

X. APPEAL AND ERROR.

§ 332 (La.) Decision of judge on the weight of evidence, showing overt act authorizing evidence of dangerous character of deceased, will not be disturbed, unless clearly erroneous.—*State v. Pullen*, 57 So. 906.

§ 338 (Ala.) In a prosecution for homicide, defendant *held* not prejudiced by a statement of a witness that a rock found near the body had hair on it.—*Pope v. State*, 57 So. 245.

§ 338 (La.) Admission of evidence *held* prejudicial to accused.—*State v. Lazarone*, 57 So. 532.

§ 339 (Ala.App.) The refusal to admit evidence of threats by decedent against accused *held* reversible error.—*Olive v. State*, 57 So. 66.

§ 339 (Ala.App.) In a prosecution for murder, *held*, that the exclusion of evidence was not prejudicial to defendant.—*Barlew v. State*, 57 So. 601.

§ 348 (Fla.) Where evidence failed to sustain conviction of murder in the second degree, and at most makes out manslaughter, the judgment will be reversed.—*Francis v. State*, 57 So. 230.

HOSPITALS.

§ 7 (Ala.) A physician *held* not liable for any default on the part of a surgeon operating on a patient.—*Robinson v. Crotwell*, 57 So. 23.
A physician owning a hospital *held* not liable for defective equipment.—*Id.*

HUMANITARIAN DOCTRINE.

See Street Railroads, § 118.

HUSBAND AND WIFE.

See Cancellation of Instruments, § 37; Contracts, § 187; Contribution; Descent and Distribution, § 69; Divorce; Evidence, § 314; Fraudulent Conveyances, §§ 104, 290; Homestead; Marriage; Telegraphs and Telephones, §§ 39, 68, 73; Vendor and Purchaser, § 104; Witnesses, § 140.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

§ 25 (Ala.App.) A notice by a materialman served on the husband of the owner *held* to bind the owner.—*Copeland v. Dixie Lumber Co.*, 57 So. 124.

IV. DISABILITIES AND PRIVILEGES OF COVERTURE.

(A) In General.

§ 62 (La.) A woman, who, on representation that she is divorced, obtains a decree of emancipation, and joins in instruments to induce another to part with money, *held* not entitled in order to escape liability, to say that she was a married woman unauthorized by her husband when the money was so parted with.—*Roberson v. Goldsmith*, 57 So. 908.

(B) Property and Conveyances.

§ 70 (Ala.) Under Code 1907, § 4494, the requirement that the husband shall join in the wife's deed does not apply to deeds by married women, who are nonresidents.—*Bell v. Burkhalter*, 57 So. 460.

V. WIFE'S SEPARATE ESTATE.**(C) Liabilities and Charges.**

§ 171 (Ala.) Mortgage on a wife's property is void only in part, if part of the debt secured was hers, or that of her and her husband jointly, though part was exclusively his.—*Mills v. Hudmon & Co.*, 57 So. 739.

VI. ACTIONS.

§ 232 (Ala.) A married woman seeking to defeat a mortgage on her property on the ground that the debt was the husband's only, and she merely a surety, though the note and mortgage were executed by them jointly, *held* to have the burden of proof.—*Mills v. Hudmon & Co.*, 57 So. 739.

VII. COMMUNITY PROPERTY.

§ 246 (La.) In determining whether land acquired under homestead laws of the United States falls into a community already dissolved by the death of the wife, the laws of the United States and not the laws of the state apply.—*Wadkins v. Producers' Oil Co.*, 57 So. 937.

§ 246 (La.) Land in Louisiana, owned by a community residing in Texas, is governed by the Louisiana laws of succession as affecting validity of a conveyance by the wife on the husband's death.—*Bender v. Bailey*, 57 So. 998.

§ 252 (La.) Where the wife dies before patent to United States public land issued to her husband, it does not become a part of the community property.—*Wadkins v. Producers' Oil Co.*, 57 So. 937.

Title acquired by homestead entryman after the death of his wife does not relate back to the community which formerly existed.—*Id.*

Congress has power to control disposition of public lands to homesteaders and to merge in the husband all rights arising from entry, ignoring the community system of the state.—*Id.*

§ 255 (La.) Where a husband exchanges property for other like property, in the absence of proof that it was his separate property, he and his estate become indebted to the community for the property received.—*Dillon v. Freville*, 57 So. 316.

§ 257 (La.) To sustain a demand that the community be liable for the sale of separate property of the husband, it must be shown that the funds were expended for the benefit of the community.—*Dillon v. Freville*, 57 So. 316.

§ 258 (La.) Improvements placed by the community on separate property belong to the owner thereof and he is liable to the community for the enhanced value thereof.—*Dillon v. Freville*, 57 So. 316.

§ 264 (La.) Where a married woman intervenes, and claims movable property which her husband has pledged for a community debt, she must show that her husband in acquiring it acted as her agent, and that the property was paid for with her paraphernal funds.—*Eilerslie Planting Co. v. Blackman*, 57 So. 279.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

§ 285½ (Ala.) Suits for alimony in the nature of separate maintenance without divorce are authorized under the statute and chancery procedure.—*Jones v. Jones*, 57 So. 376.

§ 288 (Ala.) That a wife has not joined in executing conveyances as agreed in a separation agreement would not prevent her from making the agreement a basis for a suit for maintenance, in absence of a request for her to join therein.—*Jones v. Jones*, 57 So. 376.

§ 296 (Ala.) That a wife had refused to join in executing conveyances as she had agreed to do in a separation agreement should be pleaded as a defense to an action by her for maintenance.—*Jones v. Jones*, 57 So. 376.

IMMOVABLES.

See Mortgages.

IMPEACHMENT.

See Witnesses, §§ 318-414.

IMPLIED CONTRACTS.

See Work and Labor.

IMPRISONMENT.

See Marriage, § 58.

IMPROVEMENTS.

See Husband and Wife, § 258; Tenancy in Common, § 29.

§ 4 (La.) One taking possession of land in disregard of his title *held* a possessor in bad faith, and not entitled to be reimbursed for improvements inseparable from soil.—*Vaccaro v. Pignuolo*, 57 So. 787.

INCOMPETENT PERSONS.

See Insane Persons.

INCONSISTENCY.

See Pleading, § 21; Witnesses, §§ 379-388.

INDECENT EXPOSURE.

See Obscenity.

INDEMNITY.

See Guaranty.

INDEPENDENT CONTRACTORS.

See Master and Servant, § 277.

INDICTMENT AND INFORMATION.

See Chattel Mortgages, § 232; Criminal Law, §§ 619, 627, 1030, 1031, 1032, 1116, 1211; Embezzlement, § 26; Highways, § 151; Homicide, §§ 134, 142; Intoxicating Liquors, §§ 213-217; Larceny, §§ 32, 40; Municipal Corporations, §§ 636, 642; Obscenity, § 11; Perjury, §§ 19-32; Physicians and Surgeons, § 6; Robbery.

IX. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.

§ 9 (Fla.) Correction of indictment by return of new indictment without rehearing witnesses *held* proper.—*Cannon v. State*, 57 So. 240.

§ 10 (Fla.) Indictment found by 12 members of grand jury *held* valid, though not all of the grand jury above that number were either present or consenting.—*Cannon v. State*, 57 So. 240.

§ 11 (La.) Parol evidence is admissible on the part of a clerk to amend his minutes, so as to show when indictment was returned.—*State v. Pullen*, 57 So. 906.

X. FORMAL REQUISITES OF INDICTMENT.

§ 33 (Ala.) That the name of the foreman of the grand jury was written under instead of over the words, "foreman of the grand jury," printed in the indorsement, *held* no ground for quashing an indictment.—*Parris v. State*, 57 So. 857.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 63 (Ala.App.) Indictments are statements of legal conclusions, rather than allegations of fact.—*Boyd v. State*, 57 So. 1019.

§ 72 (Ala.App.) Under Code 1907, § 6306, an affidavit *held* to charge offenses of equal de-

gress, subject to the same punishment, and such offenses may be charged in the alternative, as authorized by section 7151.—*Wray v. State*, 57 So. 144.

§ 72 (Ala.App.) An indictment for resisting an arrest, charging that the arrest or attempt was by "an officer or constable of said county," was not objectionable for its alternative designation.—*Lewis v. State*, 57 So. 1035.

§ 87 (Ala.App.) An indictment for misdemeanor *held* not subject to demurrer for failure to allege the commission of the misdemeanor or since the enactment of the law denouncing it.—*Scott v. State*, 57 So. 413; *Shelly v. Same*, Id. 416; *Wilson v. Same*, Id.; *Brannon v. Same*, Id.

§ 110 (Ala.App.) An indictment for an assault with intent to murder is sufficient, if it follows the exact language of the Code form.—*Hankinson v. State*, 57 So. 61.

§ 110 (Ala.App.) Where a statute creates a new offense, unknown to the common law, and describes its elements, the offense may be charged in the words of the statute.—*Wright v. State*, 57 So. 1023.

An affidavit that informant had probable cause for believing that a writ of habeas corpus was issued by the judge of probate, and directed to accused, commanding her to produce the bodies of two persons named before said judge on a day named, and was served on accused, who neglected to obey and execute it, being the language of Code 1907, § 7038, was sufficient.—Id.

§ 110 (Ala.App.) The form of an indictment, under Code 1907, § 7708, for resisting an officer in making an arrest, whether under process or not, is to be determined by Code 1907, § 7161, form 92.—*Lewis v. State*, 57 So. 1035.

An indictment in a prosecution for resisting an officer in making an arrest *held* sufficient, under Code 1907, § 7161, form 92.—Id.

§ 111 (Ala.App.) An affidavit charging an offense under Code 1907, § 7038, in neglecting to obey and execute a writ of habeas corpus, was sufficient, though not negating the exception, which is a matter of defense.—*Wright v. State*, 57 So. 1023.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§ 137 (Ala.App.) A motion to quash an indictment for murder on the ground that the judge drew from the jury box enough names to complete the grand jury *held* properly overruled in view of Jury Law, §§ 20, 23.—*Mathes v. State*, 57 So. 390.

§ 137 (Ala.App.) Under Code 1896, § 5269, an objection to an indictment may not be taken on the ground that the court in ordering the summoning of a grand jury did not use the words of section 5023.—*Kirkwood v. State*, 57 So. 504.

VIII. AMENDMENT.

§ 160 (Miss.) Under Code 1906, § 1508, amendment after proof of an indictment, by insertion of the words "and district" in the venue, *held* proper.—*Winston v. State*, 57 So. 545.

IX. ISSUES, PROOF, AND VARIANCE.

§ 169 (La.) That accused was a fugitive from justice may be shown without alleging it in the indictment.—*State v. Pullen*, 57 So. 906.

§ 180 (Ala.App.) Proof that an officer attempting to make an arrest was a deputy sheriff is not a variance from an indictment charging an arrest by "an officer or constable."—*Lewis v. State*, 57 So. 1035.

X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

§ 185 (Ala.App.) Under an affidavit, accused could be convicted of assault and battery.—*Wray v. State*, 57 So. 144.

§ 185 (Ala.App.) One can be convicted only of the offense for which he is indicted.—*Garner v. State*, 57 So. 502.

INDORSEMENT.

See Bills and Notes, §§ 267-299; Evidence, § 403; Mortgages, § 235.

INFANTS.

See Executors and Administrators, §§ 177-189; Guardian and Ward; Limitation of Actions, § 72; Master and Servant, § 216; Militia, § 8; Witnesses, § 40.

II. CUSTODY AND PROTECTION.

§ 18 (La.) Juvenile courts created by Act No. 83 of 1908, as amended by Act No. 48 of 1910, § 8, *held* without jurisdiction to try accused for assault committed on a delinquent child.—*State v. Jacobs*, 57 So. 905.

III. PROPERTY AND CONVEYANCES.

§ 31 (Ala.) In an action to set aside a conveyance made while plaintiffs were infants, *held* in view of Code 1907, § 4490, that an averment as to disposition of the consideration for such conveyance was not sufficient to relieve them from any tender.—*Bell v. Burkhalter*, 57 So. 460.

In an action to set aside a conveyance made while plaintiffs were infants, *held*, that they need not offer to let their part of the damages from defendant's waste be deducted from the consideration paid them.—Id.

IV. CONTRACTS.

§ 57 (Ala.) Infant, on reaching majority, may ratify and confirm his contracts without any new consideration.—*Bell v. Burkhalter*, 57 So. 460.

§ 58 (Ala.) An infant, on arriving at majority, *held* to have the right to avoid his contracts.—*Bell v. Burkhalter*, 57 So. 460.

An infant who has, during minority, wasted or consumed the consideration received upon his contract need not refund it, or place the other party in statu quo upon avoiding the contract; but it is otherwise where any part of the consideration remains in his possession when he reaches majority.—Id.

VII. ACTIONS.

§ 77 (Miss.) Where a minor's interests are at stake, and the record shows that a person instituting a suit for his use is in reality acting as the ward's next friend, he will be treated as such, although he styles himself guardian ad litem.—*Etna Indemnity Co. v. State*, 57 So. 980.

INFORMATION.

See Indictment and Information.

INJUNCTION.

See Appeal and Error, § 874; Execution, § 171; Highways, § 16; Judgment, § 883.

I. NATURE AND GROUNDS IN GENERAL.

(B) Grounds of Relief.

§ 9 (La.) An injunction will not issue to protect a right not in esse and which may never arise.—*Quirk v. Miller*, 57 So. 521.

II. SUBJECTS OF PROTECTION AND RELIEF.

(A) Actions and Other Legal Proceedings.

§ 26 (Ala.) Bill *held* not to lie to enjoin 110 separate suits against coal company for negligent death of employes killed in a mine explosion.—*Southern Steel Co. v. Hopkins*, 57 So. 11.

§ 26 (Miss.) Equity *held* not authorized to enjoin several legal actions brought by dif-

ferent persons on the ground of multiplicity of suits.—Cumberland Telephone & Telegraph Co. v. Williamson, 57 So. 559.

Equity may interfere to prevent a multiplicity of suits, where the injury is continuing in its nature, so as to result in bringing numerous actions against the same person.—Id.

(B) Property, Conveyances, and Incumbrances.

§ 38 (Ala.) Injunction to restrain trespass will be granted for a reasonable time pending suit at law to determine the legal title.—Driver v. New, 57 So. 437.

(D) Corporate Franchises, Management, and Dealings.

§ 65 (La.) Allegations of petition held to state a cause of action for injunction for protection of plaintiff's property rights.—Standard Chemical Co. v. Illinois Cent. R. Co., 57 So. 782.

III. ACTIONS FOR INJUNCTIONS.

§ 118 (Ala.) A bill held insufficient under Code 1907, § 1804, as one to enjoin issuance of a patent for school lands claimed by rival claimants.—Barry v. Stephens, 57 So. 467.

§ 118 (La.) A petition to enjoin the issuance of drainage bonds, which alleges in general terms that the forms prescribed by law were not observed in the formation of the district, is insufficient.—Coguenham v. Avoca Drainage Dist., 57 So. 989.

IX. WRONGFUL INJUNCTION.

§ 257 (La.) Plaintiff held not liable in damages under circumstances stated for suing out injunction against obstruction of street.—Quirk v. Miller, 57 So. 521.

INNKEEPERS.

§ 3 (Ala.) Inns and boarding houses defined and distinguished.—Birmingham Ry., Light & Power Co. v. Drennen, 57 So. 876.

IN PAIS.

See Estoppel, §§ 53-56.

INSANE PERSONS.

See Criminal Law, § 417; Deeds, §§ 196, 211; Wills, § 329.

VIII. CRIMES.

§ 86 (La.) Under Act No. 105 of 1896 and Act No. 264 of 1910, § 4, the only court having jurisdiction of a petition to remove an insane person under death sentence to the insane hospital is that having jurisdiction of the penitentiary wherein the convict is confined.—State v. Oteri, 57 So. 269.

Act No. 264 of 1910, § 4, contemplates that there is a mode by which the sanity of a convict sentenced to death may be passed upon in the interval between his sentence and execution.—Id.

INSOLVENCY.

See Bankruptcy; Banks and Banking, §§ 77, 80; Fraudulent Conveyances, § 159; Insurance, § 70; Judgment, § 883; Marriage, § 58.

INSTRUCTIONS.

To jury, see Criminal Law, §§ 741-845; Trial, §§ 139, 191-295.

To servant, see Master and Servant, §§ 150-156.

INSULTS.

See Railroads, § 282.

INSURANCE.

See Appeal and Error, §§ 1002, 1201; Evidence, § 471; Witnesses, § 183.

II. INSURANCE COMPANIES.

(B) Mutual Companies.

§ 55 (La.) Policy holders in mutual accident insurance company are practically stockholders therein.—Wermuth v. Minden Lumber Co., 57 So. 170.

§ 70 (La.) Liquidator of solvent mutual accident insurance company cannot question power of directors to grant rebates, or to distribute dividends.—Wermuth v. Minden Lumber Co., 57 So. 170.

V. THE CONTRACT IN GENERAL.

(B) Construction and Operation.

§ 146 (Ala.) The rule that an insurance contract shall be construed strictly against the insurer is especially applicable to forfeiture clauses.—Continental Casualty Co. v. Ogburn, 57 So. 852.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

§ 376 (Ala.App.) The written consent to the transfer of the interest in property covered by insurance policies indorsed upon the policies need not be signed.—Cosmopolitan Fire Ins. Co. v. Gingold, 57 So. 266.

XII. RISKS AND CAUSES OF LOSS.

(B) Accident and Health Insurance.

§ 467 (Ala.) Accident insurance policy construed, and held to insure a loss by death only as the result of personal bodily injury resulting directly or independently of all other causes through external, violent, and purely accidental means, etc., occurring within 90 days after the injury.—Continental Casualty Co. v. Ogburn, 57 So. 852.

"At once" and "immediately" used in an accident policy and describing the accidental injury insured against, "at once" causing disability, etc., defined.—Id.

XIV. NOTICE AND PROOF OF LOSS.

§ 560 (Ala.) Defects in preliminary proofs of loss are waived by the insurer's failing to object on that ground, or by refusal to pay for some other reason.—Continental Casualty Co. v. Ogburn, 57 So. 852.

XVI. RIGHT TO PROCEEDS.

§ 594 (Ala.App.) The assignment of a claim under a fire insurance policy may be by parol.—Cosmopolitan Fire Ins. Co. v. Gingold, 57 So. 266.

XVIII. ACTIONS ON POLICIES.

§ 624 (Ala.App.) An action on an assigned claim under a fire insurance policy may be prosecuted in the name of the party really interested under Code 1907, § 2489.—Cosmopolitan Fire Ins. Co. v. Gingold, 57 So. 266.

§ 648 (Ala.App.) In an action on a fire insurance policy, evidence as to whether other companies had paid claims held inadmissible.—Cosmopolitan Fire Ins. Co. v. Gingold, 57 So. 266.

§ 655 (La.) In action on fire policy, where misrepresentation and false swearing are set up as a defense, evidence as to profits earned by plaintiff during the few years preceding the fire held admissible.—Central Glass Co. v. German American Ins. Co., 57 So. 538.

§ 664 (Ala.App.) In an action on insurance policies that had been transferred, the evidence

of a clerk of the insurance office *held* admissible as showing a consent to a transfer of interest or facts constituting an estoppel to deny such consent.—*Cosmopolitan Fire Ins. Co. v. Gingold*, 57 So. 266.

§ 665 (Ala.) Facts *held* to show a substantial performance of an iron safe clause in a fire policy.—*Queen Ins. Co. of America v. Vines*, 57 So. 444.

§ 668 (Ala.) In an action on an accident policy, whether defendant had waived defects in the proofs *held* for the jury.—*Continental Casualty Co. v. Ogburn*, 57 So. 852.

XX. MUTUAL BENEFIT INSURANCE.

(B) The Contract in General.

§ 715 (Miss.) The application for fraternal benefit insurance will be treated as a part of the certificate, if the constitution or by-laws fairly make it such by reference.—*Thompson v. Thompson*, 57 So. 291.

The application for membership in a fraternal benefit association *held* to be made a part of the certificate by virtue of the constitution and by-laws.—*Id.*

(D) Forfeiture or Suspension.

§ 750 (Ala.App.) A provision of the by-laws or constitution of a fraternal order supplying insurance to members that in case a lodge is delinquent its members shall not be insured *held* not to be enforced to oppress innocent members.—*District Grand Lodge No. 23, United Order of Odd Fellows v. Hill*, 57 So. 147.

§ 755 (Ala.App.) Right to forfeit policies held by members of a fraternal society for delinquency of their local lodge *held* waived.—*District Grand Lodge No. 23, United Order of Odd Fellows, v. Hill*, 57 So. 147.

(E) Beneficiaries and Benefits.

§ 767 (Ala.App.) Where a person cared for an insured under an agreement that he would will her his property, she had such an insurable interest as will render a renewal of the policy in her name proper.—*District Grand Lodge No. 23, United Order of Odd Fellows, v. Hill*, 57 So. 147.

§ 775 (Miss.) A member of a beneficial association cannot make a valid bequest of the benefits to one not within the class authorized to become beneficiaries under the laws of the order.—*Hawkins v. Duberry*, 57 So. 919.

§ 789 (Ala.App.) The basing of a refusal to pay an insurance policy on one ground *held* to waive any other defects in the proofs of death.—*District Grand Lodge No. 23, United Order of Odd Fellows, v. Hill*, 57 So. 147.

(F) Actions for Benefits.

§ 813 (Ala.App.) The grand lodge of an order, and not its endowment department, *held* liable on contracts of insurance of its members.—*District Grand Lodge No. 23, United Order of Odd Fellows, v. Hill*, 57 So. 147.

§ 818 (Ala.App.) Evidence in an action on an insurance policy *held* admissible to show that the beneficiary had an insurable interest.—*District Grand Lodge No. 23, United Order of Odd Fellows, v. Hill*, 57 So. 147.

§ 819 (Miss.) Evidence in an action on a fraternal benefit certificate *held* to show that the word "children" was changed so as to read "child" after the policy was delivered.—*Thompson v. Thompson*, 57 So. 291.

INTENT.

See Statutes, § 181.

INTEREST.

See Evidence, § 278; *Guardian and Ward*, § 133; *Usury*.

I. RIGHTS AND LIABILITIES IN GENERAL.

§ 18 (Ala.) In an action against a mortgagee of chattels for an accounting, interest on the mortgagee's cash items *held* properly disallowed.—*Zadek v. Burnett*, 57 So. 447.

§ 26 (Ala.App.) Where there is no agreement for the payment of interest, the acceptance of a payment in full renders interest on the amount uncollectible, although payment was not made within the time stipulated.—*Hunnicutt Lumber Co. v. Mobile & O. R. Co.*, 57 So. 73.

INTERPRETATION.

See Bills and Notes, §§ 129, 135; *Chattel Mortgages*, §§ 109-147; *Contracts*, §§ 144-217; *Insurance*, § 146; *Sales*, §§ 54, 467; *Statutes*, §§ 181-225½; *Wills*, §§ 439-702.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUORS.

See Constitutional Law, § 200; *Costs*, § 322; *Criminal Law*, §§ 252, 814, 1186.

II. CONSTITUTIONALITY OF ACTS AND ORDINANCES.

§ 15 (Ala.App.) Acts Sp. Sess. 1909, p. 94, § 33, making any person who acts as the agent or assisting friend of the buyer or seller of intoxicating liquor guilty, is valid.—*Scott v. State*, 57 So. 413; *Shelly v. Same*, *Id.* 416; *Wilson v. Same, Id.*; *Brannon v. Same, Id.*

§ 15 (La.) Ordinance imposing tax on business of selling nonintoxicating malt liquors where state imposes no such tax *held* violative of Const. art. 229.—*City of Shreveport v. Smith*, 57 So. 655.

IV. LICENSES AND TAXES.

§ 46 (La.) "Malt liquors," as used in Const. art. 229, defined.—*City of Shreveport v. Smith*, 57 So. 652.

VI. OFFENSES.

§ 131 (Ala.App.) There was no illegal sale or giving away of intoxicants, unless the delivery of liquor was accompanied by an intention to transfer the right of property and possession therein for or without a consideration.—*O'Brien v. State*, 57 So. 1028.

Under Acts 1909 (Sp. Sess.) p. 91, § 31, the delivery of a bottle of whisky by accused to an acquaintance to keep for him, while he went before the grand jury to testify, does not support an indictment charging that he sold "or otherwise disposed of" intoxicants, in the absence of a showing that he intended or consented that such acquaintance might use part of the liquor.—*Id.*

§ 139 (Ala.App.) Under Acts Sp. Sess. 1909, pp. 64, 68, §§ 4, 16, *held* admissible to show that a place where liquors were found was used as a store and soft drink parlor.—*Bell v. State*, 57 So. 154.

§ 148 (La.) Local sales by a wholesaler to illicit vendors of liquor will be treated as unlawful sales to individuals.—*State v. Pomeranky*, 57 So. 994.

§ 167 (Ala.App.) Gen. Acts 1907, p. 366, and Acts Sp. Sess. 1909, p. 94, § 33, *held* to make an "assisting friend" of the parties to a sale of prohibited liquors guilty as a principal of such offense.—*Boyd v. State*, 57 So. 1019.

VIII. CRIMINAL PROSECUTIONS.

§ 213 (La.) Charge of selling liquor without a license *held* sufficiently specific as to the place of sale.—*State v. Foster*, 57 So. 895.

§ 215 (Ala.App.) An indictment for the unlawful sale of intoxicating liquor, in accordance

with Code 1907, § 7353, *held* sufficient under Acts Sp. Sess. 1909, p. 63.—Scott v. State, 57 So. 413; Shelly v. Same, Id. 416; Wilson v. Same, Id.; Brannon v. Same, Id.

§ 217 (La.) Charge of selling liquor in prohibition territory need not specify the quantity.—State v. Foster, 57 So. 895.

§ 231 (Ala.App.) A state's witness in a prosecution for wrongful sale of liquor may testify to the intoxicating effect of the liquor purchased.—Johnson v. State, 57 So. 499.

§ 236 (Ala.App.) A charge of illegally selling malt liquors *held* supported by evidence of the sale of "beer," though not otherwise specifically defined.—Wilson v. State, 57 So. 503.

§ 236 (Ala.App.) In a trial for unlawfully selling liquor, the time of the offense *held* insufficiently proved within the statute of limitations.—Wetzell v. State, 57 So. 509.

§ 238 (Ala.App.) On a trial for selling intoxicating liquor, evidence *held* sufficient to submit to the jury the identity of accused as the guilty person.—Hollingsworth v. State, 57 So. 501.

§ 238 (Ala.App.) In a prosecution for manufacturing liquor, evidence *held* sufficient to go to the jury on the question of the defendant's guilt.—Tice v. State, 57 So. 506.

§ 238 (Miss.) Evidence *held* to present question for jury whether defendant was engaged in keeping intoxicating liquors for sale, in view of Acts 1908, c. 115.—Minter v. City of Jackson, 57 So. 549.

§ 239 (Ala.App.) Under Acts Sp. Sess. 1909, p. 64, § 4, an instruction as to the effect of finding prohibited liquors on premises in which a person lived *held* properly refused.—Bell v. State, 57 So. 154.

§ 239 (Ala.App.) In prosecution for illegal sale of whisky, a charge that if defendant rented the room where the alleged sale was made to another, knowing liquor was kept there for sale, he was guilty, though no sale was made, *held* prejudicially misleading.—Garner v. State, 57 So. 502.

§ 239 (Ala.App.) An instruction to acquit, unless a sale of the beer was intended, was properly refused where there was some evidence to show it was a gift.—Wilson v. State, 57 So. 503.

§ 239 (Miss.) In a prosecution for a wrongful sale of liquor, an instruction eliminating certain testimony showing that defendant only assisted the witness to procure the liquor was erroneous.—Compton v. State, 57 So. 919.

IX. SEARCHES, SEIZURES, AND FORFEITURES.

§ 248 (Ala.App.) In a proceeding under Act Aug. 25, 1909 (Gen. & Loc. Laws, Sp. Sess. 1909, p. 74) § 22, motion to quash an affidavit for search and seizure *held* properly overruled.—Cheek v. State, 57 So. 108.

§ 249 (Ala.App.) A building, not covered by description in a search and seizure warrant issued under Act Aug. 25, 1909 (Gen. & Loc. Laws, Sp. Sess. 1909, p. 74) § 22, *held* not subject to search, though connected with the hotel described in the warrant.—Cheek v. State, 57 So. 108.

§ 250 (Ala.App.) Evidence tending to show unlawful sales of liquor at a hotel *held* admissible, in a search and seizure proceeding under Act Aug. 25, 1909 (Gen. & Loc. Laws, Sp. Sess. 1909, p. 74) § 22.—Cheek v. State, 57 So. 108.

In a search and seizure proceeding under Act Aug. 25, 1909 (Gen. & Loc. Laws, Sp. Sess. 1909, p. 74) § 22, it was improper to permit the state to show that defendant had more

than once been arrested for violation of the prohibition laws.—Id.

Claimant of liquors seized under Act Aug. 25, 1909 (Gen. & Loc. Laws, Sp. Sess. 1909, p. 74) § 22, *held* to have had the burden to show that he did not keep them for illegal purposes.—Id.

IRONSAFE CLAUSE.

See Insurance, § 665.

JEOPARDY.

See Criminal Law, §§ 178, 193½, 292.

JOINDER.

See Parties, § 27.

JOINT TENANCY.

See Tenancy in Common.

§ 1 (La.) Possession of one joint tenant is regarded in law as the possession of his cotenants, their assigns and legal representatives.—Chef Menteur Land Co. v. Mercier, 57 So. 329.

JOURNALS.

See Evidence, § 33.

JUDGES.

See Justices of the Peace; Mandamus, §§ 50, 61.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 4 (Ala.) Const. 1901, § 154, which sup-
planted Const. 1875, art. 6, § 14, *held*, in view
of section 139, not to inhibit the Legislature
from making probate judges not learned in the
law judges of county courts.—State v. Burke,
57 So. 870.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 29 (Ala.) In view of Const. 1901, § 139,
held, that section 280, providing that no person
shall hold two offices at the same time, did not
inhibit the Legislature from investing judges
of the probate court with powers and duties
of judges of the county courts.—State v. Burke,
57 So. 870.

§ 36 (Ala.) A judge of a court of general
jurisdiction is not liable for a judicial act in-
volving an affirmative decision as to jurisdic-
tion in excess thereof, though he acts malici-
ously.—Broom v. Douglass, 57 So. 860.

A judge of a court of limited jurisdiction is
liable when he acts, even in good faith, with-
out a general jurisdiction of the subject-mat-
ter.—Id.

A judge of an inferior court is not civilly
liable when he has jurisdiction of the subject-
matter and of the person, though acting malici-
ously.—Id.

A judge of an inferior court, acting in good
faith as to a subject-matter of which he has
a general jurisdiction, without acquiring jurisdic-
tion of the person, is not civilly liable for
assuming jurisdiction of the person.—Id.

Whether a judge of an inferior court had
colorable cause for acting, so as to be relieved
from civil liability, is a question of law.—Id.

The question of good faith, malice, or cor-
ruption on the part of a judge of an inferior
court is for the jury.—Id.

JUDGMENT.

See Appeal and Error, §§ 78-123, 325, 1073,
1118-1212; Cancellation of Instruments, §
60; Certiorari; Convicts; Costs, § 322;

Creditors' Suit, § 11; Detinue, § 25; Equity, §§ 418-431; Judicial Sales; Justices of the Peace, §§ 124, 194; Mechanics' Liens, §§ 304, 305; Partnership, § 219; Pleading, § 8; Wills, § 421.

IV. BY DEFAULT.

(A) Requisites and Validity.

§ 101 (Miss.) Where a complaint wholly fails to state a cause of action, a default judgment may not be taken therein.—Odom v. Gulf & S. I. R. Co., 57 So. 626.

(B) Opening or Setting Aside Default.

§ 139 (Ala.) Despite Loc. Acts 1888-89, p. 801, § 11, *held*, that a default judgment might be set aside by the circuit court of Jefferson county, after more than 30 days from its rendition.—Ex parte Overton, 57 So. 434.

VI. ON TRIAL OF ISSUES.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

§ 248 (Ala.) A judgment not responsive to the complaint, or which cannot be based on the cause of action therein set out, is invalid.—Kirkland v. Pilcher, 57 So. 46.

§ 256 (Ala.App.) A judgment for a sum due on a mortgage *held* unauthorized by the verdict.—Peters v. Nolen, 57 So. 398.

VII. ENTRY, RECORD, AND DOCKETING.

§ 287 (Ala.) Parol evidence in ejectment that a decree of condemnation on which defendant claimed was recorded by the judge before whom proceedings were had upon misplacement of the final decree, after expiration of his term of office, is inadmissible, where the record on its face shows that the decree was rendered and entered within the time prescribed, on a date during the term of the judge.—Leath v. Cobia, 57 So. 972.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

§ 299 (Ala.) After expiration of the term, a judgment cannot be altered or amended except for a clerical error or upon evidence shown by the record.—Briggs v. Tennessee Coal, Iron & R. Co., 57 So. 882.

§ 315 (Ala.) The mere omission of certain matters in the bench notes of a court *held* not record evidence authorizing a change of judgment.—Briggs v. Tennessee Coal, Iron & R. Co., 57 So. 882.

Erased records *held* not record evidence authorizing the amendment of a judgment nunc pro tunc after term time.—Id.

X. EQUITABLE RELIEF.

(A) Nature of Remedy and Grounds.

§ 405 (La.) It is only when parties have used due diligence, and have not been able to thereby correctly ascertain their rights, that the Supreme Court will revive issues once closed by judgment.—Moss v. Drost, 57 So. 929.

(B) Jurisdiction and Proceedings.

§ 460 (La.) Judgment in action to establish boundary will not be vacated in subsequent suit on ground that plaintiff has discovered that the tracts were not adjacent in the absence of allegations that he discovered such fact after judgment.—Moss v. Drost, 57 So. 929.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

§ 606 (Miss.) A former judgment in an action for injuries from flooding of lands is not a bar

to a recovery for a successive inundation, though the declaration alleged a permanent injury.—Rosamond v. Carroll County, 57 So. 979.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) Judgments Conclusive in General.

§ 650 (La.) Under Civ. Code, art. 3556, No. 31, a judgment, to be *res judicata* must be one from which there can be no appeal.—Roberson v. Goldsmith, 57 So. 908.

(B) Persons Concluded.

§ 666 (Miss.) A judgment creditor *held* barred by all equities which bar the judgment debtor.—Candler v. Cromwell, 57 So. 554.

§ 702 (Fla.) In suit by owner of land abutting on street, plea that, in suit between town authorities and person obstructing the street, it was adjudged not a public street, but private property, *held* not good.—Jackson v. Bullock, 57 So. 355.

§ 707 (La.) The effect of a consent decree as to third persons is merely that of a transaction in authentic form.—Roberson v. Goldsmith, 57 So. 908.

(C) Matters Concluded.

§ 713 (Fla.) A final adjudication upon the merits *held* not conclusive in a subsequent suit, which is not upon the same cause of action and between the same parties or their privies in interest.—Jackson v. Bullock, 57 So. 355.

§ 715 (Fla.) Facts necessary to show right of public in use of street *held* not the same as facts to show right of abutting owner to have the use of the street, as against one who is bound by the reserved rights of the abutting owner.—Jackson v. Bullock, 57 So. 355.

XV. LIEN.

§ 779 (Fla.) Land actually conveyed before judgment is not affected by the lien thereof, where the liability had no relation to the property and accrued after the conveyance.—Jacobs v. Scheurer, 57 So. 356.

XX. PAYMENT, SATISFACTION, MERGER, AND DISCHARGE.

§ 883 (Fla.) Allegation that defendant is insolvent and has no property in the county where he lives subject to execution and sale *held* sufficient.—Malsby v. Gamble, 57 So. 687.
Bill to enjoin execution *held* to state a case for equitable relief.—Id.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

§ 948 (Ala.) In an action for divorce, defense of bar by a former action should be invoked by a plea, and not by motion.—Jordan v. Jordan, 57 So. 436.

JUDICIAL NOTICE.

See Criminal Law, § 304; Evidence, §§ 10-31.

JUDICIAL SALES.

See Execution, §§ 256-311; Executors and Administrators, §§ 380, 388; Taxation, §§ 582, 631, 696-722, 734-742, 810.

§ 16 (La.) Under the express provisions of Civ. Code, art. 2610, where an immovable is sold at public auction for cash, the purchaser may retain the price until the act of sale is passed.—Beck v. Progressive Realty Co., 57 So. 578.

Act No. 316 of 1908 *held* to have no application where the court orders, or the seizing creditor instructs, the sheriff to sell for cash payable at time of adjudication.—Id.

§ 22 (La.) Where real estate is adjudicated for cash at a judicial sale, purchaser *held* not

entitled to retain price until act of sale is passed, but must comply with bid on demand of the officer making the sale.—Beck v. Progressive Realty Co., 57 So. 578.

JURISDICTION.

See Constitutional Law, § 197; Courts: Criminal Law, §§ 280, 1144; Elections, § 154; Infants, § 18; Insane Persons; Justices of the Peace, §§ 54, 60, 141.

JURY.

See Costs, § 175; Criminal Law, §§ 741-800, 995, 1156; Grand Jury; Trial, §§ 139-170, 191-295.

II. RIGHT TO TRIAL BY JURY.

§ 31 (Ala.) Code 1907, § 3740 et seq., which gives a judgment creditor or a simple creditor the right to maintain a bill for the discovery of assets, is not unconstitutional as cutting off a jury trial.—Elliott v. Kyle, 57 So. 752.

§ 37 (Ala.App.) Act of April 21, 1911 (Laws 1911, p. 587), authorizing appellate courts, with the consent of the parties, to reduce excessive damages instead of reversing and remanding for new trial, *held* to offend no provision of the Constitution touching right to jury trial.—Central of Georgia Ry. Co. v. Steverson, 57 So. 494.

IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

§ 70 (Ala.) Accused *held* not entitled to object to the refusal to place the names of certain jurymen on the list of a special venire.—Talley v. State, 57 So. 445.

§ 70 (Ala.) That two regular jurors were excused from serving on the regular panel did not prevent their names being placed on a special venire.—Parris v. State, 57 So. 857.

§ 70 (Ala.App.) Acts 1909, p. 317, § 32, relating to the summoning of jurors in capital cases, *held* mandatory.—Johnson v. State, 57 So. 593.

§ 80 (Ala.App.) Under Acts Sp. Sess. 1909, p. 319, § 32, a reversal of a conviction for manslaughter will be granted, where the venire did not contain the legal number of names; two of the jurors drawn for regular jury service not having been summoned.—Clark v. State, 57 So. 1024.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

§ 90 (Ala.) That a juror was a boarder at plaintiff's house *held* to vitiate the verdict.—Birmingham Ry., Light & Power Co. v. Drennen, 57 So. 876.

§ 103 (Ala.) A juror *held* properly pronounced competent, though he had formed an opinion from what he had previously heard of the case and could not be sure that such opinion might not unconsciously influence him.—Pope v. State, 57 So. 245.

§ 116 (Ala.) A motion to quash a venire, because not served forthwith on accused, as required by Jury Law, § 32, *held* by equally divided court, to have been properly denied, because not within section 29.—Savage v. State, 57 So. 469.

Under Jury Law, § 32, a venire may not be quashed because of a mistake in the name of a person summoned.—Id.

JUSTICES OF THE PEACE.

See False Imprisonment, § 22; Mandamus, § 148.

III. CIVIL JURISDICTION AND AUTHORITY.

§ 54 (Miss.) The test of jurisdiction of a justice in replevin *held* the value alleged in the affidavit, in the absence of bad faith, and not the value found by the jury.—Johnson v. Tabor, 57 So. 365.

§ 60 (Ala.) In actions for damages for injuries to real estate required by Code 1907, § 6110, to be brought in the county where the land was located, *held*, that defendant by delay had waived his right to plead in abatement.—Wolff v. McGaugh, 57 So. 754.

IV. PROCEDURE IN CIVIL CASES.

§ 124 (Miss.) Plaintiff in replevin cannot have judgment for a greater value than alleged in the affidavit by which the action was begun before a justice, which is the statement of plaintiff's cause of action.—Johnson v. Tabor, 57 So. 365.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

§ 140 (Ala.App.) Act Sept. 29, 1903 (Loc. Acts 1903, p. 398) § 2, requiring "all appeals" from justices of the peace in C. county in civil suits to be taken to the county court of said county, is not repealed by Act Feb. 28, 1907 (Loc. Acts 1907, p. 279), entitled "An act to provide for holding separate terms of the circuit court for C. county at E."; section 15 providing that the circuit court *held* at E. shall have "jurisdiction over all causes within said district conferred by law on the circuit courts."—Ex parte Graham, 57 So. 1015.

§ 141 (Miss.) The fact that the jury, in replevin before a justice of the peace, found the value of the property greater than that stated in the affidavit, does not affect the jurisdiction of the court on appeal.—Johnson v. Tabor, 57 So. 365.

§ 150 (Ala.) In view of Code 1907, § 4720, *held*, that the right to plead in abatement, if abandoned in the justice's court, could not be revived on appeal to the circuit court.—Wolff v. McGaugh, 57 So. 754.

§ 174 (Miss.) Under Code 1906, § 2347, the answer of garnishee cannot, over objections, be filed for the first time in the circuit court after an appeal from the justice court.—Southern Lumber & Mfg. Co. v. Mallett, 57 So. 548.

(B) Certiorari.

§ 194 (Ala.App.) In detinue in a justice's court in which the plaintiff gave bond pursuant to Code 1907, § 3780, in rendering judgment for defendant without assessing the value of the property as required by section 3781, *held* not to make the judgment void, so that certiorari would not lie to review it.—Hines v. Tribble, 57 So. 265.

A writ of certiorari to a justice of the peace issued upon giving bond for a statutory writ of certiorari pursuant to Code 1907, § 4714, *held* subject to being treated as a statutory writ.—Id.

§ 208 (Ala.App.) Upon removal of a case to the circuit court from a justice's court by statutory certiorari, *held*, that the circuit court should try the case de novo, and not merely quash the judgment, if it were merely erroneous, and not void.—Hines v. Tribble, 57 So. 265.

JUSTIFIABLE HOMICIDE.

See Homicide, §§ 111-122.

JUVENILE COURTS.

See Infants, § 18.

KNOWLEDGE.

See Bankruptcy, § 425; Banks and Banking, § 116.

LACHES.

See Abatement and Revival, § 74; Appeal and Error, § 787; Equity, § 67.

LANDLORD AND TENANT.

See Costs, § 42; Ejectment, § 49; Mechanics' Liens, §§ 298, 299; Mines and Minerals; Sales, § 1; Schools and School Districts.

I. CREATION AND EXISTENCE OF THE RELATION.

§ 9 (Miss.) Where the vendor, who executed a bond for title, admitted the vendee into possession, *held*, that upon the vendee's failure to make payments the parties assumed the relation of landlord and tenant.—*W. L. Robinson Co. v. Weathersby*, 57 So. 983.

VIII. RENT AND ADVANCES.

(B) Actions.

§ 229 (La.) Before suing out provisional seizure in connection with a suit on rent notes, *held*, that the lessor should have presented the notes for payment.—*Bonnabel v. Metairie Cypress Co.*, 57 So. 271.

(C) Lien.

§ 246 (La.) Where an unexpired lease of a judgment debtor has been seized and sold, the lessor has no privilege on the proceeds of the sale, his privilege extending only to the movable property on the premises.—*Brunner Mercantile Co. v. Rodgin*, 57 So. 1004.

§ 248 (Ala.App.) Under Code 1907, §§ 4734, 4743, a landlord's lien *held* paramount to the lien of one raising a crop under an agreement with the tenant, by furnishing the labor for a part of the crop.—*Hudson v. Wright*, 57 So. 90.

§ 252 (Miss.) A landlord can enforce the lien for rent and supplies against a bona fide purchaser for value of the crops raised by the tenant on the land.—*W. L. Robinson Co. v. Weathersby*, 57 So. 983.

§ 254 (Miss.) A vendor, who admitted a purchaser into possession on a bond for title, which raised the relationship of landlord and tenant, *held* not estopped from claiming the crops raised by the tenant under his landlord's lien.—*W. L. Robinson Co. v. Weathersby*, 57 So. 983.

LANDS.

See Public Lands.

LARCENY.

See Criminal Law, §§ 448, 761, 792; Embezzlement; Robbery.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 15 (Ala.App.) A daughter taking money in her possession as agent of her father *held* guilty of larceny.—*Jackson v. State*, 57 So. 594.

§ 15 (Ala.App.) One merely having the custody of goods may commit larceny thereof.—*Barney v. State*, 57 So. 598.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

§ 32 (Ala.App.) An indictment for the larceny of money *held* to properly charge that the money was the property of prosecutor.—*Campbell v. State*, 57 So. 412.

§ 40 (Ala.App.) A person indicted for larceny of a cow under Code 1907, § 7324, cannot be

convicted of the larceny of a steer calf.—*Marsh v. State*, 57 So. 387.

(B) Evidence.

§ 55 (Fla.) Evidence *held* to sustain conviction of larceny.—*Powell v. State*, 57 So. 609.

(C) Trial and Review.

§ 75 (Fla.) Omission of word "away" from charge as to felonious taking and carrying of personal property of another, in a prosecution for larceny, *held* not per se error.—*Presley v. State*, 57 So. 605.

§ 77 (Fla.) Charge as to exclusive possession of goods recently stolen, or concealment thereof, *held* to include idea that the person knowingly had possession of or concealed the goods.—*Presley v. State*, 57 So. 605.

LASCIVIOUS COHABITATION OR CONDUCT.

See Lewdness.

LAST CLEAR CHANCE.

See Street Railroads, § 118.

LEADING QUESTIONS.

See Witnesses, § 240.

LEASE.

See Mines and Minerals.

LEGISLATURE.

See States, § 173.

LETTERS.

See Evidence, §§ 183, 378.

LEVY.

See Attachment, § 164.

LEWDNESS.

See Obscenity.

§ 9 (Fla.) In a prosecution for living in an open state of adultery between certain dates, evidence of a single act of intercourse prior to such dates *held* inadmissible.—*Woodson v. State*, 57 So. 174.

LEX LOCI.

See Husband and Wife, § 246.

LIBEL AND SLANDER.

See Criminal Law, § 760.

I. WORDS AND ACTS ACTIONABLE AND LIABILITY THEREFOR.

§ 4 (La.) Where defendant had probable cause to believe the allegations of his answer were true, no legal malice can be imputed because thereof.—*Marks v. National Fire Ins. Co.*, 57 So. 168.

§ 7 (Fla.) Statements of president of coeducational college *held* not slanderous, as charging fornication.—*Hulley v. Hunt*, 57 So. 607.

It is not charging fornication for the president of a college to say of a suspended student that she would be ruined for life if he told all he knew about her.—*Id.*

III. JUSTIFICATION AND MITIGATION.

§ 56 (La.) Where alleged libels in an answer are withdrawn on compromise of the suit with the consent of the plaintiff, an action therefor does not lie.—*Marks v. National Fire Ins. Co.*, 57 So. 168.

IV. ACTIONS.**(B) Parties, Preliminary Proceedings, and Pleading.**

§ 100 (La.) In an action for damages for slander, the plaintiff must prove the words strictly as alleged in the petition.—*Vordenbaumen Lumber Co. v. Parkerson*, 57 So. 524.

(E) Trial, Judgment, and Review.

§ 123 (Fla.) Where the words spoken could not properly leave on the hearer's mind the impression charged in the innuendo, there is no issue for the jury.—*Hulley v. Hunt*, 57 So. 607.

V. SLANDER OF PROPERTY OR TITLE.

§ 140 (La.) In a jactitation suit, a plaintiff or intervener alleging slander of his title must prove actual possession of the premises.—*La Barre v. Burton-Swartz Cypress Co.*, 57 So. 655.

Want of actual possession of premises in plaintiff or intervener may be pleaded by defendant by way of exception in a jactitation suit.—*Id.*

VI. CRIMINAL RESPONSIBILITY.**(A) Offenses.**

§ 141 (Ala.App.) "Slander" or "defamation" defined.—*Dungan v. State*, 57 So. 117.

(B) Prosecution and Punishment.

§ 152 (Ala.App.) In view of Code 1907, §§ 3747, 7340, affidavit charging defamation held sufficient.—*Dungan v. State*, 57 So. 117.

LICENSES.

See Physicians and Surgeons, § 6; Railroads, §§ 261, 274-282.

I. FOR OCCUPATIONS AND PRIVILEGES.

§ 6 (Fla.) Under the charter of the city of Jacksonville (Laws 1901, c. 5065), it may regulate the sale of milk within its territorial limits, and require a license tax.—*State v. Smith*, 57 So. 426.

§ 20 (Fla.) A city board of health may be given power to withhold license to sell milk if the place of business or wagons be not in a sanitary condition fit for the purpose.—*State v. Smith*, 57 So. 426.

§ 22 (Fla.) A city may authorize its board of health to prescribe the forms for applications for licenses.—*State v. Smith*, 57 So. 426.

LIENS.

See Chattel Mortgages, §§ 118, 138-147; Frauds, Statute of, § 63; Judgment, § 779; Landlord and Tenant, §§ 246-254; Mechanics' Liens; Vendor and Purchaser, §§ 251, 278.

LIFE ESTATES.

See Wills, § 615.

§ 13 (Ala.) A life tenant is entitled to the use of the wood and timber, but not to the extent of committing waste or making a sale thereof.—*Bell v. Burkhalter*, 57 So. 460.

LIMITATION OF ACTIONS.

See Adverse Possession; Sales, § 126; Vendor and Purchaser, § 278.

I. STATUTES OF LIMITATION.**(B) Limitations Applicable to Particular Actions.**

§ 19 (La.) Under Civ. Code, arts. 1791, 3542, an action by an heir of an interdict to recover property partitioned held barred by

prescription.—*Hamilton v. Hamilton*, 57 So. 935.

§ 30 (La.) The plea of three years prescription applies only to cases arising from contract, but the plea of one year prescription is the proper one to be applied in actions for torts.—*Standard Chemical Co. v. Illinois Cent. R. Co.*, 57 So. 782.

§ 31 (Fla.) Cause of action for negligent treatment by physician held barred in three years by Gen. St. 1906, § 1725, subd. 5.—*Palmer v. Jackson*, 57 So. 240.

§ 32 (La.) Action of damages for alleged taking of right of way in street held an action ex delicto, barred by prescription of one year.—*Standard Chemical Co. v. Illinois Cent. R. Co.*, 57 So. 782.

II. COMPUTATION OF PERIOD OF LIMITATION.**(C) Personal Disabilities and Privileges.**

§ 72 (Ala.) Code 1907, §§ 4846, 4860, held to operate to extend limitations in favor of minors only when the limitations had never commenced to run against their predecessor.—*Richardson v. Mertins*, 57 So. 720.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

§ 146 (La.) Unsigned memorandum held insufficient to establish interruption of prescription claim against succession of decedent for money loaned to the decedent.—*Succession of Alexander*, 57 So. 534.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 183 (La.) A general plea of prescription is bad, but the particular prescription relied on must be specially pleaded.—*Succession of Drysdale*, 57 So. 789.

LIQUOR SELLING.

See Intoxicating Liquors.

LIVE STOCK.

See Railroads, §§ 439-447.

LOANS.

See Damages, §§ 120, 175; Limitation of Actions, § 146.

LOCAL ACTIONS.

See Courts, § 7.

LOCAL LAWS.

See Statutes, §§ 8½, 68-84.

LOGS AND LOGGING.

See Nuisance, § 7.

§ 3 (Ala.) A sale of standing timber passes no interest in the soil generally, and until the purchaser enters and severs the timber it remains in possession of the landowner.—*Christopher v. Curtis-Attalla Lumber Co.*, 57 So. 837.

§ 3 (Ala.App.) A conveyance of standing timber construed.—*Montgomery Cooperage Co. v. Carter*, 57 So. 60.

§ 3 (Ala.App.) Under Code 1907, § 3355, an unwitnessed instrument certifying to a sale of certain trees uncut held not a deed conveying title to real property.—*Gibbs v. Wright*, 57 So. 258.

A conveyance of standing trees must be executed with the formalities of a deed, as prescribed by Code 1907, § 3355.—*Id.*

Contracts for the sale of standing trees confer no right on the licensee to cut and remove

the trees after the termination of the time fixed.—*Id.*

§ 3 (Ala.App.) In an action for the price of cross-ties, *held*, that defendant had not waived his right to set off loss resulting from plaintiff's breach.—*McCloud v. Flournoy*, 57 So. 630.

§ 3 (La.) Purchase of timber, subject to conditions of payment of certain notes, *held* to give purchaser no right to possession.—*La Barre v. Burton-Swartz Cypress Co.*, 57 So. 655.

§ 4 (Ala.App.) A contract for the cutting and removal of timber *held* to confer on plaintiff no title thereto, but a mere license to remove the timber within a specified time, and not afterwards.—*Gibbs v. Wright*, 57 So. 258.

LOST INSTRUMENTS.

See Pleading, § 340.

LUMBER.

See Nuisance, § 7.

LUNATICS.

See Insane Persons.

MAINTENANCE.

See Guardian and Ward, § 133; Husband and Wife, §§ 285½-296.

MALICE.

See Homicide, § 11; Libel and Slander, § 4.

MALICIOUS PROSECUTION.

II. WANT OF PROBABLE CAUSE.

§ 21 (Ala.) That defendant consulted a reputable attorney and the attorney advised the prosecution, is not of itself a defense.—*Abingdon Mills v. Grogan*, 57 So. 42.

V. ACTIONS.

§ 42 (Miss.) A principal is liable for malicious prosecution by his agent, where such prosecution was authorized or subsequently ratified.—*Fisher v. Westmoreland*, 57 So. 563.

Letter from principal to agent *held* not to expressly authorize the agent to prosecute certain persons for theft.—*Id.*

Agent in charge of a sawmill *held* to have no implied authority to prosecute for an alleged theft from the mill.—*Id.*

§ 58 (Ala.) In an action for malicious prosecution, plaintiff *held* entitled to show that the deputy sheriff who arrested him was appointed at defendant's request.—*Abingdon Mills v. Grogan*, 57 So. 42.

§ 64 (Ala.) Evidence in an action for malicious prosecution *held* not to show probable cause.—*Abingdon Mills v. Grogan*, 57 So. 42.

§ 68 (Ala.) Punitive damages may be awarded for a malicious prosecution.—*Abingdon Mills v. Grogan*, 57 So. 42.

§ 71 (Ala.) In an action for malicious prosecution, whether the prosecutions were in good faith on the advice of counsel *held* a jury question.—*Abingdon Mills v. Grogan*, 57 So. 42.

MALPRACTICE.

See Physicians and Surgeons, §§ 14-18.

MALT LIQUOR.

See Intoxicating Liquors.

MANDAMUS.

See Appeal and Error, § 1194; States.

II. SUBJECTS AND PURPOSES OF RELIEF.

(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

§ 43 (Ala.) Under Code 1907, § 3687, requiring nonresident plaintiffs to give security for costs, *held*, that the trial court might be compelled by mandamus to dismiss an action in which security had not been given.—*Ex parte Bradshaw*, 57 So. 16.

§ 50 (La.) Mandamus will not lie to compel a judge to again decide a primary election protest on the merits, or to review or reverse his judgment on the merits.—*Brown v. Dupuy*, 57 So. 890.

§ 53 (Ala.) Mandamus is the proper remedy to require the lower court to stay a proceeding in a divorce action until complainant pay the costs of previous suits, and to show cause why the order allowing alimony should not be vacated.—*Jordan v. Jordan*, 57 So. 436.

§ 59 (Ala.) Mandamus is the proper remedy to require the lower court to stay a proceeding in a divorce action until complainant pay the costs of previous suits, and to show cause why the order allowing alimony should not be vacated.—*Jordan v. Jordan*, 57 So. 436.

§ 61 (La.) Application of person charged with capital offense to be admitted to bail *held* not to make it the plain duty of the judge to grant the application.—*State v. Jenkins*, 57 So. 321.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 109 (Ala.) Mandamus *held* to be an appropriate remedy against a county treasurer on his refusal to pay a warrant founded on a claim authorized by law.—*State v. Mims*, 57 So. 466.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 148 (Fla.) An individual cannot prosecute mandamus to compel a justice of the peace to issue a warrant in a criminal case.—*Nickelson v. State*, 57 So. 194.

§ 151 (La.) Right of candidates for membership of state central committees to have names printed on official ballots *held* not subject to adjudication in mandamus to which they are not parties.—*State ex rel. Williams v. Everett*, 57 So. 576.

§ 165 (Fla.) Demurrer to return to alternative writ of mandamus *held* to admit well-pleaded averments of fact and fair inferences therefrom, but not conclusions of law.—*State v. Louisville & N. R. Co.*, 57 So. 175.

§ 180 (Fla.) Where an amended return presents no sufficient defense to an alternative writ of mandamus, a peremptory writ may be awarded.—*State v. Louisville & N. R. Co.*, 57 So. 673.

MANSLAUGHTER.

See Homicide.

MAPS.

See Evidence, § 342.

MARK.

See Animals, § 13.

MARRIAGE.

See Divorce; Husband and Wife.

§ 1 (Fla.) At common law marriage is a civil contract relation, valid when consummated by consent and cohabitation of parties.—*Caras v. Hendrix*, 57 So. 345.

§ 2 (Fla.) The marriage relation is subject to regulation by law.—*Caras v. Hendrix*, 57 So. 345.

§ 13 (Fla.) Statutory enactments relating to marriage *held* generally directory, so that failure to comply therewith does not invalidate a common-law marriage.—*Caras v. Hendrix*, 57 So. 345.

Marriage contract between competent parties consummated under rules of common law *held* not invalidated by any statute.—*Id.*

Gen. St. 1906, §§ 2574-2578, relating to marriage licenses and marriage ceremonies, *held* merely directory, not affecting validity of marriage consummated as at common law.—*Id.*

§ 40 (Ala.) Rule governing presumption of marriage from cohabitation, stated.—*Prince v. Edwards*, 57 So. 714.

§ 50 (Ala.) Evidence *held* to warrant a finding of existence of a common-law marriage, as affecting the right to letters of administration as a widow.—*Prince v. Edwards*, 57 So. 714.

§ 50 (Miss.) Evidence *held* sufficient to establish the validity of a second marriage.—*Taylor v. Garrett*, 57 So. 658.

§ 58 (La.) Interdiction for insanity and incarceration in state asylum of one of the spouses is no ground for annulling the marriage.—*Ryals v. Ryals*, 57 So. 904.

MARSHALING ASSETS AND SECURITIES.

§ 1 (Ala.) The right to marshal securities is confined to cases where two or more persons are creditors of the same debtor and for successive demands to the same property.—*Chandler v. Kyle*, 57 So. 475.

§ 2 (Ala.) The equity of one of two joint debtors to have the whole debt discharged by the other to his own exoneration may be enforced by, and for the benefit of, his separate creditors.—*Chandler v. Kyle*, 57 So. 475.

MASTER AND SERVANT.

See Corporations, § 423; Injunction, § 26; Trial, §§ 194, 244, 252.

I. THE RELATION.

(C) Termination and Discharge.

§ 30 (Miss.) Intoxication *held* a proper ground for discharge of a servant.—*Willis v. Lowery*, 57 So. 418.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

§ 96 (La.) The negligence of a licensee operating railroad trains, whereby a section foreman's work is rendered unnecessarily dangerous, *held* imputable to the foreman's employé.—*Bailey v. Louisiana & Northwest R. Co.*, 57 So. 325.

(B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102 (La.) A section foreman in the employ of a railroad company has a right to expect a reasonably safe place in which to work.—*Bailey v. Louisiana & Northwest R. Co.*, 57 So. 325.

§§ 101, 102 (La.) A master is not required to furnish the best and safest appliances, but only to provide appliances which are reasonably safe and suitable.—*Dill v. C. L. Smith Lumber Co.*, 57 So. 1006.

§§ 101, 102 (Miss.) A master, operating a railroad, *held* not chargeable with an absolute duty to furnish a safe roadbed.—*Hooks v. Mills*, 57 So. 545.

§ 103 (Miss.) A master *held* not liable for death, from defective roadbed, of servant in charge thereof.—*Hooks v. Mills*, 57 So. 545.

§ 107 (La.) Employer *held* liable for injuries to employé caused by a defective appliance.—*Smith v. American Bridge Co.*, 57 So. 891.

§ 107 (Miss.) A master must not only furnish, but must maintain, a reasonably safe place; and where the proprietor of a lumber mill allowed accumulations to gather around the saws, he was liable for an injury to a servant caused thereby.—*Finkbine Lumber Co. v. Cunningham*, 57 So. 916.

(C) Methods of Work, Rules, and Orders.

§ 137 (La.) Acts of trainmen in running a long train backward with insufficient arrangements for stop signals *held* gross negligence.—*Bailey v. Louisiana & Northwest R. Co.*, 57 So. 325.

(D) Warning and Instructing Servant.

§ 150 (La.) A section foreman in the employ of a railroad company has a right to expect adequate instructions.—*Bailey v. Louisiana & Northwest R. Co.*, 57 So. 325.

§ 153 (Ala.) An employer *held* not bound to instruct an inexperienced employé as to the proper method of loading metal pots; his duty merely being to unload them.—*Republic Iron & Steel Co. v. Woody*, 57 So. 441.

§ 156 (Ala.) Foreman *held* negligent for failure to warn employé of dripping acid.—*Alabama Chemical Co. v. Phelps*, 57 So. 694.

(E) Fellow Servants.

§ 185 (La.) In action for injuries to toggle knocker in employ of defendant, plea of negligence of fellow servant *held* not sustainable.—*Cross v. Lee Lumber Co.*, 57 So. 631.

§ 185 (Miss.) Where a servant was injured by the failure of the master to keep accumulations of trash from around the saws, the master cannot escape liability by showing that a failure to remove trash was due to the negligence of another servant; the duty being nondelegable.—*Finkbine Lumber Co. v. Cunningham*, 57 So. 916.

(F) Risks Assumed by Servant.

§ 205 (La.) In action for injuries to toggle knocker in defendant's employ, plea of assumption of risk *held* not sustainable.—*Cross v. Lee Lumber Co.*, 57 So. 631.

§ 213 (La.) A section foreman *held* not to have assumed the risk of negligence of trainmen in the operation of train.—*Bailey v. Louisiana & Northwest R. Co.*, 57 So. 325.

§ 216 (Ala.) A minor and inexperienced employé *held* to assume the risk of injury from the negligence of fellow servants.—*Republic Iron & Steel Co. v. Woody*, 57 So. 441.

§ 217 (La.) Plaintiff *held* entitled to recover for injuries through the carelessness of an incompetent hand who was not his fellow servant.—*Rogers v. Hiram J. Allen Lumber Co.*, 57 So. 166.

§ 223 (Ala.) Employé *held* not to have assumed risk of danger of acid dripping into his eyes.—*Alabama Chemical Co. v. Phelps*, 57 So. 694.

(G) Contributory Negligence of Servant.

§ 231 (La.) In action for injuries to toggle knocker in employ of defendant, plea of contributory negligence *held* not sustainable.—*Cross v. Lee Lumber Co.*, 57 So. 631.

§ 233 (La.) Where the death of a loading foreman of a lumber company resulted from the fall of a log from a car improperly loaded by him, his contributory negligence precludes

MOTIONS.

See Appeal and Error, §§ 627, 1097; Costs, § 137; Criminal Law, §§ 693, 1091, 1125, 1182; Jury, § 116; Pleading, § 362.

MULTIFARIOUSNESS.

See Equity, §§ 148-150.

MULTIPLICITY OF SUITS.

See Equity, § 51; Injunction, § 28.

MUNICIPAL CORPORATIONS.

See Counties; Criminal Law, § 304; Evidence, § 32; Intoxicating Liquors, § 15; Judgment, §§ 702, 715; Licenses; Schools and School Districts; Statutes, § 93; Street Railroads; Towns.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division.

§ 24 (Fla.) Description of territory incorporated as municipality *held* not void for uncertainty.—Lane v. State, 57 So. 662.

§ 25 (Fla.) Under Const. art. 8, § 8, an act incorporating municipality is not unconstitutional, though the description covers noncontiguous lands.—Lane v. State, 57 So. 662.

(C) Amendment, Repeal, or Forfeiture of Charter, and Dissolution.

§ 48 (Ala.) A change in municipal charters does not affect existing ordinances in harmony with the new provisions.—Sloss-Sheffield Steel & Iron Co. v. Smith, 57 So. 29.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(B) Ordinances and By-Laws in General.

§ 109 (Ala.App.) Under Code 1907, § 1258, a city ordinance duly passed and published is effective, though not recorded and certified by the clerk.—Bell v. Town of Jonesboro, 57 So. 138.

§ 116 (Ala.) Ordinance 181 of the city of Birmingham, enacted under Acts 1890-91, pp. 114, 134, and Loc. Acts 1898-99, pp. 1413-1414, § 25, subd. 23, *held* not repealed by Code 1907, § 1251 (Acts 1907, p. 790, § 80).—Sloss-Sheffield Steel & Iron Co. v. Smith, 57 So. 29.

§ 120 (Ala.) In determining the validity of ordinances, a reasonable construction should be given; the judicial inclination being to sustain them.—Sloss-Sheffield Steel & Iron Co. v. Smith, 57 So. 29.

A penal ordinance must be strictly construed.—Id.

As municipal ordinances are construed by the same rules as statutes, an ordinance may by reference adopt the provisions of statutes or other ordinances.—Id.

§ 122 (Ala.App.) Certain evidence *held* admissible to show that an ordinance was published according to Code 1907, § 1258.—Bell v. Town of Jonesboro, 57 So. 138.

Minutes of a city council *held* to sufficiently show the adoption of an ordinance.—Id.

In an action for breach of a city ordinance, a particular method of proving the ordinance *held* proper.—Id.

V. OFFICERS, AGENTS, AND EMPLOYEES.

(A) Municipal Officers in General.

§ 146 (Ala.) An appointment by the Governor of a commissioner of a city to fill a vacancy *held* complete, without a commission required by Code 1907, § 1474.—Draper v. State, 57 So. 772.

X. POLICE POWER AND REGULATIONS.

(A) Delegation, Extent, and Exercise of Power.

§ 592 (Ala.) A municipal ordinance, providing that any person guilty of any misdemeanor under the state laws shall be punished, *held* not invalid, because some of the state misdemeanor statutes were inapplicable to a municipality.—Sloss-Sheffield Steel & Iron Co. v. Smith, 57 So. 29.

§ 592 (Miss.) An ordinance adopting as the laws of the municipality Code 1906, c. 28, *held* void, in view of section 3410.—Dismukes v. Town of Louisville, 57 So. 547.

§ 594 (Ala.) A municipal ordinance, providing that any person guilty of a misdemeanor under the state laws shall be punished, is not invalid for uncertainty.—Sloss-Sheffield Steel & Iron Co. v. Smith, 57 So. 29.

(B) Violations and Enforcement of Regulations.

§ 639 (Ala.App.) A complaint for violation of a city ordinance *held* to have sufficiently pleaded the ordinance and the provisions claimed to have been violated.—Bell v. Town of Jonesboro, 57 So. 138.

§ 642 (Ala.App.) Defendant was not prejudiced by the striking of pleas embracing matter available under the plea of not guilty.—Bell v. Town of Jonesboro, 57 So. 138.

Defendant was not prejudiced by the overruling of his demurrer to a replication to his second plea, where the matter in that plea was provable under his plea of not guilty.—Id.

§ 642 (Miss.) The circuit court, on appeal from a conviction in mayor's court of an offense against a town, *held* without jurisdiction to try the case as a prosecution by the state.—Thomas v. State, 57 So. 364.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

§ 657 (Ala.) Loc. Acts 1907, pp. 644, 645, *held* not to ratify the obstruction of a street, so as to deprive property owners of the right to recover damages.—Duy v. Alabama Western R. Co., 57 So. 724.

Loc. Acts 1907, pp. 644, 645, vacating streets and alleys, *held* a valid exercise of power.—Id.

The only restraint on the state's power to vacate streets and highways is Const. 1901, § 23; section 235 being addressed solely to persons authorized to take property for public use.—Id.

§ 671 (Ala.) Where obstruction of streets minimized the prominence and lessened the value of an abutter's property, he suffered a special injury, entitling him to recover damages.—Duy v. Alabama Western R. Co., 57 So. 724.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, §§ 715-819.

MUTUAL INSURANCE COMPANIES.

See Insurance, §§ 55, 70.

NAMES.

See Indictment and Information, § 33.

NAVIGABLE WATERS.

See Ferries; Taxation, § 776; Waters and Water Courses.

I. RIGHTS OF PUBLIC.

§ 4 (Fla.) At common law all navigable waters were held by the sovereign for the benefit of the whole people.—Merrill-Stevens Co. v. Durkee, 57 So. 428.

Upon admission into the Union, by Act Cong. March 3, 1845, state of Florida *held* to have assumed title to and sovereignty over navigable waters for the use of the people of the state.—*Id.*

II. LANDS UNDER WATER.

§ 36 (Fla.) At common law lands under navigable waters were held by the sovereign for the benefit of the whole people.—Merrill-Stevens Co. v. Durkee, 57 So. 428.

Upon admission into the Union, by Act Cong. March 3, 1845, state of Florida *held* to have assumed title to and sovereignty over lands under navigable waters for the use of the people of the state.—*Id.*

§ 37 (Fla.) State *held* to have power to grant limited rights in portions of lands under navigable waters, when the rights of the whole people as to navigation and other uses are not materially impaired.—Merrill-Stevens Co. v. Durkee, 57 So. 428.

State *held* to have power to fix exterior lines of navigable river and to grant rights in submerged lands not within such lines, if the rights of the people to the use of the waters and shores are not substantially impaired.—*Id.*

III. RIPARIAN AND LITTORAL RIGHTS.

§ 39 (Fla.) The rights granted by the riparian act of 1856 *held* to extend to the space between lines drawn at right angles from the shore line to the edge of the channel.—Merrill-Stevens Co. v. Durkee, 57 So. 428.

The rights granted by the riparian act of 1856 relate to the space between the shore line and the edge of the channel of navigable streams, bays, or harbors, and are not controlled by the direction of lines dividing the uplands.—*Id.*

Complainant seeking to prevent encroachments upon riparian rights granted by the riparian act of 1856 *held* required to show that the encroachments are upon lands in which he has the exclusive right.—*Id.*

Bill of complaint for removal of encroachments on rights under the riparian act of 1856 *held* subject to demurrer.—*Id.*

§ 44 (Fla.) Rights at common law of owner of land abutting on navigable waters as to land growing out of accretion or reliction, stated.—Merrill-Stevens Co. v. Durkee, 57 So. 428.

§ 44 (Miss.) Ownership of alluvion *held* not to depend on where such alluvion first commenced to form.—Smith v. Leavenworth, 57 So. 803.

Under exceptional circumstances, alluvion may be apportioned in different proportions than the proportions of the old shore line owned by the parties.—*Id.*

NEGLIGENCE.

See Carriers, §§ 113-132, 211-397½; Damages, §§ 18, 91, 163; Master and Servant; Physicians and Surgeons, §§ 14-18; Pleading, § 8; Railroads, §§ 256-479; Statutes, § 267; Street Railroads; Telegraphs and Telephones, §§ 66, 67.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.**(A) Personal Conduct in General.**

§ 6 (Ala.) The violation of an ordinance is negligence *per se*, entitling one injured as a result thereof to recover damages.—Watts v. Montgomery Traction Co., 57 So. 471.

§ 11 (Ala.) Wanton injury defined.—Birmingham Ry., Light & Power Co. v. Drennen, 57 So. 876.

(B) Dangerous Substances, Machinery, and Other Instrumentalities.

§ 21 (Ala.App.) Liability of one kindling a fire on his own premises for the destruction of the property of another *held* limited to cases of negligence.—Edwards v. Massingill, 57 So. 400.

(C) Condition and Use of Land, Buildings, and Other Structures.

§ 32 (La.) Defendant sawmill company *held* bound to see that its private road used by plaintiff with its knowledge was in safe condition.—Baucum v. Pine Woods Lumber Co., 57 So. 577.

III. CONTRIBUTORY NEGLIGENCE.**(A) Persons Injured in General.**

§ 76 (Ala.) The violation of an ordinance by plaintiff *held* capable of being pleaded as a defense by way of contributory negligence.—Watts v. Montgomery Traction Co., 57 So. 471.

(D) Comparative Negligence.

§ 100 (Ala.App.) Contributory negligence is no defense to an action for wanton negligence.—Birmingham Ry., Light & Power Co. v. Demmins, 57 So. 404.

IV. ACTIONS.**(A) Right of Action, Parties, Preliminary Proceedings, and Pleading.**

§ 108 (Fla.) In actions for negligent injuries, it may be necessary to allege only relation between parties out of which duty arises and the act or omission proximately causing the injury, with a statement that the act or omission was negligent.—Warfield v. Hepburn, 57 So. 618.

§ 117 (Ala.App.) A plea of contributory negligence *held* bad in not designating any facts of negligence of plaintiff.—Smiley, Son & Co. v. Keith, 57 So. 127.

§ 117 (Ala.App.) Contributory negligence must be pleaded.—Birmingham Ry., Light & Power Co. v. Demmins, 57 So. 404.

§ 119 (Fla.) Under Laws 1891, c. 4071, and Gen. St. 1906, § 3149, railroad company sued for injuries *held* entitled to avail itself of defense of contributory negligence appearing from proof adduced by plaintiff under the general issue.—Farnsworth v. Tampa Electric Co., 57 So. 233.

(B) Evidence.

§ 122 (Ala.App.) Defendant *held* to have the burden to prove contributory negligence, notwithstanding allegation in the complaint that plaintiff used due care.—North Alabama Traction Co. v. Taylor, 57 So. 146.

§ 125 (Ala.App.) In an action for the death of a heifer which fell into an unguarded pit maintained by a fertilizer company, evidence that other companies maintained such pits *held* admissible on the issue of negligence.—Jefferson Fertilizer Co. v. Houston, 57 So. 98.

(C) Trial, Judgment, and Review.

§ 136 (Fla.) Questions of negligence and of contributory negligence are for the jury, when the facts are controverted.—Farnsworth v. Tampa Electric Co., 57 So. 233.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEGROES.

See Street Railroads, § 70.

NEWLY DISCOVERED EVIDENCE.

See Criminal Law, § 958.

NEW TRIAL.

See Appeal and Error, §§ 1005, 1000; Criminal Law, § 958.

I. NATURE AND SCOPE OF REMEDY.

§ 6 (La.) The granting of new trials is largely in the trial court's discretion; new trials being grantable in the interests of substantial justice.—*Nessans v. Colomes*, 57 So. 1010.

II. GROUNDS.

(G) **Surprise, Accident, Inadvertence, or Mistake.**

§ 86 (La.) A new trial should be granted upon application showing that an instrument signed by plaintiff, upon the introduction of which her counsel abandoned her case, was forged.—*Nessans v. Colomes*, 57 So. 1010.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 123 (Ala.App.) Under Code 1907, §§ 5372, 5373, *held*, that defendants' application for a rehearing was properly dismissed.—*Zavelo v. J. Goldstein & Co.*, 57 So. 102, 103.

§ 140 (La.) It was not necessary that an application for new trial be sworn to where applicant offered herself as a witness to testify to the grounds relied upon.—*Nessans v. Colomes*, 57 So. 1010.

NEXT FRIEND.

See Infants, § 77.

NOISE.

See Nuisance, § 53.

NOMINATION.

See Elections, §§ 123-154.

NONRESIDENCE.

See Attachment, § 25; Costs, §§ 106-137.

NOTARIES.

§ 3 (La.) The fees to which notaries are entitled for making inventories of succession property are regulated by Act No. 101 of 1870, under which the charge of a round sum, including other services, is not permissible.—*Succession of Alexander*, 57 So. 534.

NOTES.

See Bills and Notes.

NOTICE.

See Appeal and Error, § 429; Banks and Banking, § 116; Bills and Notes, §§ 327-375; Chattel Mortgages, § 147; Contracts, § 217; Divorce, § 214; Ejectment, § 110; Estoppel, § 54; Execution, § 272; Husband and Wife, § 25; Mortgages, § 261; Statutes, § 8½; Taxation, §§ 734, 750, 788; Telegraphs and Telephones, § 39; Trespass, § 81; Vendor and Purchaser, §§ 229-243.

NUISANCE.

See Action, § 53; Damages, § 62.

I. PRIVATE NUISANCES.

(A) **Nature of Injury, and Liability Therefor.**

§ 3 (Ala.) The fact that a planing mill was erected in a district already used for residences would be a material consideration in deter-

mining whether it was a nuisance.—*Harris v. Randolph Lumber Co.*, 57 So. 453.

§ 7 (Ala.) Negligence or want of ordinary care in operating the offensive factory is not ordinarily an element of an actionable nuisance.—*Harris v. Randolph Lumber Co.*, 57 So. 453.

The storage of lumber on defendant's property which caused the insurance rate on plaintiff's residence to be increased *held* not an actionable nuisance.—*Id.*

(C) **Abatement and Injunction.**

§ 21 (Ala.) Bill against railroad companies to abate a nuisance caused by defective privies in station *held* properly dismissed with costs against the companies where privies were corrected pending suit.—*Collins v. Louisville & N. R. Co.*, 57 So. 833.

(D) **Actions for Damages.**

§ 42 (Ala.) Plaintiff *held*, under Code 1907, § 5198, to have a right of action for a private nuisance.—*Harris v. Randolph Lumber Co.*, 57 So. 453.

§ 48 (Ala.) A complaint *held* to state a cause of action for private nuisance sufficiently precise to be good on general demurrer.—*Harris v. Randolph Lumber Co.*, 57 So. 453.

A complaint for damages for a nuisance alleged to be wantonly maintained *held* not to show wanton injury.—*Id.*

A complaint *held* to state a good cause of action for a private nuisance.—*Id.*

§ 50 (Ala.App.) Facts *held* to show no willful misconduct, so as to authorize more than actual damages for a nuisance.—*Central of Georgia Ry. Co. v. Steverson*, 57 So. 494.

A verdict of \$250 for damages from the nuisance of a disinterred calf *held* excessive.—*Id.*

§ 50 (Ala.App.) When a nuisance is not a permanent one, damages are not measured by the difference between the value of the property before the nuisance was started and its value afterwards.—*Birmingham Ry., Light & Power Co. v. Bruce*, 57 So. 1011.

§ 53 (Ala.) Whether the noises made by a planing mill in a residence section of a city are unreasonable and a nuisance to other property owners is a question for the jury.—*Harris v. Randolph Lumber Co.*, 57 So. 453.

II. PUBLIC NUISANCES.

(B) **Rights and Remedies of Private Persons.**

§ 72 (Ala.) A private person may recover for public nuisance only in case he suffers a special injury.—*Duy v. Alabama Western R. Co.*, 57 So. 724.

NUCUPATIVE WILLS.

See Wills, § 148.

OBJECTIONS.

See Appeal and Error, §§ 194-237; Indictment and Information, §§ 137, 160; Jury, §§ 116, 116; Trial, §§ 74-86, 411.

OBSCENITY.

§ 3 (Ala.App.) Indecent exposure of the person in a public place, willfully and intentionally, in the presence of an assembly, *held* an offense at common law.—*Truett v. State*, 57 So. 512.

As regards the offense of indecent exposure of the person, *held* intent may be inferred from the recklessness of the act.—*Id.*

As regards the offense at common law of indecent exposure of the person, it is enough that the act, committed in a public place, was in the presence of more than one person.—*Id.*

Conviction of indecent exposure of the person and imposition of fine *held* authorized by

Code 1907, § 7622, as to offenses, the punishment of which is not particularly specified in the Code.—Id.

§ 11 (Ala.App.) The indictment for indecent exposure of the person need not allege the act was a nuisance.—Truet v. State, 57 So. 512.

OBSTRUCTING JUSTICE.

See Criminal Law, § 364; Homicide, § 111; Indictment and Information, §§ 72, 110.

§ 17½ (Ala.App.) Evidence in a prosecution for resisting an officer in making an arrest *held* sufficient to go to the jury.—Lewis v. State, 57 So. 1035.

OBSTRUCTIONS.

See Municipal Corporations, §§ 657, 671.

OFFICERS.

See Arrest; Banks and Banking, § 116; Execution, § 459; Homicide, § 111; Indictment and Information, § 180; Justices of the Peace; Mandamus, § 109; Municipal Corporations, § 146; Notaries, § 3; Obstructing Justice; Receivers; Schools and School Districts; Sheriffs and Constables; States; Statutes, §§ 29, 30; Taxation, §§ 582, 710; Weapons.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(C) Eligibility and Qualification.

§ 20 (Fla.) In the absence of constitutional or statutory provision, an adult unmarried woman, a citizen of the state, may be appointed to the office of county treasurer.—In re Opinion of Judges, 57 So. 351.

OPENING.

See Judgment, § 139.

OPINION EVIDENCE.

See Criminal Law, §§ 448-490; Evidence, §§ 471-571.

ORDERS.

See Criminal Law, § 240; Evidence, § 461.

ORDINANCES.

See Criminal Law, § 304; Evidence, § 32; Municipal Corporations, §§ 109-122, 592-639.

PARDON.

See Constitutional Law, § 58.

§ 2 (Miss.) Code 1906, § 3384, *held* not invalid, as conflicting with the power of pardon committed to the Governor by Const. 1890, § 124.—Allen v. McGuire, 57 So. 217.

PARENT AND CHILD.

See Deeds, § 196; Guardian and Ward; Infants; Militia, § 8.

PARISHES.

See Constitutional Law, § 65; Counties; Statutes, § 64.

PAROL EVIDENCE.

See Criminal Law, § 447; Evidence, §§ 155, 397-461.

PARTIES.

See Appeal and Error, §§ 325-329, 882, 883; Bills and Notes, § 443; Carriers, § 76; Chat-

tel Mortgages, § 300; Contracts, §§ 184, 187; Insurance, § 624; Trusts, § 366; Vendor and Purchaser, § 104.

II. DEFENDANTS.

(B) Joinder.

§ 27 (La.) Allegation that two persons have committed the same tort *held* sufficient to warrant their being joined as defendants, in an action for damages therefor.—Standard Chemical Co. v. Illinois Cent. R. Co., 57 So. 782.

III. NEW PARTIES AND CHANGE OF PARTIES.

§ 65 (Ala.App.) Under Code 1907, § 5367, an amendment striking out the name of a defendant improperly joined *held* authorized.—Hughes v. Albertville Mercantile Co., 57 So. 98.

IV. DESIGNATION AND DESCRIPTION.

§ 69 (Ala.App.) The complaint against "Smiley, Son & Co." *held* not demurrable because not designating "Smiley, Son & Co." as a partnership or corporation (Code 1907, § 2506).—Smiley, Son & Co. v. Keith, 57 So. 127.

PARTITION.

See Appeal and Error, § 115; Equity, § 150; Limitation of Actions, § 19.

II. ACTIONS FOR PARTITION.

(A) Right of Action and Defenses.

§ 12 (La.) Property burdened with a usufruct may be partitioned in kind subject to the usufruct.—Kaffie v. Wilson, 57 So. 1001.

§ 12 (Miss.) Under Code 1906, § 3521, heirs of a tenant in common *held* entitled to sue for partition of the land, including a railroad right of way.—Hill v. Woodward, 57 So. 294.

§ 19 (Ala.) Possession is unnecessary to entitle one of several cotenants to partition.—Brown v. Feagin, 57 So. 20.

§ 29 (La.) Property not included in a prior partition may be made the subject of a supplemental partition.—Succession of Drysdale, 57 So. 789.

(B) Proceedings and Relief.

§ 55 (Ala.) A bill *held* to be treated primarily as a bill for partition between joint owners.—Brown v. Feagin, 57 So. 20.

§ 63 (Ala.) Evidence in an action for partition *held* sufficient to sustain a decree for plaintiffs.—Norsworthy v. Willoughby, 57 So. 717.

§ 77 (La.) Where some of the heirs inherit by representation, the partition should be made by roots.—Kaffie v. Wilson, 57 So. 1001.

Partition in kind should be ordered in all cases where property is divisible, and no material diminution in value or loss or inconvenience results.—Id.

§ 104 (La.) Under Civ. Code, art. 1343, payment for premises purchased at partition *held* properly made by the heirs and representatives receipting to the sheriff for their portion.—Hamilton v. Hamilton, 57 So. 935.

§ 108 (La.) After a holding for 30 years, a partition sale *held* not open to attack as a mere simulation.—Hamilton v. Hamilton, 57 So. 935.

A partition sale only relatively null may not be ignored in a suit to recover property involved.—Id.

Recitals of official documents in partition *held* not to be overthrown by inference after a lapse of 30 years.—Id.

A petitory action against realty *held* not proper to recover share of an interdict from

a partition sale for which the guardian accepted; the remedy being against the guardian.—Id.

PARTNERSHIP.

See Bills and Notes, § 370; Principal and Surety, § 15.

III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS.

(C) Actions Between Partners.

§ 110 (La.) That joint owners of land are partners in planting business *held* no bar to an action by one joint owner against the other for his share of the price on the sale of the land.—Succession of Alexander, 57 So. 534.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Representation of Firm by Partner.

§ 125 (Miss.) The authority of a partner is based solely upon agency.—Persons v. Oldfield, 57 So. 417.

§ 146 (La.) A firm *held* a commercial firm so that a partner could bind it by executing a note.—First Nat. Bank v. Mayer, 57 So. 308.

§ 146 (Miss.) The presence of a partnership's name on commercial paper *prima facie* binds the firm.—Persons v. Oldfield, 57 So. 417.

§ 147 (Miss.) A partner *held* not bound by his copartner's act in becoming surety for another.—Persons v. Oldfield, 57 So. 417.

§ 160 (La.) One dealing with a partner apparently exceeding his authority must ascertain whether the partner is acting for himself or for the firm.—Victoria Lumber Co. v. Montgomery, 57 So. 650.

(D) Actions by or Against Firms or Partners.

§ 219 (Miss.) A judgment against a partnership in a foreign state binds only the individual member upon whom service of process was had and partnership property there situate.—Persons v. Oldfield, 57 So. 417.

PARTY WALLS.

§ 2 (La.) Presumption of Civ. Code, art. 877, that a division wall is a wall in common does not apply to a division wall between a building and a vacant lot.—Cordill v. Israel, 57 So. 778.

§ 9 (La.) Division wall between a building and a vacant lot *held* the exclusive property of the owner of the building until the owner of the adjacent lot pays its value or one-half of the cost of construction.—Cordill v. Israel, 57 So. 778.

PASSENGERS.

See Railroads, §§ 218, 227; Shipping, §§ 163, 164.

PASSES.

See Evidence, § 373.

PATENTS.

See Contracts, § 106; Evidence, §§ 339, 383; Injunction, § 118.

PAUPERS.

IV. SUPPORT, SERVICES, AND EXPENSES.

§ 43 (Ala.) Under Code 1907, §§ 1603, 1607, *held*, that county funds cannot be used for the support of a pauper outside of a poorhouse in the absence of emergency.—State v. Mims, 57 So. 466.

PAYMENT.

See Evidence, § 383; Interest, § 26; Mortgages, §§ 298, 312; Sales, § 479; Taxation, § 530.

PENALTIES.

See Courts, § 121; Mortgages, § 312; Municipal Corporations, § 120.

PERCOLATING WATERS.

See Waters and Water Courses, §§ 104, 107.

PERFORMANCE.

See Contracts, §§ 295-322.

PERJURY.

See Criminal Law, § 1030.

II. PROSECUTION AND PUNISHMENT.

§ 19 (Ala.App.) Under Code 1907, §§ 7132, 7542, and section 7161, form 82, an indictment in an action for perjury in a civil case *held* to sufficiently describe the proceedings in which the perjury was alleged to have occurred.—Maddox v. State, 57 So. 95; Lawley v. Same. Id. 96.

§ 19 (Ala.App.) An indictment for perjury, being in substantial accordance with Code 1907, § 7161, Form 82, *held* sufficient.—Johnson v. State, 57 So. 389.

§ 29 (Miss.) In a prosecution for perjury, *held*, that there was a fatal variance between the allegation and proof.—Willoughby v. State, 57 So. 361.

§ 32 (Ala.App.) Under an indictment for perjury, accused's affidavit *held* admissible.—Johnson v. State, 57 So. 389.

PERPETUITIES.

§ 4 (La.) Attempted dispositions of property by will *held* void, as creating a fidei commissum, or tenure of property, prohibited by law, and as extending the authority of executors beyond the limits prescribed by law.—Succession of Pleasants, 57 So. 923.

PERSONAL INJURIES.

See Carriers, §§ 283-343; Courts, § 121; Damages, §§ 130-132; Evidence, §§ 471, 483; Master and Servant; Statutes, § 267; Street Railroads.

PETITORY ACTION.

See Execution, § 188; Real Actions.

PHYSICIANS AND SURGEONS.

See Hospitals; Limitation of Actions, § 31; Trial, § 250.

§ 6 (Ala.App.) An affidavit charging that accused practiced medicine in a certain county, within 12 months before the making of the affidavit, without a license, contrary to law, was sufficient, under Code 1907, § 7161, form 84, and section 7564.—Carter v. State, 57 So. 1022.

Where, in a trial for practicing medicine without a license, accused's evidence tended to show that he had not treated or offered to treat any disease, but had merely made medicine from roots and herbs, gathered by himself and had sold it to those asking it, the general affirmative charge for the state was improper.—Id.

§ 14 (Ala.) A physician failing to exercise reasonable care *held* civilly liable to a patient for injuries sustained thereby.—Robinson v. Crotwell, 57 So. 23.

An instruction, in an action for malpractice, *held* properly refused for failing to require of the physician the proper skill.—Id.

§ 16 (Ala.) A physician performing an operation on a patient without the latter's consent *held* liable for the injuries sustained.—*Robinson v. Crotwell*, 57 So. 23.

§ 18 (Ala.) An instruction, in an action against a physician for malpractice, *held* not objectionable as failing to limit the physician's responsibility for negligence to the proximate result thereof.—*Robinson v. Crotwell*, 57 So. 23.

An instruction, in an action for malpractice, *held* properly refused as misleading.—*Id.*

In an action against a physician for malpractice, evidence *held* not to support a verdict.—*Id.*

PLANING MILLS.

See Nuisance, §§ 3, 53.

PLEA.

See Criminal Law, §§ 280-293; Municipal Corporations, § 642.

PLEADING.

See Accord and Satisfaction, § 25; Account, §§ 6, 17; Account, Action on, § 6; Appeal and Error, §§ 78, 194, 737, 843, 916, 917, 1040, 1042; Assumpsit, Action of, § 23; Bankruptcy, § 302; Bills and Notes, § 481; Bonds; Cancellation of Instruments, § 37; Carriers, §§ 227, 236, 275, 314, 343; Contracts, § 339; Courts, §§ 121, 122, 487; Creditors' Suit, § 39; Damages, § 142; Discovery; Divorce, § 93; Elections, § 285; Eminent Domain, §§ 191, 242; Equity, §§ 39, 148-232, 373, 427; Evidence, § 366; Execution, § 256; Fraud, § 43; Highways, § 16; Infants, § 31; Injunction, §§ 65, 118; Judgment, §§ 101, 248, 883, 948; Justices of the Peace, §§ 60, 150, 174; Limitation of Actions, § 183; Mandamus, § 165; Master and Servant, §§ 258, 264; Mortgages, § 459; Navigable Waters, § 39; Negligence, §§ 108-119; Nuisance, § 48; Parties, § 69; Partition, § 55; Principal and Agent, § 189; Quieting Title, §§ 1, 35-44; Railroads, § 282; Receivers, § 183; Reformation of Instruments, § 36; Sales, §§ 130, 354, 435, 479; Sheriffs and Constables, § 137; Street Railroads, §§ 110, 111; Trespass, §§ 40, 41; Trial, §§ 250, 251, 253; Trover and Conversion, § 34; Usury, § 111; Vendor and Purchaser, § 314; Wills, §§ 277, 282, 702; Work and Labor.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 7 (Miss.) A complaint against a railroad company, charging breach of a contract made with its agent, *held* sufficient to charge the defendant; there being an inference that the agent acted within the scope of his authority.—*Canada v. Yazoo & M. V. R. Co.*, 57 So. 913.

§ 8 (Ala.) The bill to set aside an execution sale *held* not to show fraud by a mere allegation of fraudulent intent.—*Empire Realty Co. v. Harton*, 57 So. 763.

§ 8 (Ala.App.) Where the gravamen of an action is the nonfeasance or misfeasance of defendant, the complaint *held* required to show the facts out of which a duty owed by defendant to plaintiff arises.—*Higdon v. Fields*, 57 So. 58.

§ 8 (Ala.App.) The pleader's conclusion in a complaint counting on the alleged negligence or wrong of another cannot be accepted as a substitute for appropriate averments of the facts out of which the duty to plaintiff violated by defendant is supposed to have arisen.—*Birmingham Ry., Light & Power Co. v. Anderson*, 57 So. 103.

§ 8 (La.) In a suit to annul judgment for fraud, acts constituting the fraud must be specifically alleged.—*Moss v. Droast*, 57 So. 929.

§ 11 (Ala.) Certain averments in a bill to cancel and set aside a conveyance *held* not subject to demurrer.—*Wilks v. Wilks*, 57 So. 776.

§ 21 (Ala.App.) In an action for injuries to a street car passenger, a count in the complaint *held* not demurrable as alleging inconsistent and repugnant averments.—*Birmingham Ry., Light & Power Co. v. Hunnicutt*, 57 So. 262.

§ 34 (Fla.) Any ambiguities in the allegations of a bill will be construed against the complainant in considering a demurrer to the bill.—*Merrill-Stevens Co. v. Durkee*, 57 So. 428.

§ 34 (Miss.) A pleading is to be construed most strongly against the pleader.—*Odom v. Gulf & S. I. R. Co.*, 57 So. 626.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

§ 48 (Fla.) A declaration should contain sufficient allegations of all the facts necessary to state a cause of action, but only ultimate facts need be alleged.—*Warfield v. Hepburn*, 57 So. 618.

Declaration *held* required to state facts sufficient to apprise defendant of particular circumstances on which action is based.—*Id.*

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(A) Defenses in General.

§ 100 (Fla.) Where a plaintiff "takes and joins issue" on pleas containing new matter, the cause may be regarded as at issue, the addition of a similiter being immaterial.—*Globe Theatre & Amusement Co. v. Watt*, 57 So. 201.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

§ 166 (Fla.) Under Gen. St. 1906, § 1447, submission of case to jury *held* not error, though plaintiff filed no replication to a plea containing new matter.—*American Tie & Timber Co. v. Washington*, 57 So. 201.

V. DEMURRER OR EXCEPTION.

§ 192 (Ala.) Where a complaint shows a right of recovery, though only for nominal damages, a defect arising from the fact that it contains claims for unrecoverable damages cannot be reached by a demurrer.—*A. Dreher & Co. v. National Surety Co.*, 57 So. 34.

§ 192 (Ala.App.) When a complaint states a cause of action, it is not demurrable because it contains redundant allegations.—*Birmingham Ry., Light & Power Co. v. Hunnicutt*, 57 So. 262.

§ 194 (Ala.App.) A plea of contributory negligence *held* subject to demurrer, when presumptively directed to all the counts, because not designating any of them, when one was for punitive damages for wanton or intentional injury.—*Smiley, Son & Co. v. Keith*, 57 So. 127.

§ 194 (Ala.App.) A plea which merely sets up matter available under the plea of the general issue is demurrable on that ground.—*Taxicab Co. v. Grant*, 57 So. 141.

§ 196 (Ala.) It is no ground for demurrer to a rejoinder that it contains the same defenses set up in the pleas.—*John Deere Plow Co. v. City Hardware Co.*, 57 So. 766.

§ 204 (Ala.) Where replication to all the pleas, collectively, does not state a good defense to each and all of them, a demurrer to the replication *held* properly sustained.—*Richardson v. Mertins*, 57 So. 720.

§ 204 (Ala.App.) If either averment of an alternative plea is demurrable, demurrer to the whole plea is properly sustained.—*Birmingham Ry., Light & Power Co. v. Demmins*, 57 So. 404.

§ 214 (Ala.) On demurrer, the question whether a clause of a contract as pleaded is an exact copy of the clause in the contract cannot be inquired into.—*John Deere Plow Co. v. City Hardware Co.*, 57 So. 766.

§ 214 (Ala.) A demurrer to the rejoinder admits the facts alleged therein.—*Bluthenthal & Bickart v. City of Columbia*, 57 So. 814.

§ 216 (Fla.) Notwithstanding Gen. St. 1906, § 1444, demurrer to plea stating no matters of law intended to be argued will be sustained, where, upon a bare inspection of the plea, it is found to show no defense.—*Franklin Phosphate Co. v. International Harvester Co. of America*, 57 So. 206.

§ 228 (La.) The exception of no cause of action must be disposed of on the face of the petition, irrespective of the allegations of the answer.—*State ex rel. Barthe & Levy v. Mayor of City of New Orleans*, 57 So. 793.

§ 228 (Miss.) An exception does not raise the legal sufficiency of affirmative matter in the answer.—*Rosamond v. Carroll County*, 57 So. 979.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 245 (Fla.) Allegations *held* to be of ultimate facts showing relation of passenger and carrier.—*Warfield v. Hepburn*, 57 So. 618.

§ 248 (Ala.) Under Code 1907, §§ 5329, 5367, an amendment to a complaint, charging damage to a totally different lot from that in the original, *held* improperly refused.—*Baranco v. Birmingham Terminal Co.*, 57 So. 434.

§ 248 (Ala.App.) An amendment to a complaint *held* not a departure.—*Western Ry. of Alabama v. McPherson*, 57 So. 396.

§ 248 (La.) Amendment to pleading in action on mortgage note *held* not to change the substance of the demand nor ask a different remedy, and to be properly allowed.—*Christina v. Cusimano*, 57 So. 157.

§ 285 (Fla.) Discretion of trial judge in permitting additional pleas after former pleas have been adjudged defective must be wisely exercised.—*Franklin Phosphate Co. v. International Harvester Co. of America*, 57 So. 206.

X. FILING, SERVICE, AND WITHDRAWAL.

§ 332 (La.) The Supreme Court will not dismiss a suit because of exception that the petition is vague because a copy of the map referred to therein has not been served on the defendant.—*Morgan's Louisiana & T. R. & S. Co. v. John T. Moore Planting Co.*, 57 So. 635.

§ 340 (Ala.App.) Where a complaint is lost at the time of trial, plaintiff is authorized by Code 1907, § 5737, to use the record in lieu thereof.—*North Alabama Traction Co. v. Daniel*, 57 So. 120.

XI. MOTIONS.

§ 362 (Ala.) Where a complaint shows a right of recovery, though only for nominal damages, a defect arising from the fact that it contains claims for unrecoverable damages should be reached by a motion to strike.—*A. Dreher & Co. v. National Surety Co.*, 57 So. 34.

§ 362 (Ala.) A motion to strike *held* the proper remedy for a defective complaint, and not demurrer.—*Harris v. Randolph Lumber Co.*, 57 So. 453.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

§ 409 (Fla.) After a full trial on the merits, the mere absence of a similiter *held* not ground

pleading over or amending pleadings after judgment *held* not to waive right to review of judgment.—*Franklin Phosphate Co. v. International Harvester Co. of America*, 57 So. 206.

POLICE POWER.

See Municipal Corporations, §§ 592-642.

POLLUTION.

See Waters and Water Courses, §§ 104, 107.

POOR PERSONS.

See Paupers.

POSSESSION.

See Adverse Possession, §§ 25, 33, 43, 60-85; Ejectment, §§ 94, 109; Joint Tenancy; Partition, § 19; Quieting Title, § 23; Sales, § 479; Taxation, § 805; Tenancy in Common, § 15; Trespass, §§ 81, 89; Vendor and Purchaser, §§ 191, 232.

POWERS.

See Mortgages, § 340; Wills, § 693.

PRACTICE.

See Criminal Law, §§ 575-1001; Trial.

PREJUDICE.

See Witnesses, § 872.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

PRESUMPTIONS.

See Appeal and Error, §§ 901-938; Criminal Law, §§ 308, 1141, 1144; Evidence, §§ 63-83.

PRIMARY ELECTIONS.

See Elections, §§ 123-154.

PRINCIPAL AND ACCESSORY.

See Criminal Law, § 59.

PRINCIPAL AND AGENT.

See Boundaries, § 46; Brokers; Carriers, § 283; Corporations, §§ 336, 432, 492; Counties, §§ 62, 88; Embezzlement, § 11; Evidence, §§ 243, 244; Frauds, Statute of, § 17, 56; Malicious Prosecution, § 42; Partnership, §§ 125-160; Sales, § 7.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

(B) Compensation and Lien of Agent.

§ 81 (Ala.App.) An agent in an action for commissions wherein payment to the principal was a condition precedent to recovery, *held* not entitled to recover on showing of nonperformance of conditions, although the necessity of the principal's taking back machinery sold, etc., was not shown.—*Newell & Allen v. Port Huron Engine & Thresher Co.*, 57 So. 68.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

§ 122 (Ala.App.) In an action for conversion of machinery sold by an agent, evidence of the agent's declarations to certain facts, *held* admissible.—*Avery & Co. v. Turner*, 57 So. 255.

(F) Actions.

§ 189 (Ala.) Allegations that defendants committed trespass through their agents, serv-

ants, or employes are sufficient in counts, either for common-law trespass, or the statutory penalty for cutting trees.—Cooper v. Slaughter, 57 So. 477.

PRINCIPAL AND SURETY.

See Appeal and Error, §§ 1227-1234; Bankruptcy, § 302; Convicts; Costs, §§ 106-137; Guaranty; Guardian and Ward, § 175; Husband and Wife, § 232; Partnership, § 147.

I. CREATION AND EXISTENCE OF RELATION.

(A) Between Individuals.

§ 15 (Ala.) One whose individual property was included in the mortgage for a firm deed held not a surety as to the other partner, but a joint principal.—Chandler v. Kyle, 57 So. 475.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

§ 82 (Ala.) A surety in a building contractor's bond held liable equally with the contractor for the performance of the contract and for damages for nonperformance.—Huntsville Elks' Club v. Garrity-Hahn Bldg. Co., 57 So. 750.

§ 86 (Ala.) A surety of a building contractor held chargeable with knowledge of the terms of the contract.—Huntsville Elks' Club v. Garrity-Hahn Bldg. Co., 57 So. 750.

V. RIGHTS AND REMEDIES OF SURETY.

(B) As to Principal.

§ 183 (Ala.) The parties may agree that the surety may proceed against the principal or independent security given to the surety before payment by the surety.—Cooper v. Parker, 57 So. 472.

PRIVATE NUISANCE.

See Nuisance, §§ 3-53.

PRIVIES.

See Nuisance, § 21.

PROBABLE CAUSE.

See Libel and Slander, § 4; Malicious Prosecution, § 21.

PROCESS.

See Appearance, § 19; Detinue; Execution; Garnishment.

PROMISSORY NOTES.

See Bills and Notes.

PROOF.

Of loss, see Insurance, §§ 560, 668.

PROSTITUTION.

See Lewdness.

PROVINCE OF COURT AND JURY.

See Criminal Law, §§ 741-766; Trial, §§ 191-194.

PROVOCATION.

See Homicide, § 181.

PROXIMATE CAUSE.

See Damages, §§ 18, 19.

PUBLICATION.

See Municipal Corporations, § 122.

PUBLIC LANDS.

See Evidence, §§ 83, 383; Injunction, § 118; Navigable Waters, §§ 36, 37; Taxation, § 631.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(B) Entries, Sales, and Possessory Rights.

§ 32 (La.) Between the entry on land by a homesteader and the issuance of a patent, the title remains in the United States, though the entryman has the right of possession and cultivation.—Wadkins v. Producers' Oil Co., 57 So. 937.

(F) Swamp and Overflowed Lands.

§ 60 (La.) No land passed from the federal government to the state under the Swamp Land Acts of 1849 and 1852 until it had been surveyed.—Elms v. Elliott, 57 So. 307.

§ 61 (Ala.) The act of February 12, 1879 (Acts 1878-79, p. 198), regulating sales of swamp and overflowed lands, held constitutional.—Brannan v. Henry, 57 So. 967.

PUBLIC NUISANCE.

See Nuisance, § 72.

PUBLIC POLICY.

See Contracts, § 108.

PUBLIC SCHOOLS.

See Schools and School Districts.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC USE.

See Eminent Domain.

PUNISHMENT.

See Criminal Law, §§ 1208, 1211; Fines.

PUNITIVE DAMAGES.

See Damages, §§ 91, 208.

QUALIFICATIONS.

See Officers.

QUASHING.

See Indictment and Information, §§ 83, 137; Jury, § 116.

QUESTIONS OF LAW AND FACT.

See Appeal and Error, §§ 992-1021.

QUIETING TITLE.

See Appeal and Error, § 1051; Equity, § 150; Evidence, § 383.

I. RIGHT OF ACTION AND DEFENSES.

§ 1 (Ala.) If defendant in a suit to quiet title desires to test the complainant's title or claim, he must do so by a cross-bill.—Vaughan v. Palmore, 57 So. 488.

§ 19 (Ala.) Code 1907, §§ 5443-5449, relating to suits to quiet title, is a highly remedial statute, and a statute of repose, and should be liberally construed.—Vaughan v. Palmore, 57 So. 488.

forged deed, if complainants are out of possession.—Id.

§ 23 (Ala.) Peaceable possession, within the statute authorizing a suit to quiet title, defined.—Central of Georgia Ry. Co. v. Rouse, 57 So. 706.

II. PROCEEDINGS AND RELIEF.

§ 35 (Ala.) Under Code 1907, §§ 5443, 5444, relating to suits to quiet title, complainant need only allege generally that he is in the peaceable possession of the land.—Vaughan v. Palmore, 57 So. 488.

Unnecessary allegation in amended bill in suit to quiet title *held* not detrimental to defendant.—Id.

§ 41 (Ala.) A bill to quiet title, which failed to allege that no suit to try title was pending or that complainant was in possession, is demurrable.—Brown v. Feagin, 57 So. 20.

§ 44 (Ala.) Where complainant in a suit to quiet title has unnecessarily alleged in terms that he was the owner of the land, he has the burden of proving it if it be denied by the defendant's answer.—Vaughan v. Palmore, 57 So. 488.

§ 44 (Ala.) One suing to quiet title *held* not to show such peaceable possession as is essential under the statute to maintain the suit.—Central of Georgia Ry. Co. v. Rouse, 57 So. 706.

QUO WARRANTO.

See Evidence, § 339.

RAILROAD PASSES.

See Evidence, § 373.

RAILROADS.

See Carriers; Constitutional Law, §§ 249, 311; Eminent Domain, § 196; Evidence, §§ 123, 143, 373, 471, 546; Execution, § 28; Master and Servant; Nuisance, § 21; Street Railroads; Vendor and Purchaser, § 212; Waters and Water Courses, § 110.

I. CONTROL AND REGULATION IN GENERAL.

§ 9 (Fla.) Abuse of discretion by Railroad Commissioners must be shown affirmatively by admissions or proofs before the courts will interfere.—State v. Louisville & N. R. Co., 57 So. 175.

The Railroad Commissioners may perform their duties conferred by statute without awaiting a specific complaint to be made to them.—Id.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

§ 73 (Miss.) Nature of title of railroad company in right of way stated.—Hill v. Woodward, 57 So. 294.

§ 79 (La.) Grantee of right of way through public streets *held* to have an action in tort, but not for rent for interference with his rights.—Standard Chemical Co. v. Illinois Cent. R. Co., 57 So. 782.

Grantee of right of way on public street *held* entitled to recover damages based on rental value of the property.—Id.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

§ 102 (Miss.) It is not necessary, to authorize recovery of the penalty prescribed by Code 1906, § 4058, for failure to maintain a suitable railroad crossing, that plaintiff show

the crossing, in order to entitle the plantation owner to recover the statutory penalty for failure to maintain the crossing in a suitable condition.—Id.

X. OPERATION.

(A) Duty to Operate.

§ 218 (Fla.) Privileges which state permits railroad companies to use in rendering public service *held* to carry the duty to render adequate service and to observe all governmental regulations.—State v. Louisville & N. R. Co., 57 So. 673.

Law *held* to raise implied duty of railroad to provide adequate facilities for transportation of passengers not subordinate to duty of transporting freight.—Id.

(B) Statutory, Municipal, and Official Regulations.

§ 227 (Fla.) Railroad Commissioners *held* authorized to make and enforce reasonable rules requiring common carriers to furnish reasonably adequate facilities and accommodations to the traveling public.—State v. Louisville & N. R. Co., 57 So. 175.

Railroad Commissioners *held* authorized to require running of passenger trains separate from freight trains.—Id.

In determining reasonableness of regulation establishing train schedules, necessities and convenience of public *held* to be considered as a whole and severably.—Id.

Train schedule prescribed by Railroad Commissioners, which is not reasonable with reference to all interests directly affected, will not be enforced by the courts.—Id.

Scope of authority of Railroad Commissioners as to making of rules and regulations establishing train schedules stated.—Id.

§ 227 (Fla.) State *held* to have ample authority to require carrier to transport passengers separate from freight trains.—State v. Louisville & N. R. Co., 57 So. 673.

Railroads may be required by governmental regulations to transport passengers and freight in separate trains without reference to fact that the particular service may not be profitable.—Id.

(C) Companies and Persons Liable for Injuries.

§ 256 (La.) The determination by a railroad company to operate its road by itself or by another *held* not to relieve it of consequences to others of negligence in such operation.—Bailey v. Louisiana & Northwest R. Co., 57 So. 325.

§ 261 (La.) A licensee operating trains *held* liable for injuries to a section foreman, caused by the licensee's negligence.—Bailey v. Louisiana & Northwest R. Co., 57 So. 325.

(D) Injuries to Licensees or Trespassers in General.

§ 274 (Miss.) A railroad *held* not liable to a person injured while at a station without intent to transact business with the company.—Odum v. Gulf & S. I. R. Co., 57 So. 626.

Code 1906, § 4867, *held* not to render a railroad company liable for a failure of its agent to protect all persons entering its station.—Id.

§ 278 (La.) A section foreman in the employ of a railroad company *held* entitled to recover of the railroad and a licensee for negligence of the latter, unless his negligence contributed to his injury.—Bailey v. Louisiana & Northwest R. Co., 57 So. 325.

§ 282 (Miss.) A declaration *held* insufficient to charge a railroad company for a failure of

its station agent to protect from insult and abuse.—*Odum v. Gulf & S. I. R. Co.*, 57 So. 626.

(G) Injuries to Persons on or near Tracks.

§ 396 (Miss.) Under Code 1906, § 1985, proof of an injury from a running train raises presumption of negligence, casting on the railroad the burden of proof, which cannot be sustained, in the absence of proof of the condition of the one injured.—*New Orleans, M. & C. R. Co. v. Cole*, 57 So. 556.

Code 1906, § 1985, which raises a presumption of negligence on proof of an injury received from a running train, *held* not unconstitutional.—*Id.*

(H) Injuries to Animals on or near Tracks.

§ 439 (Ala.App.) A complaint, in an action against a railroad company for injury to a cow, *held* to state a cause of action.—*Western Ry. of Alabama v. McPherson*, 57 So. 396.

§ 447 (Ala.App.) In an action against a railroad company for the killing of a cow, a requested charge *held* properly refused because not in accordance with Code 1907, §§ 5474, 5476.—*Western Ry. of Alabama v. McPherson*, 57 So. 396.

(I) Fires.

§ 456 (Fla.) Duty of railway company as to preventing escape of fire from its engine and right of way to adjoining premises stated.—*Dowling Lumber Co. v. King*, 57 So. 337.

§ 479 (Fla.) In an action by administratrix for damages to premises of decedent by fire set by the engine, exclusion of a letter of decedent as to train setting fire *held* not error.—*Dowling Lumber Co. v. King*, 57 So. 337.

RAPE.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

§ 48 (Miss.) It is fatal error to permit witnesses to testify in detail as to what prosecutrix told them, including what she stated about the locality where the offense occurred.—*Frost v. State*, 57 So. 221.

RATIFICATION.

See Counties, § 14; Sunday, § 15.

REAL ACTIONS.

See Ejectment; Partition; Quieting Title.

§ 7 (La.) Defendant in a petitory action cannot avail himself of relative nullities in the title of plaintiff.—*Hughes v. Edson*, 57 So. 154.

§ 8 (La.) In a petitory action, issues cannot be raised as to the ownership of land not sued for by plaintiff.—*Knight v. Berwick Lumber Co.*, 57 So. 900.

REASONABLE DOUBT.

See Criminal Law, § 789.

REBUTTAL.

See Trial, § 62.

RECEIPTS.

See Evidence, § 408.

RECEIVERS.

See Banks and Banking, §§ 77, 80; Damages, § 128.

III. TITLE TO AND POSSESSION OF PROPERTY.

§ 69 (Ala.) Ordinarily the appointment of a receiver does not vest in him any title to the

property involved, but only the right of possession.—*Oates v. Smith*, 57 So. 438.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

(D) Sale and Conveyance or Redelivery of Property.

§ 135 (La.) Where a receiver did not purchase at his own sale, he cannot be charged with the difference between the purchase price and the price the property should have brought.—*In re Receivership of Bonita Mercantile Co.*, 57 So. 332.

§ 140 (La.) Sale by receiver *held* not subject to attack by opposition to final account, when necessary order for sale has been on the order book for the required time.—*In re Receivership of Bonita Mercantile Co.*, 57 So. 332.

V. ALLOWANCE AND PAYMENT OF CLAIMS.

§ 154 (La.) Allowance by receiver of attorney's fees on notes *held* improper.—*In re Receivership of Bonita Mercantile Co.*, 57 So. 332.

VI. ACTIONS.

§ 183 (La.) Where damages have not been prayed for in action against a receiver, the question of whether they are due cannot be inquired into.—*In re Receivership of Bonita Mercantile Co.*, 57 So. 332.

RECEPTION OF EVIDENCE.

See Criminal Law, §§ 673-687; Trial, §§ 39-96.

RECORDS.

See Appeal and Error, §§ 497-737; Bankruptcy, § 161; Criminal Law, §§ 260, 447, 995, 1086-1125, 1141, 1144, 1182; Evidence, §§ 184, 186; Execution, § 272; Executors and Administrators, § 256; Infants, § 77; Judgment, §§ 287, 315; Mortgages, §§ 244, 261; Municipal Corporations, § 109; Sales, §§ 465, 472; Trial, §§ 39, 82; Vendor and Purchaser, §§ 212, 229, 232, 239.

RECOUPMENT.

See Set-Off and Counterclaim, § 27.

REDEMPTION.

See Chattel Mortgages, § 300; Mechanics' Liens, § 299; Mortgages, §§ 542, 591-605; Taxation, §§ 696-722.

REDHIBITORY ACTION.

See Sales, §§ 126, 130.

REDIRECT EXAMINATION.

See Witnesses, §§ 287, 289.

REFERENCE.

See Appeal and Error, §§ 1019, 1021.

II. REFEREES AND PROCEEDINGS.

§ 58 (Fla.) Referee *held* to have the same power to change prior ruling of circuit judge on pleadings as the judge himself would have possessed, had no reference been made.—*Franklin Phosphate Co. v. International Harvester Co. of America*, 57 So. 206.

III. REPORT AND FINDINGS.

§ 99 (Fla.) Findings by master appointed by consent *held* not to be set aside at discretion of the court, but to have the weight of a verdict.—*Croom v. Ocala Plumbing & Electric Co.*, 57 So. 243.

§ 1 (Ala.) A contract will not be reformed to permit complainant to recover nominal damages for its breach.—Whitley v. Willingham & Bell, 57 So. 816.

II. PROCEEDINGS AND RELIEF.

§ 36 (Miss.) A complaint alleging that, when plaintiff sold land to defendant, it was agreed that plaintiff was not the sole owner of one of the tracts, but that defendant, who was an attorney, prepared a deed with full warranty as to both tracts, which plaintiff signed without knowledge of its contents and in reliance on the agreement, stated a case for reformation of the deed.—Eichelberger v. Cooper, 57 So. 808.

REFRESHING MEMORY.

See Witnesses, § 255.

REGISTRATION.

See Sales, §§ 465, 472.

REJOINDER.

See Pleading, § 196.

RELEASE.

See Frauds, Statute of, § 63; Guardian and Ward, § 175.

RELICION.

See Navigable Waters, § 44.

REMAINDERS.

See Life Estates; Wills, § 629.

REMEDY AT LAW.

See Equity, §§ 46, 51.

REMOVAL.

See Counties, § 26.

REMOVAL OF CAUSES.

See Courts, §§ 484, 485.

RENEWAL.

See Bills and Notes, § 140.

RENT.

See Railroads, § 79; Vendor and Purchaser, § 196.

REPEAL.

See Municipal Corporations, § 116; Statutes, §§ 159, 161.

REPLEVIN.

See Appeal and Error, § 47; Damages, § 197; Detinue; Justices of the Peace, §§ 54, 124, 141.

REPLICATION.

See Pleading, § 166.

REPUGNANCY.

See Pleading, § 21.

REPUTATION.

See Evidence, § 324; Witnesses, §§ 337, 361.

REQUESTS.

For instructions, see Criminal Law, §§ 829-834; Trial, §§ 256-260.

See Contracts, § 266; Sales, §§ 38, 113-130, 260; Vendor and Purchaser, §§ 98, 104.

RES GESTÆ.

See Criminal Law, §§ 363-368; Evidence, § 123.

RES IPSA LOQUITUR.

See Railroads, § 396.

RES JUDICATA.

See Judgment, §§ 606-715, 948.

RETREAT.

See Homicide, § 118.

RETROSPECTIVE LAWS.

See Constitutional Law, §§ 191-200; Statutes, 263-267.

RETURN.

See Execution, § 311; Habeas Corpus, § 75; Mandamus, §§ 165, 180.

REVENUE.

See Taxation.

REVIEW.

See Appeal and Error; Certiorari.

REVOCATION.

See Wills, §§ 179-194.

RIGHT OF WAY.

See Railroads, §§ 73, 79.

RIPARIAN RIGHTS.

See Navigable Waters, §§ 39-44; Waters and Water Courses, § 38.

RISKS.

See Master and Servant, §§ 205-223, 278.

ROADS.

See Highways.

ROBBERY.

§ 20 (Ala.App.) A variance between an indictment charging robbery and the proof held not fatal to a conviction.—Davis v. State, 57 So. 493.

RULES.

See Railroads, § 227.

SAFE PLACE TO WORK.

See Master and Servant, §§ 101-107.

SALARY.

See Garnishment, § 116.

SALES.

See Corporations, § 117; Evidence, §§ 133, 408, 461; Execution, §§ 256-311; Executors and Administrators, §§ 380, 388; Frauds, Statute of, §§ 56, 95, 158; Fraudulent Conveyances, §§ 159, 271; Guardian and Ward, § 42; Intoxicating Liquors; Judicial Sales; Logs and Logging; Mechanics' Liens, § 299; Mortgages, §§ 515, 542; Partition, §§ 104, 108; Public Lands, § 61; Receivers, §§ 135, 140; Statutes, § 267; Taxation, §§

530, 582, 631, 696-722, 734-742, 810; Trial, § 253; Trover and Conversion, § 37; Trusts; Vendor and Purchaser; Wills, §§ 194, 740.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 1 (Ala.) A contract for sale of cotton is valid, although the grade of cotton is not specified.—Whitley v. Willingham & Bell, 57 So. 816.

§ 1 (Ala.App.) A tenant leaving corn in cribs indicated by a landlord without a specific agreement to take the corn for rent *held* not to bind the landlord for a sale and delivery.—Sells v. Price, 57 So. 285.

§ 7 (Ala.App.) Accused *held* not an agent under a contract for the purchase of fertilizer, but a buyer.—Jackson v. State, 57 So. 110.

§ 21 (Miss.) A buyer of feed for animals is not liable under an implied promise to pay, where the feed is worthless.—Dulaney v. Jones & Rogers, 57 So. 225.

§ 38 (Ala.) Material false statements relied on *held* to authorize rescission of a contract of sale.—Hafer v. Cole, 57 So. 757.

Where a buyer has a right to rely on the seller's representations, it is immaterial that the defects are patent.—Id.

II. CONSTRUCTION OF CONTRACT.

§ 54 (Ala.) All the provisions of a contract must be construed together.—John Deere Plow Co. v. City Hardware Co., 57 So. 766.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(C) Rescission by Buyer.

§ 113 (Ala.) The right to a rescission of a sale for fraud does not depend on insolvency of the other party.—Hafer v. Cole, 57 So. 757.

§ 118 (Ala.) Upon seller's false representations as to his title, buyer *held* not bound to buy up hostile claims.—Hafer v. Cole, 57 So. 757.

§ 120 (Ala.) The buyer cannot rescind an executed contract of sale for mere breach of warranty.—Hafer v. Cole, 57 So. 757.

§ 126 (La.) The prescription of one year against redhibitory actions and actions quanti minoris does not apply where the seller had knowledge of the vices of the thing, and failed to declare them to the purchaser. Civ. Code arts. 2534, 2544.—Templeman Bros. Lumber Co. v. Fairbanks, Morse & Co., 57 So. 309.

§ 130 (Ala.) The right to a surrender and cancellation of written instruments or to a conveyance is sufficient ground for a suit in equity to rescind.—Hafer v. Cole, 57 So. 757.

Complaint in an action to rescind a contract of sale for representations *held* bad on demurrer.—Id.

§ 130 (La.) In a redhibitory suit, the judge may decree merely a reduction of the price.—Templeman Bros. Lumber Co. v. Fairbanks, Morse & Co., 57 So. 309.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

§§ 178, 179 (La.) Receipt and use of machinery by the buyer for more than a year before offering to return *held* an acceptance, but not to conclude the buyer from demanding reduction of price for defects known to, but not disclosed by, the seller.—Templeman Bros. Lumber Co. v. Fairbanks, Morse & Co., 57 So. 309.

V. OPERATION AND EFFECT.

(A) Transfer of Title as Between Parties.

§ 199 (Miss.) Whether or not delivery is a condition precedent to a sale becoming absolute is a matter of intention.—Johnson v. Tabor, 57 So. 365.

§ 201 (Ala.App.) A seller delivering goods to a carrier for transportation and delivery to the buyer *held* to constructively deliver them to the buyer.—National Chemical Co. v. National Aniline & Chemical Co., 57 So. 114.

§ 201 (Miss.) As between the parties to a sale of personalty, otherwise complete, *held*, delivery is not necessary to vest title, unless made a condition precedent by the contract.—Johnson v. Tabor, 57 So. 365.

§ 218½ (Miss.) Whether or not it was the intention of the parties to the contract that delivery of the property was a condition precedent to the sale becoming absolute *held*, under the evidence, a question for the jury.—Johnson v. Tabor, 57 So. 365.

VI. WARRANTIES.

§ 260 (Ala.) On seller's misrepresentation, though not a part of the contract, the buyer is entitled to rescind.—Hafer v. Cole, 57 So. 757.

§ 262½ (Ala.) An implied warranty does not arise where the defect is obvious.—Hafer v. Cole, 57 So. 757.

§ 263 (Ala.) Where the seller of goods is in possession, the law implies a warranty of title.—Hafer v. Cole, 57 So. 757.

§ 274 (Miss.) A seller of provisions intended for human food impliedly warrants soundness, but a seller of food for animals does not.—Dulaney v. Jones & Rogers, 57 So. 225.

§ 283 (Ala.) A buyer of personal property has the right to yield its possession to the true and hostile owner upon his demand.—Hafer v. Cole, 57 So. 757.

Buyer's failure to buy up hostile claims *held* not to affect his right to recover for breach of warranty.—Id.

VII. REMEDIES OF SELLER.

(D) Resale.

§ 339 (Fla.) One contracting to purchase an automobile, to be delivered in Florida, notifying seller to cancel order before shipment, *held* not liable for difference between contract price and what the seller sold the car for in Florida.—Faulk v. Richardson, 57 So. 666.

§ 339 (Miss.) In an action for damages for breach of contract of sale, an instruction *held* erroneous.—Thayer Export Lumber Co. v. Naylor, 57 So. 227.

(E) Actions for Price or Value.

§ 347 (Miss.) Where the goods purchased were worthless and valueless, the buyer need not return or offer to return them, to escape liability for the price.—Dulaney v. Jones & Rogers, 57 So. 225.

§ 354 (Miss.) A plea in an action for the price of goods sold *held* equivalent to a plea of total failure of consideration.—Dulaney v. Jones & Rogers, 57 So. 225.

§ 359 (Ala.App.) In an action for goods sold, evidence *held* to support a verdict for plaintiff for at least a nominal amount.—Kendrick & McGough v. Chafin, 57 So. 78.

VIII. REMEDIES OF BUYER.

(D) Actions and Counterclaims for Breach of Warranty.

§ 435 (Ala.App.) A plea in an action for goods sold *held* demurrable.—National Chemical Co. v. National Aniline & Chemical Co., 57 So. 114.

yielded to a paramount title.—Hafer v. Cole, 57 So. 757.

§ 446 (Ala.App.) Where a seller did not show any damages under his plea of set-off, in an action for the price, a charge that the seller was not entitled to any damages was proper.—National Chemical Co. v. National Aniline & Chemical Co., 57 So. 114.

An instruction in an action for the price of goods sold *held* misleading.—Id.

IX. CONDITIONAL SALES.

§ 465 (Ala.App.) Code 1896, § 1017, providing for the registration of conditional sale contracts, *held* not to affect the validity of such contracts as between the parties.—Lynn v. Broyles Furniture Co., 57 So. 122.

§ 467 (Ala.) Provisions of contract of sale construed.—John Deere Plow Co. v. City Hardware Co., 57 So. 766.

§ 472 (Ala.App.) Under Code 1896, § 1017, repealed as to J. and M. counties by Loc. Acts 1898-99, p. 1120, where furniture sold under a conditional sale contract was removed from J. to C. counties, that the contract was not required to be recorded in J. county did not exempt the seller from recording it in C. county to protect it against bona fide purchasers.—Lynn v. Broyles Furniture Co., 57 So. 122.

§ 479 (Ala.) In detinue *held*, that it was not necessary for defendant to deny a contract set up by plaintiff or that the goods were sold thereunder.—John Deere Plow Co. v. City Hardware Co., 57 So. 766.

§ 479 (Ala.) Provision in a conditional contract of sale for retaking possession by the seller *held* limited by a provision extending the time for payment.—John Deere Plow Co. v. City Hardware Co., 57 So. 821.

§ 479 (Fla.) Where note in payment of price of personality reserves title in vendor until the note is paid, and the debtor fails to pay the note, the vendor has the right to take possession.—Bank of Jasper v. Tuten, 57 So. 238.

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(D) District Property, Contracts, and Liabilities.

§ 79 (Fla.) Trustees of special tax school district have no authority to lease school property.—Trustees of Special Tax School Dist. No. 1, Leon County, v. Lewis, 57 So. 614.

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§ 5 (Ala.App.) The addition of the letters "L. S." after the name of a signer does not make the instrument a sealed instrument.—Hughes v. Spratling, 57 So. 629.

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II. SUBJECT-MATTER.

§ 27 (Ala.) An owner employing a building contractor *held* entitled to recover by way of recoupment the damages resulting from delay in the completion of the work.—Huntsville Elks' Club v. Garrity-Hahn Bldg. Co., 57 So. 750.

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See Judgment, § 139.

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See Attachment, § 164; Execution, §§ 125, 459; Weapons.

II. COMPENSATION.

§ 28 (Ala.App.) A sheriff or constable claiming fees or costs is bound to point to a definite law authorizing it.—Northern Alabama Ry. Co. v. Lowery, 57 So. 260.

§ 45 (Ala.App.) Under Code 1907, §§ 3275, 3697, 3698, 3722, a sheriff is not entitled to commissions for collecting an execution, unless he actually collects the money, or has made an actual levy on property subject to levy and sale.—Northern Alabama Ry. Co. v. Lowery, 57 So. 260.

A sheriff is not entitled to commissions on money paid to a judgment creditor before execution is issued, or to fees after execution is issued, if the payment is made before the execution is served or levied.—Id.

III. POWERS, DUTIES, AND LIABILITIES.

§ 106 (Ala.App.) To put a sheriff under a duty to make a levy in attachment, it must appear that defendant owned property subject to levy which the sheriff could have found.—Higdon v. Fields, 57 So. 58.

§ 111 (Ala.App.) The law will consider and condemn the motives and acts of an officer with reference to the levy of an execution only when they are carried into an act which is in itself illegal.—Northern Alabama Ry. Co. v. Lowery, 57 So. 260.

§ 137 (Ala.App.) A complaint in an action against a sheriff for failing to make a levy in attachment *held* demurrable for failing to show that the sheriff was under a duty to make a levy.—Higdon v. Fields, 57 So. 58.

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See Ferries.

VIII. CARRIAGE OF PASSENGERS.

§ 163 (Ala.App.) A carrier's agreement to wire for stateroom accommodations for a passenger *held* a part of the contract of carriage.—Central of Georgia Ry. Co. v. Knight, 57 So. 253.

§ 164 (Ala.App.) A carrier's failure to reserve stateroom accommodations, as agreed, *held* a breach of contract.—Central of Georgia Ry. Co. v. Knight, 57 So. 253.

First-class transportation on passenger steamer *held* to include stateroom accommodations.—*Id.*

§ 165 (Ala.App.) In an action for breach of a railway company's contract to secure stateroom accommodations, instructions *held* proper.—Central of Georgia Ry. Co. v. Knight, 57 So. 253.

That plaintiff was on her bridal trip *held* proper to be considered in determining the damages for breach of the contract of transportation.—*Id.*

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See Master and Servant, § 137.

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II. CONTRACTS ENFORCEABLE.

§ 49 (Fla.) Equity will enforce specific performance of contract for sale of land when the price was fair when the contract was made, and no advantage was taken of defendant, though later it was worth considerably more.—Charbonier v. Arbona, 57 So. 887.

IV. PROCEEDINGS AND RELIEF.

§ 119 (Fla.) As against general denial, the burden is to be upon complainant in specific performance to prove tax liens, the existence and validity whereof depend on matters of public record.—Charbonier v. Arbona, 57 So. 887.

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See Street Railroads, § 117.

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V. CLAIMS AGAINST STATE.

§ 173 (Fla.) Acts 1861, c. 1275, § 2 (being the same as section 27, p. 200, McClellan's Dig.), does not authorize Comptroller to audit claim against the state which does not grow out of official functions as sheriff or other ministerial officer.—State v. Croom, 57 So. 420.

Authority of Legislature over claims against the state *held* not abdicated by McClellan's Dig. p. 196, § 6, and, after Legislature has provided for payment of claim, Comptroller cannot be compelled by mandamus to reinvestigate.—*Id.*

STATUTES.

For statutes relating to particular subjects, see the various specific topics.

See Courts, § 97; Evidence, §§ 25, 29; Frauds, Statute of; Limitation of Actions.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 8½ (Ala.App.) Under Const. 1901, § 106, construed in connection with Code 1907, § 5184, notice of an intent to apply for the passage of a local law, published 24 days between the first insertion of the notice and the introduction of the bill, *held* sufficient.—Lower v. State, 57 So. 500.

§ 29 (Ala.) The six days during which the Governor may consider a bill under the Constitution, without it becoming a law, are calendar days.—State v. Joseph, 57 So. 942.

§ 30 (Ala.) The constitutional provision that a bill shall not become a law, if its return by the Governor is prevented by adjournment of the Legislature, refers to a final adjournment, and not recess.—State v. Joseph, 57 So. 942.

A bill cannot, during a recess, be returned by the Governor, pursuant to the Constitution, to officers or members of the house in which it originated.—*Id.*

The two days after the reassembling of a house in which a bill originated, within which it must be returned, after recess, by the Governor to prevent it from becoming a law, under the Constitution, must be legislative days.—*Id.*

§ 39 (Fla.) Gen. St. 1906, § 1969, as it appears in copy filed in office of Secretary of State, *held* to control the section as it appears in the printed and published volume.—Investment Co. v. Trueman, 57 So. 663.

§ 60 (Fla.) Act approved by Governor *held* to be taken as legislative act in the absence of an affirmative showing by the journals that a materially different act was in fact passed.—State v. Sammons, 57 So. 196.

§ 61 (Ala.) Statutes should not be held invalid, if there is a reasonable doubt as to their validity.—Central of Georgia Ry. Co. v. Groesbeck & Armstrong, 57 So. 380.

§ 64 (La.) Referendum provisions of Act No. 77 of 1910, creating parish of Jefferson Davis, if unconstitutional, *held* to be so inseparably connected with the rest of the act as to invalidate the whole statute.—State ex rel. Carey v. Sanders, 57 So. 924; State ex rel. Moore v. Same, *Id.* 927; State ex rel. McMahon v. Same, *Id.*

Doctrine that a statute may be constitutional in part *held* not applicable, where Legislature has provided that the operation of the act shall depend on the result of an election.—*Id.*

II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 68 (Fla.) A law is a general law which is potentially applicable to every county in the state, though at the time of its passage it ap-

to the same subject, but being reasonably based on population, are not special laws, relating to municipal government, within the constitutional inhibition.—State v. Joseph, 57 So. 942.

§ 94 (Fla.) The Legislature may provide that there be no county seat elections in counties having built a courthouse until that courthouse be 20 years old.—Collier v. Cassady, 57 So. 617.

III. SUBJECTS AND TITLES OF ACTS.

§ 117 (Ala.) Act April 4, 1911 (Acts 1911, p. 192), giving prima facie evidential effect to certain documents, *held* not in violation of Const. 1901, § 45, relating to the subjects and titles of statutes.—Brannan v. Henry, 57 So. 967.

§ 118 (La.) Act No. 51 of 1906, relating to work on public roads by defendants who were formerly condemned to imprisonment only, has only one object.—State v. Nolan, 57 So. 274.

§ 123 (La.) The title of Act No. 317 of 1910, amending Act No. 159 of 1902, and authorizing commissioners of drainage to levy taxes on popular vote, is sufficiently broad to include a provision authorizing the levy of a tax without a previous election.—Coguenham v. Avoca Drainage Dist., 57 So. 989.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§ 159 (Miss.) The repeal of a statute by implication *held* not favored.—Ascher & Baxter v. Edward Moyse & Co., 57 So. 299.

§ 161 (Miss.) A later statute covering the whole subject of prior statutes *held* to repeal the prior statutes.—Ascher & Baxter v. Edward Moyse & Co., 57 So. 299.

The rule that a later statute covering the whole subject of a former statute impliedly repeals the former statute *held* subject to a specified qualification.—Id.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 181 (Miss.) The court, in construing a statute, will seek to ascertain the intent of the

effectuate the purpose of the Legislature.—Lynn v. Broyles Furniture Co., 57 So. 122.

§ 224 (Miss.) The court, in construing a statute, will presume that the Legislature was familiar with prior statutes and with judicial constructions placed thereon.—Ascher & Baxter v. Edward Moyse & Co., 57 So. 299.

§ 225½ (Ala.) A re-enacted statute, judicially construed prior to its re-enactment, must receive such construction.—Bruce v. Sierra, 57 So. 709.

(D) Retroactive Operation.

§ 263 (Ala.) Courts will not construe an enactment as retrospective, unless the Legislature expresses a clear intent to give it that effect.—Duy v. Alabama Western R. Co., 57 So. 724.

§ 263 (Miss.) Statutes will be given a prospective operation, unless a contrary intention is clearly and positively shown.—Richards v. City Lumber Co., 57 So. 977.

§ 267 (Ala.) Code 1907, § 3351, providing that proof that anything of value agreed to be sold and delivered was not actually delivered at the time of making the agreement, and that one of the parties deposited margins, shall be prima facie evidence of a contract to deliver in future, relates to the remedy only, and applies to an action commenced before its enactment.—Birmingham Trust & Savings Co. v. Currey, 57 So. 962.

§ 267 (Miss.) Laws 1910, c. 135, providing that, in "all actions hereafter brought" for personal injuries, contributory negligence shall not bar a recovery, is not retroactive.—Richards v. City Lumber Co., 57 So. 977.

VII. PLEADING AND EVIDENCE.

§ 284 (Ala.) A memorandum made on a bill at the time by Governor's recording secretary is not admissible to show that it was not returned within six days after being sent to the Governor, as contemplated by the Constitution.—State v. Joseph, 57 So. 942.

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III. LIABILITY OF PERSONS AND PROPERTY.

(A) Private Persons and Property in General.

§ 79 (La.) That plaintiff did not, on the first day of the year, own property sought to be assessed for taxes, but acquired it subsequently, *held* not to make it nontaxable for the remainder of the year.—*Citizens' Bank & Trust Co. v. Board of Assessors*, 57 So. 528.

§ 98 (La.) Movables brought from another state after January 1st of the current tax year are assessable in the district of their location, as are also movables brought from one taxing district to another if not assessed in the former.—*Hammond Lumber Co. v. Smart*, 57 So. 277.

V. LEVY AND ASSESSMENT.

(G) Review, Correction, or Setting Aside of Assessment.

§ 452 (Ala.) Code 1907, § 2252, *held* to have been repealed by Act March 31, 1911 (Acts 1911, pp. 159-191).—*State v. Ide Cotton Mills*, 57 So. 481.

The Legislature can authorize an appeal by taxpayers from assessments and deny the right to the state.—*Id.*

§ 495 (Ala.) The repeal of Code 1907, § 2252, by Act March 31, 1911 (Acts 1911, pp. 159-191) *held* to deprive the state of the right to appeal from an order of a county commissioners' court, assessing property for taxation.—*State v. Ide Cotton Mills*, 57 So. 481.

RECOVERY OF TAX PAID.

§ 530 (La.) After payment of taxes, a collector is without power to sell the property, regardless of who made the payment.—*Bender v. Bailey*, 57 So. 998.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(B) Summary Remedies and Actions.

§ 582 (Miss.) Tax collector's sale of mill property worth several thousand dollars for delinquent tax of \$54 *held* in excess of his authority and void.—*Stuard v. Southern Engine & Boiler Works*, 57 So. 218.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

§ 631 (La.) Where the United States suspends a homestead entry, the entryman has no taxable property in connection with the land sought to be entered.—*McCrorry v. Bradford*, 57 So. 892.

X. REDEMPTION FROM TAX SALE.

§ 696 (Miss.) Code 1906, §§ 4341, 4342, relating to the collection of delinquent taxes, *held* not to permit the redemption of a boiler, part of a sawmill plant, from a tax sale.—*Stuard v. Southern Engine & Boiler Works*, 57 So. 218.

§ 708 (Fla.) Provision of the revenue act of 1893, making tax title under which purchaser has not taken possession void unless he sues for possession within one year from the passage of the act, *held* not to divest title or put material burden on title already vested before the enactment of the provision.—*Johnson v. Du Pont*, 57 So. 670.

§ 710 (La.) Acts 1882, No. 96, § 62, authorized a tax collector to receive redemption of price on sale for taxes only when purchaser at sale could not be found.—*Frisco Land Co. v. Nevins*, 57 So. 284.

§ 722 (Ala.) A bill will not lie to redeem land from a tax sale; the remedy at law provided by Code 1907, §§ 2313, 2314, being exclusive.—*Osborne v. Waddell*, 57 So. 698.

XI. TAX TITLES.

(A) Title and Rights of Purchaser at Tax Sale.

§ 734 (La.) Notice to tax debtor *held* essential to validity of tax sale.—*McCrorry v. Bradford*, 57 So. 892.

§ 734 (Miss.) Tax sale *held* void, where land was assessed to state.—*Smith v. Leavenworth*, 57 So. 803.

§ 742 (Fla.) Provision of the revenue act of 1887 that purchaser of tax sale certificate shall purchase all certificates held by state *held* to relate to purchase of certificates from the state, and not to issue of tax deed on certificate issued at sale to individual.—*Johnson v. Du Pont*, 57 So. 670.

(B) Tax Deeds.

§ 750 (Fla.) Failure to comply with Gen. St. 1906, § 574, as to publication of notice of application for tax deed, renders the deed void.—*Saunders v. Collins*, 57 So. 842.

§ 750 (Fla.) Where the notice of an application for a tax deed required by Gen. St. 1906, § 575, is not given, the deed is ineffectual as title.—*Johnson v. Du Pont*, 57 So. 670.

§ 776 (Miss.) Tax deed *held* to cover alluvion in river adjoining land conveyed.—*Smith v. Leavenworth*, 57 So. 803.

§ 785 (Fla.) Even where a tax deed is subject to an outstanding tax certificate, if the latter is void, the tax deed is not affected by

plication for tax deed, may be shown after the deed is admitted in evidence.—Saunders v. Collins, 57 So. 342.

(C) Actions to Confirm or Try Title.

§ 805 (Miss.) Under Ann. Code 1892, § 2735, person in possession of land for three years under a tax deed acquires a good title.—Smith v. Leavenworth, 57 So. 803.

§ 810 (La.) In an action wherein plaintiffs sought to defeat a tax sale, evidence held insufficient to show that the taxes were paid before the sale, as claimed by plaintiffs.—Bender v. Bailey, 57 So. 998.

XIV. DISPOSITION OF TAXES COLLECTED, AND FAILURE OF LOCAL AUTHORITIES TO COLLECT.

§ 913 (Miss.) Under Laws 1886, c. 90, §§ 1, 2, and Laws 1888, c. 185, repealed by Laws 1892, c. 49, held, that there was no authority for a town to make a legal demand upon the county for a refund of taxes.—Town of Durant v. Attala County, 57 So. 914.

TELEGRAPHS AND TELEPHONES.

II. REGULATION AND OPERATION.

§ 39 (Ala.App.) A message sent by a husband announcing the death of his wife and the time of her burial held notice of the relationship between the husband and the sendee.—Western Union Telegraph Co. v. Bennett, 57 So. 87.

§ 66 (Ala.App.) Proof that the telegram delivered to the sendee was not a copy of the telegram which the sender delivered for transmission is prima facie proof of negligence.—Western Union Telegraph Co. v. Bennett, 57 So. 87.

§ 67 (Ala.App.) Measure of damages for breach by a telegraph company to transmit and deliver a message defined.—Western Union Telegraph Co. v. Reed, 57 So. 83.

A telegraph company negligently transmitting a message held liable for traveling expenses incurred in consequence thereof.—Id.

A telegraph company erroneously transmitting a message held not liable for certain traveling expenses incurred by the sendee.—Id.

§ 68 (Ala.App.) A husband suffering mental anguish from the failure of his father-in-law to attend the funeral of his wife held entitled to recover damages therefor.—Western Union Telegraph Co. v. Bennett, 57 So. 87.

§ 73 (Ala.App.) Whether a husband suffered mental anguish because of the failure of his father-in-law to attend the funeral of his wife held for the jury.—Western Union Telegraph Co. v. Bennett, 57 So. 87.

TENANCY IN COMMON.

See Joint Tenancy; Partition.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

§ 15 (Ala.) Persons held tenants in common, so that the possession of one was prima facie that of the others.—Hays v. Dillard, 57 So. 695.

§ 15 (Ala.) Cotenants held not to have established adverse possession as against the other cotenants.—Palmer v. Sims, 57 So. 704.

§ 20 (La.) Cotenants acquiring title from tax purchaser within time for redemption held to acquire no greater interest than he had before, except a claim for reimbursement.—Gulf Refining Co. of Louisiana v. Jeems Bayou Hunting & Fishing Club, 57 So. 322.

calling for interposition of equity.—Gulf Refining Co. of Louisiana v. Hart, 57 So. 581.

§ 29 (Miss.) A will held to devise land in common to each of the testator's children and to entitle the children to whatever improvements they may place on the land.—Eaton v. Broaderick, 57 So. 298.

§ 30 (Miss.) Heirs of a tenant in common held not divested of title by a purchase by the cotenant at tax sale.—Hill v. Woodward, 57 So. 294.

§ 35 (La.) Conveyance by co-owner as heir held not to take effect as to tax title acquired by him, but only as to his interest as an heir.—Gulf Refining Co. of Louisiana v. Jeems Bayou Hunting & Fishing Club, 57 So. 322.

III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

§ 55 (La.) Uncorroborated testimony of surviving co-owner of real estate that, as between her and the deceased co-owner, she was not to be liable for any part of the debt secured by mortgage on the property, held insufficient to release her from liability.—Succession of Alexander, 57 So. 534.

TENDER.

See Costs, § 42; Infants, § 31; Mortgages, § 605; Trover and Conversion, § 37.

TESTAMENTARY CAPACITY.

See Wills, §§ 52, 55, 153, 310, 329.

THEATERS AND SHOWS.

See Courts, § 122.

THEFT.

See Larceny.

THREATS.

See Homicide, §§ 190, 191, 339.

TIMBER.

See Logs and Logging; Trespass, § 89.

TIME.

See Appeal and Error, §§ 339, 351, 627, 797; Statutes, § 29.

TITLE.

See Deeds, §§ 38, 203; Ejectment, §§ 106, 109; Execution, § 256; Libel and Slander, § 140; Logs and Logging, § 4; Public Lands, § 32; Quieting Title; Real Actions, § 7; Receivers, § 69; Sales, §§ 118, 199-213½, 439, 479; Statutes, §§ 117-123; Taxation, §§ 734-810; Vendor and Purchaser, § 212.

TORTS.

See Attachment, §§ 375, 377; Corporations, § 492; False Imprisonment; Fraud; Libel and Slander; Limitation of Actions, § 30; Malicious Prosecution; Negligence; Nuisance; Parties, § 27; Railroads, §§ 79, 256-479; Trespass; Trover and Conversion.

TOWNS.

See Municipal Corporations; Taxation, § 913.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

§ 4 (La.) The dividing line between two townships established by the surveys of 1907

will be sustained unless there is positive proof that such line was erroneous.—*Elms v. Elliott*, 57 So. 307.

TRANSCRIPTS.

See Appeal and Error, §§ 627, 628, 797; Criminal Law, §§ 1086-1125; Evidence, §§ 184, 186.

TRANSITORY ACTIONS.

See Courts, § 7.

TRESPASS.

See Appeal and Error, § 1050; Courts, § 5; Criminal Law, §§ 763, 764; Evidence, § 274; Injunction, § 38; Mechanics' Liens, § 298; Principal and Agent, § 189; Trial, § 45; Venue, § 17.

II. ACTIONS.

(A) Right of Action and Defenses.

§ 24 (Ala.) An attachment quashed under claim of exemptions *held* no justification in trespass for a taking of a stock of goods.—*Southern Cotton Oil Co. v. Harris*, 57 So. 854.

(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

§ 40 (Ala.) A complaint *held* to state a cause of action for trespass to personal property, in conformity to Code 1907, form 23, p. 1199.—*Miller-Brent Lumber Co. v. Lunday*, 57 So. 722.

§ 41 (Ala.) A plea in trespass for wrongfully taking property which justified under an attachment *held* insufficient as confusing and failing to sufficiently describe the suit in which the attachment was levied.—*Southern Cotton Oil Co. v. Harris*, 57 So. 854.

A plea in trespass *held* insufficient for failing to show that an attachment relied on was ever returned into court.—*Id.*

A plea in trespass setting up an attachment, and a sale in that suit, *held* insufficient as not showing the process under which the property was sold.—*Id.*

(C) Evidence.

§ 45 (Ala.) Questions as to the securing of a stock of goods from his wife by a plaintiff in trespass *held* properly excluded as not showing that the plaintiff was without means to purchase the goods sued for.—*Southern Cotton Oil Co. v. Harris*, 57 So. 854.

(E) Trial, Judgment, and Review.

§ 68 (Ala.) An instruction in trespass for the taking of goods *held* to properly identify the subject-matter.—*Southern Cotton Oil Co. v. Harris*, 57 So. 854.

III. CRIMINAL RESPONSIBILITY.

§ 81 (Ala.) Under Code 1907, § 4756, an entry to remove a building purchased *held* not a violation of the criminal statute against trespass after warning.—*Wildman v. Evans Bros. Const. Co.*, 57 So. 831.

§ 81 (Ala.App.) The warning required by the statute to support a conviction of trespass *held* to imply notice to accused not to go on the premises.—*Banks v. State*, 57 So. 63.

§ 81 (Ala.App.) Where accused acquired actual possession of land under claim of ownership before warning, his subsequent entry was a continuing trespass under the possession previously acquired, and not a re-entry after warning.—*Hendley v. State*, 57 So. 1017.

Where, on trial for trespass after warning, prosecutor testified that accused made no claim to possession before warning, but at the time recognized prosecutor's possession, a conviction

was warranted, though accused showed actual possession before warning.—*Id.*

§ 89 (Ala.App.) An instruction, on trial for trespass after warning, that if, at the time of the warning, accused was in possession, cutting and removing timber, he must be acquitted though he was a trespasser, was properly refused as leading the jury to believe the cutting and removing of timber constituted actual possession in good faith.—*Hendley v. State*, 57 So. 1017.

TRIAL.

See Accord and Satisfaction, § 27; Adverse Possession, §§ 115, 116; Appeal and Error, §§ 216, 1010, 1011, 1038, 1062-1068; Attachment, § 375; Boundaries, §§ 35, 41; Carriers, §§ 132, 230, 278, 321; Chattel Mortgages, § 177; Costs; Criminal Law, §§ 575-1001, 1036-1066, 1086-1091, 1122, 1125, 1159-1166½; Damages, §§ 197-215; Deeds, § 66; Ejectment, §§ 109, 110; Embezzlement, § 48; Evidence, §§ 496½, 570, 571; Guaranty, § 92; Homicide, §§ 264-313; Insurance, § 688; Intoxicating Liquors, §§ 236-239; Jury; Larceny, §§ 75, 77; Libel and Slander, § 123; Malicious Prosecution, § 71; Master and Servant, §§ 284-291; Negligence, § 136; New Trial; Nuisance, § 58; Obstructing Justice; Physicians and Surgeons, §§ 6, 14, 18; Reference; Sales, §§ 218½, 339, 446; Shipping, § 165; Street Railroads, §§ 117, 118; Telegraphs and Telephones, § 73; Trespass, §§ 68, 89; Venue; Waters and Water Courses, §§ 107, 126; Wills, § 829.

I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

§ 1 (Fla.) It is irregular to allow a cause to go to trial in the absence of any reply to, or joinder of issue on a plea which requires something more than a mere similitur.—*Globe Theatre & Amusement Co. v. Watt*, 57 So. 201.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

§ 39 (Ala.App.) Under Code 1907, §§ 3368, 3999, the admission in evidence of a recorded instrument bearing a proper certificate *held* evidence of its registry.—*Polytinsky v. M. F. Patterson & Son*, 57 So. 130.

§ 45 (Ala.) Offer in trespass to show that plaintiff "married stock of goods and continued in business" *held* properly rejected as unintelligible.—*Southern Cotton Oil Co. v. Harris*, 57 So. 854.

§ 45 (Fla.) In a suit to enforce a mortgage, the defendant calling for proof, the bonds must be offered or received in evidence.—*International Kaolin Co. v. Vause*, 57 So. 360.

§ 46 (Ala.App.) The court cannot be put in error for excluding testimony which at the time it is offered appears inadmissible.—*Burton v. Phillips*, 57 So. 152.

(B) Order of Proof, Rebuttal, and Re-opening Case.

§ 62 (Ala.) The acceptance or rejection of evidence not strictly in rebuttal is within the sound discretion of the trial court.—*Cooper v. Slaughter*, 57 So. 477.

(C) Objections, Motions to Strike Out, and Exceptions.

§ 74 (Ala.App.) An objection to a question to a witness *held* properly overruled.—*V. J. Forrester & Bro. v. J. A. May Co.*, 57 So. 64.

§ 81 (Ala.) When a party objects to a question, unless other facts are shown, this is a conditional objection, and it is not error to overrule it.—*Cooper v. Slaughter*, 57 So. 477.

§ 82 (Ala.) A general objection to introduction of the record of a mortgage, the original

of which had been introduced, is not enough.—*Mills v. Hudmon & Co.*, 57 So. 739.

§ 83 (Ala.) The statement of one or more grounds of objection to the admission of evidence is a waiver of all other grounds.—*Cooper v. Slaughter*, 57 So. 477.

§ 83 (Ala.) The court *held* unauthorized to exclude the testimony of a witness in a will contest on a general motion to exclude the evidence.—*Bruce v. Sierra*, 57 So. 709.

§ 83 (Ala.) The objection to the competent testimony that witness at the mortgage foreclosure sale bought the land in for plaintiff, that it was in writing, or else void, is inapt.—*Mills v. Hudmon & Co.*, 57 So. 739.

§ 84 (Ala.) An objection that testimony is illegal does not raise the point that the question calls for a conclusion of the witness.—*Johnston v. Johnston*, 57 So. 450.

The overruling of general objections to questions propounded to witnesses in a will contest case *held* not the subject of complaint.—*Id.*

§ 85 (Ala.App.) Where a part of a question put to a witness was proper, a general objection thereto *held* properly refused.—*Long-Richardson Mercantile Co. v. Herron*, 57 So. 133.

§ 91 (Ala.App.) A responsive answer to a question should not be stricken on motion, if no objection was made to the question.—*Carbon Hill & Lost Creek Coal Co. v. W. P. Cooper & Son*, 57 So. 81.

§ 96 (Ala.) Exception *held* insufficient to preserve for review an error in the admission of testimony.—*Alabama Chemical Co. v. Phelps*, 57 So. 694.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

§ 139 (Ala.) An affirmative charge on the whole case is properly refused though on the whole evidence plaintiff's case is so thoroughly unproved that a verdict for him cannot stand.—*Robinson v. Crotwell*, 57 So. 23.

§ 139 (Ala.) Where there is evidence to support plaintiff's case, affirmative charges for defendant are properly refused.—*Louisville & N. R. Co. v. Hutcherson*, 57 So. 379.

§ 139 (Ala.App.) The weight and sufficiency of evidence is for the jury and not for the court.—*Jefferson Fertilizer Co. v. Houston*, 57 So. 98.

§ 140 (Ala.) The weight of the testimony of a witness to the execution of a will *held* for the jury.—*Bruce v. Sierra*, 57 So. 709.

§ 142 (Ala.App.) An instruction to find for plaintiff if the jury believe the evidence should not be given, if there is any evidence supporting an inference which would prevent his recovery.—*Birmingham Ry., Light & Power Co. v. Camp*, 57 So. 50.

§ 143 (Ala.App.) The evidence on the question of liability being in conflict, a general affirmative charge is properly refused.—*Smiley, Son & Co. v. Keith*, 57 So. 127.

§ 143 (Ala.App.) Where there is a conflict in the evidence, plaintiff is not entitled to the general affirmative charge.—*Avery & Co. v. Turner*, 57 So. 255.

§ 143 (Ala.App.) In an action for the price of goods, credibility of plaintiff's testimony *held* for the jury.—*Cameron v. Haas Bros. Packing Co.*, 57 So. 388.

(C) Dismissal or Nonsuit.

§ 165 (Ala.App.) A judgment of nonsuit *held* valid as against plaintiff, whether rendered upon the day the case was set for trial or not.—*Corn Products Refining Co. v. Dreyfus Bros.*, 57 So. 517.

(D) Direction of Verdict.

§ 170 (Fla.) Where the evidence makes out the plaintiff's case, and there is no evidence to contradict or rebut it, a peremptory charge for plaintiff is proper.—*Investment Co. v. Trueman*, 57 So. 663.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

§ 191 (Ala.) An instruction which assumes a fact contrary to evidence is properly refused for that reason.—*Robinson v. Crotwell*, 57 So. 23.

§ 191 (Ala.) An instruction in an action of trespass *held* not improper as assuming that the goods were purchased by the plaintiff.—*Southern Cotton Oil Co. v. Harris*, 57 So. 854.

§ 191 (Ala.App.) In an action for one-half the cost of digging a ditch dug by plaintiff across his and defendant's land, a requested charge that the digging of the ditch more than three feet in depth contrary to the contract was a material departure therefrom *held* properly refused under the evidence.—*Alexander v. Smith*, 57 So. 104.

§ 191 (Ala.App.) A requested instruction *held* bad in assuming a fact, when there was evidence to the contrary.—*Smiley, Son & Co. v. Keith*, 57 So. 127.

§ 194 (Ala.) In an action for death in a collision between a street car and decedent's carriage, an instruction that, if either count of plaintiff's complaint was true his case was made out, *held* not objectionable as directing a verdict for plaintiff.—*Birmingham Ry., Light & Power Co. v. Drennen*, 57 So. 876.

§ 194 (Ala.App.) An instruction *held* erroneous as invading the province of the jury.—*National Chemical Co. v. National Aniline & Chemical Co.*, 57 So. 114.

§ 194 (Ala.App.) An instruction on contributory negligence *held* properly refused, as invading the jury's province.—*North Alabama Traction Co. v. Taylor*, 57 So. 146.

§ 194 (Ala.App.) A charge, on the court's own motion, that if the jury believed the evidence they must find for plaintiff *held* in violation of Code 1907, § 5362, as on the effect of the testimony.—*Birmingham Ry., Light & Power Co. v. Elmitt*, 57 So. 1015.

Where there was evidence that defendant was not guilty of the wrongs charged against it, a charge authorizing a verdict for plaintiff if the jury believed the evidence was objectionable, as on the weight of the evidence, and could not be given, though requested in writing by plaintiff.—*Id.*

§ 194 (Fla.) To the jury is given the function of passing upon the credibility of the witnesses and the weight of the evidence.—*Farnsworth v. Tampa Electric Co.*, 57 So. 233.

§ 194 (Miss.) An instruction, in an action for the death of a servant, *held* improper, as on the weight of the evidence.—*Hooks v. Mills*, 57 So. 545.

(B) Necessity and Subject-Matter.

§ 203 (Fla.) Duty of trial judge in charging jury stated.—*Farnsworth v. Tampa Electric Co.*, 57 So. 233.

§ 207 (Ala.) Where evidence was only admissible for a particular purpose, a requested charge limiting it to that purpose should have been given.—*Birmingham Trust & Savings Co. v. Currey*, 57 So. 962.

§ 207 (Ala.App.) Under Code 1907, § 5362, a charge on the effect of testimony, given without any request therefor, *held* ground for reversal.—*Hughes v. Albertville Mercantile Co.*, 57 So. 98.

§ 210 (Ala.App.) Refusal to give an instruction on the right of the jury to disregard the

testimony of a witness *held* reversible error.—Penney v. McCauley, 57 So. 510.

The refusal to charge on the credibility of a witness *held* not reversible error.—Id.

(C) Form, Requisites, and Sufficiency.

§ 224 (Ala.App.) When the oral charge contains an elliptical expression which might mislead, the remedy is to ask a written explanatory charge.—Birmingham Ry., Light & Power Co. v. Demmins, 57 So. 404.

§ 234 (Ala.App.) An instruction on the right of a street car passenger to recover for personal injuries *held* properly refused.—North Alabama Traction Co. v. Taylor, 57 So. 146.

§ 237 (Ala.) Refusal to give a charge on the burden of proof *held* not erroneous.—Robinson v. Crotwell, 57 So. 23.

§ 240 (Ala.App.) A charge which is argumentative is properly refused.—Stinson v. Faircloth Byrd Co., 57 So. 143; Penney v. McCauley, Id. 510.

§ 243 (Fla.) Contradictory charges or instructions should not be given, as their tendency necessarily is to mislead.—Farnsworth v. Tampa Electric Co., 57 So. 233.

§ 244 (Ala.App.) A charge which singles out part of the evidence for consideration of the jury is properly refused.—Stinson v. Faircloth Byrd Co., 57 So. 143.

§ 244 (Ala.App.) In an action for injuries to a street car passenger, an instruction *held* properly refused as giving undue prominence to particular matters.—Birmingham Ry., Light & Power Co. v. Hunnicutt, 57 So. 262.

§ 244 (Ala.App.) An instruction *held* properly refused as singling out testimony.—Penney v. McCauley, 57 So. 510.

§ 244 (Miss.) In an action for the death of a servant, an instruction *held* improper, as giving undue prominence to certain evidence.—Hooks v. Mills, 57 So. 545.

(D) Applicability to Pleadings and Evidence.

§ 248 (Ala.) Error cannot be predicated on the giving of abstract instructions, unless they mislead the jury.—Robinson v. Crotwell, 57 So. 23.

§ 248 (Ala.) In an action for deflecting surface water into a sink hole, causing injury to plaintiff's spring, an instruction defining a known and well-defined channel *held* properly refused, as abstract.—Killian v. Killian, 57 So. 825.

§ 248 (Ala.) In an action for death in a collision with a street car, an instruction on discovered peril *held* not objectionable as abstract.—Birmingham Ry., Light & Power Co. v. Drennen, 57 So. 876.

§ 250 (Ala.) An instruction, in an action for malpractice, *held* properly refused, in view of the pleadings and evidence of plaintiff.—Robinson v. Crotwell, 57 So. 23.

§ 250 (Fla.) Only such instructions should be requested as bear upon the law of the case and will aid the jury in trying and determining the issues.—Farnsworth v. Tampa Electric Co., 57 So. 233.

§ 251 (Ala.App.) In an action against a fertilizer company for the death of a heifer which fell into an unguarded white lead pit, a requested charge *held* not abstract.—Jefferson Fertilizer Co. v. Houston, 57 So. 98.

§ 251 (Ala.App.) Instructions on contributory negligence are properly refused where there is no plea of that defense.—Birmingham Ry., Light & Power Co. v. Demmins, 57 So. 404.

§ 252 (Ala.App.) In detinue, a charge *held* not applicable to the evidence.—Stinson v. Faircloth Byrd Co., 57 So. 143.

§ 252 (Ala.App.) An instruction *held* properly refused, not being applicable to the evidence.—Western Ry. of Alabama v. McPherson, 57 So. 396.

§ 252 (Fla.) A charge should not impose either upon the plaintiff or defendant a duty not shown to exist.—Farnsworth v. Tampa Electric Co., 57 So. 233.

§ 252 (Miss.) In an action for the death of a servant, an instruction as to the servant's assumption of responsibility for track repairs *held* improper, as not supported by the testimony.—Hooks v. Mills, 57 So. 545.

§ 253 (Ala.) A requested instruction ignoring a claim supported by the evidence *held* properly refused.—Robinson v. Crotwell, 57 So. 23.

§ 253 (Ala.) In an action for death in a collision between a street car and decedent's carriage, an instruction that, if either count of plaintiff's complaint was true, his case was made out *held* not objectionable as ignoring pleas of contributory negligence.—Birmingham Ry., Light & Power Co. v. Drennen, 57 So. 876.

§ 253 (Ala.App.) An instruction in an action for the price of goods sold *held* erroneous as ignoring a part of the evidence.—National Chemical Co. v. National Aniline & Chemical Co., 57 So. 114.

A requested instruction in an action for the price of goods sold *held* properly refused for ignoring a part of the evidence.—Id.

§ 253 (Ala.App.) In an action for goods sold, a requested instruction *held* properly refused as ignoring evidence.—Long-Richardson Mercantile Co. v. Herron, 57 So. 133.

§ 253 (Ala.App.) In an action against a carrier for injuries to a passenger, a requested instruction *held* properly refused as not applicable to pleading.—Birmingham Ry., Light & Power Co. v. Hunnicutt, 57 So. 262.

(E) Requests or Prayers.

§ 256 (Ala.App.) A party who believes that an instruction stating a correct proposition is not sufficiently specific must request an explanatory charge.—National Chemical Co. v. National Aniline & Chemical Co., 57 So. 114.

§ 256 (Ala.App.) A party deeming a charge misleading though applicable to the issues must request an explanatory charge.—Edwards v. Massingill, 57 So. 400.

§ 256 (Ala.App.) A party *held* required to request an explanatory charge, where the charge given asserted correct propositions.—Penney v. McCauley, 57 So. 510.

§ 260 (Ala.App.) A proposition which is covered by a written charge given at the request of plaintiff need not be repeated.—Hunnicutt Lumber Co. v. Mobile & O. R. Co., 57 So. 73.

§ 260 (Ala.App.) Instructions covered by other instructions are properly refused.—North Alabama Traction Co. v. Taylor, 57 So. 146; Birmingham Ry., Light & Power Co. v. Demmins, Id. 404.

(G) Construction and Operation.

§ 295 (Ala.App.) In determining objections to the court's charge, it must be construed as a whole.—Central of Georgia Ry. Co. v. Knight, 57 So. 253.

X. TRIAL BY COURT.

(A) Hearing and Determination of Cause.

§ 367 (Ala.App.) In a trial by the court, the manner of considering the evidence stated.—Copeland v. Dixie Lumber Co., 57 So. 124.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

§ 411 (Fla.) The rule that objections to evidence are waived by failure to have a ruling

thereon does not apply to a failure to offer evidence.—*International Kaolin Co. v. Vause*, 57 So. 360.

TROVER AND CONVERSION.

See Chattel Mortgages, § 177; Evidence, §§ 244, 317, 461; Principal and Agent, § 122; Witnesses, § 268.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

§ 9 (Ala.App.) Acts *held* to constitute a conversion authorizing an action in trover without proving demand and refusal to deliver.—*Frazer v. Sellers*, 57 So. 384.

II. ACTIONS.

(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

§ 34 (Ala.App.) There is no variance between a complaint in trover alleging the conversion to have been about October 18th, and the proof that it was on the 21st.—*Blair v. Riddle*, 57 So. 382.

(C) Evidence.

§ 37 (Ala.App.) In an action for the conversion of property which defendant claimed to have purchased, evidence of a tender of the purchase price *held* admissible.—*V. J. Forrester & Bro. v. J. A. May Co.*, 57 So. 64.

(D) Damages.

§ 46 (Ala.App.) Measure of damages for conversion stated.—*Blair v. Riddle*, 57 So. 382.

TRUST DEEDS.

See Mortgages.

TRUSTS.

See Charities; Guardian and Ward, § 84; Wills, §§ 674, 686.

II. CONSTRUCTION AND OPERATION.

(B) Estate or Interest of Trustee and of Cestui Que Trust.

§ 152 (Fla.) Deed creating spendthrift trust, providing that trustees shall convey property to cestuis que trust upon their joint request in writing, *held* not to exempt the property from their debts.—*Croom v. Ocala Plumbing & Electric Co.*, 57 So. 243.
“Spendthrift trust” defined.—*Id.*

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

§ 191 (Miss.) Provisions of a will requiring the executor to sell land *held* mandatory.—*Cady v. Lincoln*, 57 So. 213.

§ 202 (Miss.) The purchasers of property sold by a trustee *held* not bound to see that the beneficiaries' guardian applied the money as directed by the will.—*Cady v. Lincoln*, 57 So. 213.

§ 213 (Miss.) One signing a note given for the purchase price of corporate stock *held* liable individually, though signing it as trustee.—*Kelly v. Bank of Commerce*, 57 So. 978.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(C) Actions.

§ 366 (Ala.) One having no interest, and against whom no relief is prayed, is not a proper party defendant to a proceeding to declare a trust in land.—*Harton v. Little*, 57 So. 851.

TUTORSHIP.

See Guardian and Ward, § 145.

UNDUE INFLUENCE.

See Gifts; Wills, §§ 155, 282.

UNITED STATES.

See Courts, § 97; Public Lands.

USUFRUCT.

See Partition, § 12.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

§ 52 (Fla.) A note was given bearing 8 per cent. interest, and it was agreed that the lender should have one-third interest in the profits of certain real estate transactions. When the note fell due, the makers were unable to pay and gave three additional notes, and it was agreed that these were for the payee's claim for profits when at that time there were no profits. *Held* usurious.—*Cooper v. Rothman*, 57 So. 985.

(B) Rights and Remedies of Parties.

§ 100 (Fla.) Where there is a note for \$5,000, and three \$500 notes representing usury, all involved in same foreclosure, payments were properly applied on the \$5,000, and interest on principal debt was properly denied.—*Cooper v. Rothman*, 57 So. 985.

§ 111 (Ala.) Rule as to pleading usury *held* not to apply where usurious interest is added to an account without any express or implied agreement.—*Zadek v. Burnett*, 57 So. 447.

§ 117 (Ala.) Evidence in a proceeding against a mortgagee of chattels for an accounting *held* sufficient to support a finding that a certain balance carried forward included usurious interest.—*Zadek v. Burnett*, 57 So. 447.

VACATION.

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VAGRANCY.

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VENDOR AND PURCHASER.

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II. CONSTRUCTION AND OPERATION OF CONTRACT.

§ 58 (Ala.) Action by a vendor for purchase money *held* maintainable without making or offering to make a deed.—*Vandiver v. Reynolds*, 57 So. 462.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(B) Rescission by Vendor.

§ 98 (La.) One receiving part of proceeds of sale by executor, who has not returned the same, *held* estopped from denying the sale.—*Kerlec v. New Orleans Land Co.*, 57 So. 647.

§ 104 (Ala.) On bill to rescind executed contract of sale and for equitable relief, *held*, that the wife of complainant was not a necessary party.—*Hafer v. Cole*, 57 So. 757.

IV. PERFORMANCE OF CONTRACT.

(B) Conveyance.

§ 145 (Ala.) Where a vendor executed a bond for title, providing for stipulated payments, *held*, that he must convey the land upon the vendees making such payments.—*Able v. Gunter*, 57 So. 464.

(C) Quantity of Land and Appurtenances.

§ 167 (La.) When there is a deficiency of land in a sale per aversionem, the court cannot order the vendor to supply the deficiency out of land not included in the tract intended to be sold.—*Adams v. Porter*, 57 So. 526.

V. RIGHTS AND LIABILITIES OF PARTIES.

(A) As to Each Other.

§ 191 (Ala.) Upon the giving of a bond for title, providing only for the payment of stipulated sums, the vendee is entitled to the possession of the land.—*Able v. Gunter*, 57 So. 464.

§ 196 (Ala.) Upon the giving of a bond for title, providing only for the payment of stipulated sums, the vendee is entitled to the rents.—*Able v. Gunter*, 57 So. 464.

(B) As to Third Persons in General.

§ 212 (La.) Purchasers of immovables, save in certain exceptional cases, *held* affected only by adverse titles spread upon the public records.—*Webster Sand, Gravel & Construction Co. v. Vicksburg, S. & P. Ry. Co.*, 57 So. 529.

Owner of land occupied by public service railroad and those claiming under him *held* not entitled to recover the land free of servitude; the remedy being an action for damages.—*Id.*

Construction by railway of branch road for its exclusive benefit and that of owner of private enterprise, from the use of which the public is excluded, *held* not excepted from rule that purchasers of immovables are affected only by adverse titles spread upon the public record.—*Id.*

(C) Bona Fide Purchasers.

§ 229 (La.) Plaintiff's title derived from the record owner cannot be affected by unrecorded agreements between prior holders of the title.—*Hughes v. Edson*, 57 So. 154.

§ 232 (Ala.) Possession of real estate by a purchaser under an unrecorded deed *held* constructive notice only when the possession is open, notorious, and exclusive.—*Christopher v. Curtis-Attalla Lumber Co.*, 57 So. 837.

A terminated possession *held* not constructive notice to a subsequent purchaser.—*Id.*

A purchaser of land *held* not chargeable with constructive notice of the rights of a prior purchaser of the standing timber.—*Id.*

A purchaser of land in possession of the vendor *held* not, by the cutting and removal of timber, chargeable with notice of the prior purchase by a third person of the standing timber.—*Id.*

§ 239 (La.) Purchaser relying on public records *held* protected against any claims between his vendor and other persons.—*Breaux v. Royer*, 57 So. 164.

§ 239 (La.) One purchasing on the faith of the public records, which show that the vendor has a clear title, *held* to get a title good as against the world.—*Copland v. Carey*, 57 So. 796.

§ 243 (Ala.) Evidence of specified acts of ownership by plaintiff *held* inadmissible in the

absence of evidence of defendant's knowledge of them; defendant claiming to be a bona fide purchaser.—*Christopher v. Curtis-Attalla Lumber Co.*, 57 So. 837.

In ejectment against a junior purchaser, evidence that the price was full value *held* admissible to show defendant's good faith.—*Id.*

VI. REMEDIES OF VENDOR.

(A) Lien and Recovery of Land.

§ 251 (Fla.) Vendor's lien *held* given by implication of law, and enforceable in equity where the vendor is entitled to it.—*Shaylor v. Cloud*, 57 So. 666.

§ 278 (Fla.) Vendor's lien *held* enforceable in equity at any time before remedy by action on note for price of land is barred by limitations.—*Shaylor v. Cloud*, 57 So. 666.

A vendor's lien is a right created by law as an incident to the debt, and ceases to be available in equity when the debt is not enforceable at law.—*Id.*

Bill to enforce vendor's lien *held* barred by limitations where the debt for the price of the land is barred.—*Id.*

(B) Actions for Purchase Money.

§ 314 (Ala.) In a vendor's action for the purchase price of land, *held*, that certain defenses should be set up by special pleas.—*Vandiver v. Reynolds*, 57 So. 462.

It is not necessary that a complaint in an action by a vendor for the purchase price of lands payable on a certain day should affirmatively show that a deed was executed and tendered.—*Id.*

(C) Actions for Damages.

§ 323 (Ala.) Where the payment of purchase money for land is conditioned upon the vendor's title, he cannot recover damages on failure to perform such condition precedent.—*Vandiver v. Reynolds*, 57 So. 462.

VENIRE.

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VENUE.

See Courts, §§ 18, 37; Criminal Law, § 1159.

I. NATURE OR SUBJECT OF ACTION.

§ 17 (Ala.) A party having cause to set aside any process or proceeding waives his right by neglecting to assert it within a reasonable time; Code 1907, § 6110, relating to venue of actions for trespass in no way conflicting with such view.—*Wolff v. McGaugh*, 57 So. 754.

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II. NATURAL WATER COURSES.

(A) Riparian Rights in General.

§ 38 (Ala.) That water flows naturally through a channel will not make it a known and well-defined channel.—Killian v. Killian, 57 So. 825.

III. SUBTERRANEAN AND PERCOLATING WATERS.

§ 104 (Ala.) A landholder may not place anything in percolating waters or in surface water in definite channels which will pollute the springs of his neighbors.—Killian v. Killian, 57 So. 825.

Liability of an upper owner for pollution of a spring held to depend on water diverted by his act running through the spring.—Id.

One not an owner nor authorizing acts on land held not liable in an action for diverting surface waters and polluting a spring.—Id.

§ 107 (Ala.) Evidence in an action for deflection of water held not to sustain damage charged to a spring and farm.—Killian v. Killian, 57 So. 825.

In an action for pollution of a spring from deflecting surface waters into a sink hole, whether the deflection was proper held for the jury.—Id.

Whether defendant knew that water diverted would flow into plaintiff's spring was for the jury in determining whether the diversion was prudent, and an instruction that lack of knowledge would not relieve defendant was misleading.—Id.

In an action for pollution of a spring from a diversion of surface waters, the burden of proving damage held on the plaintiff.—Id.

V. SURFACE WATERS.

§ 119 (Ala.) Railroad companies in constructing their embankments must provide adequate waterways, so that water flowing from adjoining premises shall not be dammed up and thrown back in harmful quantities.—Collins v. Louisville & N. R. Co., 57 So. 833.

That a railroad company maintained inadequate waterways under its embankments did not make it liable for overflow of land during an unprecedented flood.—Id.

§ 126 (Ala.) Evidence held insufficient to sustain counts charging diversion of surface waters onto plaintiff's land.—Killian v. Killian, 57 So. 825.

Whether an upper owner made a proper use of waters in ditching, etc., held a question for the jury.—Id.

VII. CONVEYANCES AND CON-TRACTS.

§ 153 (La.) Purchaser of a part of a plantation takes it subject to apparent servitude of drain.—Rodriguez v. Prevost, 57 So. 276.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

§ 179 (Ala.) Evidence held insufficient to support charge of diversion of a natural stream to flow over and across plaintiff's land.—Killian v. Killian, 57 So. 825.

WEAPONS.

§ 11 (Miss.) A deputy sheriff of a county, who goes into another county, but not in pursuit of an escaping offender, within Code 1906, § 1454, held not authorized to carry concealed weapons in the latter county.—Shirley v. State, 57 So. 221.

§ 17 (Ala.App.) Prosecutrix's friendly relations with defendant after the alleged commission of the offense, the time of her first complaining, whom she told about the occurrence, and why she did not sooner swear out the warrant, are irrelevant on a prosecution under Code 1907, § 6893, for presenting at another a firearm.—Wheat v. State, 57 So. 68.

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See Appeal and Error, § 1062; Courts, § 487; Descent and Distribution; Executors and Administrators; Guardian and Ward, § 11; Homestead, § 136; Perpetuities; Tenancy in Common, § 29; Trial, § 83; Trusts.

II. TESTAMENTARY CAPACITY.

§ 52 (Ala.) One contesting the probate of a will on the ground of mental incapacity held to have the burden of proof.—Johnston v. Johnston, 57 So. 450.

§ 55 (Ala.) One contesting the probate of a will on the ground of mental incapacity need only prove to the reasonable satisfaction of the jury that the testator was incapable.—Johnston v. Johnston, 57 So. 450.

IV. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Testamentary Dispositions.

§ 69 (Ala.) "Will" defined.—Blacksher Co. v. Northrup, 57 So. 743.

§ 70 (Ala.) Lex domicilii prevails with reference to bequests of personal property, and the lex rei sitae as to realty.—Blacksher Co. v. Northrup, 57 So. 743.

(C) Execution.

§ 115 (Ala.) An instrument signed by but one witness held ineffectual as a will for any purpose, under Code 1907, § 6172.—Blacksher Co. v. Northrup, 57 So. 743.

(E) Nuncupative Wills.

§ 148 (La.) Nuncupative will by public act held void under Civ. Code, art. 1578.—Richard v. Richard, 57 So. 286.

(F) Mistake, Undue Influence, and Fraud.

§ 153 (Ala.) One mentally incompetent to make a will cannot be the subject of fraud.—Johnston v. Johnston, 57 So. 450.

§ 155 (Ala.) One mentally incompetent to make a will cannot be the subject of undue influence.—Johnston v. Johnston, 57 So. 450.

(G) Revocation and Revival.

§ 179 (Ala.) Under Code 1907, § 6174, a will legally executed held to revoke a prior will.—Bruce v. Sierra, 57 So. 709.

§ 184 (Miss.) Under Code 1906, § 5079, the addition of a codicil to a will without re-execu-

tion rendered the codicil void, but did not affect the validity of the will.—*Hawkins v. Durberry*, 57 So. 919.

§ 186 (Ala.) Under Code 1907, § 6174, an instrument revoking a will must be executed as prescribed by section 6172.—*Bruce v. Sierra*, 57 So. 709.

§ 194 (Ala.) A devisee *held* entitled under Code 1907, § 6163, to one-half interest in notes given for the purchase price of property devised to her.—*Scarborough v. Scarborough*, 57 So. 820.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(A) Probate and Revocation in General.

§ 220 (Ala.) Under Code 1907, § 6196, a purchaser claiming through an heir or distributee *held* entitled to contest a will.—*Elmore v. Stevens*, 57 So. 457.

(G) Petitions, Objections, and Pleadings.

§ 277 (Ala.) A person pleading a conclusion as to his interest in a will *held* not entitled under Code 1907, § 6196, to contest.—*Elmore v. Stevens*, 57 So. 457.

§ 282 (Ala.) Complaint in will contest *held* to sufficiently allege undue influence.—*Alexander v. Gibson*, 57 So. 760.

(I) Hearing or Trial.

§ 310 (Ala.) Where the mental incapacity of a testator is in issue, the inquiry must be of the broadest range.—*Johnston v. Johnston*, 57 So. 450.

§ 329 (Ala.) In a will contest case, an instruction on the burden of proof as to insanity *held* erroneous.—*Johnston v. Johnston*, 57 So. 450.

(M) Operation and Effect.

§ 421 (Ala.) Where a probate decree showed on its face that the paper was signed by but one witness, it was subject to collateral attack.—*Blacksher Co. v. Northrup*, 57 So. 743.

VI. CONSTRUCTION.

(A) General Rules.

§ 439 (Ala.) Testator's intent must prevail, if not inconsistent with law or public policy.—*Castleberry v. Stringer*, 57 So. 849.

§ 441 (Ala.) In ascertaining testator's intention, courts will look to the surrounding circumstances, condition of estate and family, etc.—*Castleberry v. Stringer*, 57 So. 849.

§ 446 (Ala.) The court is bound to adopt that construction of a will which would effectuate it when it is fairly open to two constructions.—*Castleberry v. Stringer*, 57 So. 849.

§ 455 (Ala.) That a will was drawn by an unskilled person may be considered in construing it.—*Castleberry v. Stringer*, 57 So. 849.

§ 476 (Ala.) A will and a codicil should be construed together, to ascertain testator's intention.—*Crum v. Westcott*, 57 So. 490.

A will and codicil construed, and *held* to require distribution of the estate under the statutes governing intestacy, subject to a gift in trust for a grandson.—*Id.*

(B) Designation of Devisees and Legatees and Their Respective Shares.

§ 506 (Ala.) While a technical word, the word "heirs" may be given a nontechnical meaning, such as "children."—*Castleberry v. Stringer*, 57 So. 849.

A will directed that testatrix's mother should have the entire use and control of the property during her life, and that the H. building should go to testatrix's brother, and the resi-

due of her property should "go to the heirs of my sister F." The will was drawn by an unskilled person, and, when it was executed, sister F. was about 32 years of age and testatrix's mother, the life tenant, was much older. *Held* that, in view of the improbability of sister F. dying before the life tenant so as to have "heirs" at the life tenant's death, that word would be construed as meaning "children," so that the sister's children would take a vested remainder in the residue of the property other than the H. building.—*Id.*

(E) Nature of Estates and Interests Created.

§ 610 (Miss.) A testator *held* to have bequeathed to his wife absolutely the proceeds of certain cotton.—*Eaton v. Broaderick*, 57 So. 298.

§ 615 (Miss.) A will *held* by necessary implication to have given the testator's wife a life estate in lands and a life income in the proceeds of certain notes.—*Eaton v. Broaderick*, 57 So. 298.

(F) Vested or Contingent Estates and Interests.

§ 629 (Ala.) The law favors vested remainders.—*Castleberry v. Stringer*, 57 So. 849.

(H) Estates in Trust and Powers.

§ 674 (Miss.) A paragraph of a will *held* not to create a spendthrift trust as to the property devised thereunder, except a certain part thereof, as stated.—*Cady v. Lincoln*, 57 So. 213.

§ 686 (Miss.) A trust is not defeated by failure of the trustee to exercise it.—*Cady v. Lincoln*, 57 So. 213.

§ 693 (Miss.) The provision of a will requiring lands to be sold by an executor *held* only to confer a naked power of sale.—*Cady v. Lincoln*, 57 So. 213.

(I) Actions to Construe Wills.

§ 702 (Ala.) A bill to remove the administration of an estate from the probate to the chancery court, and to construe the will, *held* not demurrable for want of equity.—*Spiers v. Zeigler*, 57 So. 699.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) Nature of Title and Rights in General.

§ 710 (La.) Civ. Code, art. 1029, relating to forfeiture of heirs' share in property embzzled or concealed, *held* not to apply to legatee who was executrix of estate.—*Succession of Drysdale*, 57 So. 789.

§ 733 (Miss.) Will construed, as to time for division of estate between testator's children.—*Dailey v. Horton*, 57 So. 657.

§ 740 (La.) Sale by legatees to colegatee of shares in estate will be annulled, when procured through suppression of the fact that the purchaser, as executrix, had assets which had never been inventoried.—*Succession of Drysdale*, 57 So. 789.

(E) Void, Lapsed, and Forfeited Devises and Bequests, and Property and Interests Undisposed of.

§ 866 (Miss.) Personal property not disposed of by the testator's will is distributed under the statute of descent and distribution.—*Eaton v. Broaderick*, 57 So. 298.

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